EMPLOYMENT TRIBUNALS

Claimant: **Mrs K Hardy-Popa**

Respondent: **(1) Iceland Foods Limited (2) Mr Greg Robinson**

Heard at: **Cardiff** **On: 14, 15, 16 & 17 January 2020**

Before: **Employment Judge Harfield**
Members **Mrs M Walters**
Mr M Pearson

Representation:
Claimant: In person
Respondent: Mr B Gray (Counsel)

Interpreter: Mr Sayf Camran Shamin

JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

(1) The claimant's complaint of constructive unfair dismissal against the first respondent is not well founded and is dismissed;

(2) The claimant's complaint of disability discrimination against the first respondent and the second respondent is not well founded and is dismissed.

REASONS

This constructive unfair dismissal and disability discrimination claim came before the Tribunal on 14 – 17 January 2020. Oral reasons were provided on 17 January 2020, with the assistance of the interpreter provided for the claimant. The claimant requested written reasons which are now provided. References in square brackets are references to page numbers in the Tribunal bundle.

Introduction

1. The claimant presented her tribunal claims on 10 September 2018 in two separate claim forms against the first and second respondents claiming constructive unfair dismissal, albeit the claimant had no standing to bring an unfair dismissal claim against the second respondent as he was not the claimant's employer.

2. At a preliminary hearing on 10 June 2019 Employment Judge Harfield (also the Employment Judge at this full hearing) allowed the claimant to amend her claim to bring a complaint of disability discrimination against both respondents. Employment Judge Harfield summarised the factual basis of the claimant's disability discrimination claim in the case management order found at [46 – 60]. The claimant provided further particulars on 14 July 2019 [61 – 70] which confirmed that her complaints were of a failure to make reasonable adjustments and disability related harassment.

3. We heard evidence from the claimant and from Mr Hale, Mr Robinson and Mr Shattock for the respondent. We had a joint bundle extending to 408 pages. The respondent provided a chronology, a draft list of issues and a bundle of authorities. We received closing submissions and comments from both parties which we took into account. It was agreed that we would only deal with liability issues at this stage of the proceedings, i.e. does the claimant win part of all of her case, and not issues relating to the calculation of any tribunal award. If necessary we were also to consider Polkey related issues (i.e. if the claimant establishes an unfair or discriminatory dismissal, what is the chance the claimant would have been dismissed anyway if a fair or non discriminatory process had been followed) and the question of contributory fault. The claimant had assistance, when needed, from an interpreter, Mr Shamin.

Findings of fact

4. We need only make findings of fact necessary to determine the issues before us in this case and not every issue raised or in dispute between the parties. We make our findings by applying the balance of probabilities.

5. The claimant started working for the respondent's Blackwood store in February 2016 as a sales assistant working a minimum of 7.5 hours a week, normally at the weekend. The claimant enjoyed her job. The store manager was initially Marc Hale who the claimant liked working with.

6. Around Easter 2016 Mr Hale transferred to the Pontypool store and CJ took over as store manager. The claimant did not like working with CJ, for the reasons set out in her subsequent grievance at [146 – 149].

7. On 15 October 2017 the claimant attended the works Christmas party. It was for the whole area and there were therefore around 140 people in attendance, from a variety of stores. On the claimant's own account in the course of the evening she had a shot of apple sours, about 3 plastic glasses of wine from bottle of wine and some, at least, of a pint of lager. She became unwell and was sick which she says was in part due to drinking on an empty stomach and a hiatus hernia. She was taken outside the venue by security and an ambulance was called and the claimant declined to go with the ambulance. The claimant admits throwing some water over a colleague who was teasing her and telling another colleague to fuck off as the claimant says the colleague was being a busybody. The claimant stayed outside the venue before travelling home on the pre-arranged staff bus.

8. Mr Robinson, the area manager, was present at the party and went to see the claimant when she was unwell. At the end of the party CJ approached Mr Robinson and told him that he had been told by three females working in the Blackwood store that the claimant had made a comment relating to the threat of an assault to CJ with a shoe. Mr Robinson told CJ to think about it that evening and to speak to HR the next day. We have not heard evidence from CJ.

9. The claimant was not aware of the allegation at the time and denies making any such comment. She says in her witness statement that she was upset about CJ's treatment of her and that when talking to 3 colleagues about it she was upset and said: "I hate Chris he is like a snake in the grass and if you don't watch out he will stab you in the back." She says that one colleague told her to calm down as CJ was behind her.

10. On 16 October 2017 CJ contacted HR [139-140] seeking advice. The account recorded by HR includes that when CJ went to the front of the nightclub the claimant was with 3 other staff members, who told her to be quiet as CJ was behind her. The HR entry states that one of these 3 staff members had said that the claimant had asked to borrow her heels so that she could embed them in the back of his head. It also states that claimant had drunk 5 bottles of wine, been removed from the club by bouncers and that she was abusive to other colleagues one whom she told to fuck off. The HR note says that CJ was advised to locate a store manager not at the event and to refer the matter to the area manager to find an investigation manager, to get some context from the 3 witnesses and establish what was the reason for the behaviour.

11. It would appear from [139] that CJ contacted HR further again, the next day, about whether the claimant could be suspended when next in work. The allegations recorded then were slightly different in that it was alleged the claimant had been abusive to ambulance staff and that colleagues had reported her as saying "If I was wearing high heels I would remove them and embed them in CJ's head and kill him." The advice from HR was to suspend the claimant on her next shift and that the behaviour should be considered gross misconduct, specifically grossly inappropriate behaviour at events associated with the company.

12. Mr Hale was contacted by CJ and asked to act as suspension manager [138]. Mr Hale attended the Blackwood store on 20 October 2017. When the claimant had been in work for about an hour, he asked her to accompany him to the office with SB, the shift supervisor. There is a suspension meeting script at [141] which Mr Hale states was drafted by SB at his dictation and was read out to the claimant. It says that the allegation is "grossly inappropriate behaviour at events associated with the company and actual or threatened assault on any person at the area party on Sunday 15/10/17 both of which are gross misconduct." Mr Hale states he took the wording from some suggested wording in the HR manual. It records the claimant being asked whether there was anything she wanted to say when consideration was being given whether to suspend. It records: "Karine wants it noted that she did not go near or speak to the person involved in the allegation at the area party on 15/10/17." The document shows the claimant therefore understood that the incident related to an actual or threatened assault on CJ. The Tribunal is satisfied that Mr Hale did not tell the claimant at the time the precise nature of the alleged threat to strike CJ with a shoe. The claimant was placed on paid suspension [141] and escorted from the store.

13. The claimant was shocked and upset at being suspended and she started to constantly think about what the assault allegation specifically related to. She said she became obsessed about it.

14. The claimant telephoned Mr Hale again the next day and he told the claimant she would get an official letter from HR about her suspension. Mr Hale was also due to go on annual leave and gave the claimant Mr Robinson's phone number.

15. The claimant telephoned Mr Robinson and left a message. He called her back and left a message. The claimant emailed him at 2:15am in the morning of 23 October [144 – 145]. The subject matter of the email is "Grievance." In the email the claimant said she was relieved to hear from Mr Robinson, as she had been left drifting without a soul to talk to about what has happened in the Blackwood store, that she was deeply hurt about the suspension, that she felt her head had been pushed under

water and it was impossible to concentrate on a single task, she was numb with disbelief, shock, horror and she felt sick, she had not slept and she was confused. She said she did not understand the gross misconduct allegation or her suspension. She set out her account of what happened the day of her suspension and said that she had not gone near or spoken to CJ on the night in question. She asked Mr Robinson whether there was a union in Iceland and what she should do now.

16. On 24 October the claimant visited her GP. She was prescribed Propranolol. Mr Robinson telephoned the claimant that day as the claimant was leaving the GP surgery. It is not in dispute that Mr Robinson told the claimant that he did not consider her email to be a grievance. The claimant states that he told her he would rather not get involved and that he could not help her and he did not explain why she was suspended. Mr Robinson states that he told the claimant the reasons why she was suspended as she seemed unsure and that an investigation would take place and she would be given the chance to give her side of events. He states that the claimant had asked him to represent her during the process and that he did not consider it appropriate given his position as area manager with potential involvement in the disciplinary process and that he said she could be supported by a colleague or trade union representative.

17. The tribunal considers it likely that Mr Robinson did explain some of the reasoning behind the claimant's suspension and what would happen next in the process (his email of 24 October [143] refers to a meeting, which suggests there was a discussion about the claimant attending a meeting), but that the level of detail did not include the alleged threat of assault with a shoe. The tribunal also accepts that Mr Robinson's comment of not being able to get involved related to not being able to represent the claimant or act as a companion during the disciplinary process.

18. The claimant asked Mr Robinson to confirm what he had said in writing and he sent an email that day [143] in summary form confirming he did not consider the claimant's email to raise a grievance, and explaining the claimant could join a union and invite them to the meeting or to ask a colleague to join the meeting as a support.

19. On 25 October 2017 the claimant received a letter from HR dated 24 October 2017 [142] which confirmed the claimant's suspension and gave the same allegation of gross misconduct. The letter said the claimant's point of contact during her suspension was her line manager and she should contact her line manager with any questions. This was a standard letter which HR failed to amend, and which therefore directed the claimant to CJ who had made the complaint against her.

20. The claimant telephoned HR [308 – 309] asking who she should contact during her suspension and asking for a copy of her contract and the suspension notes. GC in HR explained the error in the letter and that the claimant should contact Mr Hale in the first instance. GC promised to send the documents and provided Retail Hub support information.

21. In the early hours of 26 October 2017, the claimant sent a further email to Mr Robinson [146 – 149]. The email said the claimant considered her earlier email did amount to a grievance. The claimant again raised the questions she had about the reason for her suspension and what the exact alleged inappropriate behaviour and assault were said to be. She said that she was getting panic attacks day and night, she was constantly sick, she spent her nights crying her eyes out unable to sleep and she could not take it anymore. She raised various questions about the documents and the disciplinary investigation process. She also set out her grievance against CJ. The body of the email also said she had found their last phone call confusing and it was paramount that further communication should be written down.

22. Mr Robinson did not send an email to the claimant in response. Instead he forwarded the claimant's email to AK in HR stating :"Hello, whilst you're upstairs today getting ready for the APM, have a read of this epilogue!" [146]. Mr Robinson says he did so not in a derogatory way but that this was an explanation of, and conclusion to events, and it was so that the grievance could be opened and processed. He said he did not reply directly to the claimant because a letter was sent arranging a grievance meeting. He said he did not respond to the questions about the suspension and disciplinary process as he intended to cover all that in the grievance meeting.

23. The claimant at the time did not know any of this and was due to take some annual leave in Ireland. Whilst she was away a letter was sent by HR on 26 October 2017 stating that a formal grievance meeting had been arranged for 2 November 2017 and that if the claimant did not confirm her attendance at the meeting it would be assumed she would no longer wish to pursue her grievance [150].

24. On the claimant's return on 2 November 2017 the claimant found the letter. She was distressed that the grievance meeting had been arranged for when she was away, and that her grievance may have been closed as she had not confirmed attendance. The claimant tried to phone HR but the lines were closed. She sent Mr Robinson an email expressing her disappointment she had not had a response to her last email and her concerns about the grievance meeting appointment [153]. Mr Robinson responded explaining he had not acknowledged receipt of the previous email as a grievance acknowledgment letter was usually sent but that had

not happened on this occasion because the invite had been sent so quickly. He explained that a further date had been booked and would be confirmed in a letter and that the purpose of the grievance meeting was to allow the claimant the opportunity to discuss the allegations [152 – 153].

25. The claimant telephoned GC in HR [308] expressing her upset and stating that she could not make the grievance meeting on 8 November as it needed to be on a Friday, Saturday or Sunday. GC contacted Mr Robinson about the claimant's non availability and it was re-arranged for 17 November 2017.

26. On 7 November 2017 a decision was made by HR that the disciplinary investigation should be placed on hold until the grievance concluded. A decision was also made that Mr Shattock would take over the grievance investigation given the discontent the claimant was expressing about Mr Robinson. A letter was sent confirming the grievance investigation arrangements on 8 November 2017 [154].

27. On 9 November 2017 the claimant emailed Mr Robinson confirming receipt of the letter and asking if she could bring an independent witness to the grievance meeting. Mr Robinson telephoned the claimant in response to ask her to liaise with Mr Shattock. He forgot that the claimant had requested correspondence to be in writing. He followed it up with an email with Mr Shattock's contact details [155].

28. On 9 November 2017 the claimant emailed Mr Shattock asking if she could bring an independent witness [164]. He responded on 13 November [158] to say that if the claimant meant a representative then she should ask a colleague. He asked to move the time of the meeting. The claimant replied to say she would not be able to make the proposed new time and asking again if she could bring someone from outside Iceland to the meeting or record the meeting. On 14 November Mr Shattock suggested some new dates for the meeting and said that he would allow the claimant to bring someone to the meeting to make notes and support her [157].

29. On 15 November the claimant accepted a date and time for Saturday 18 November and told Mr Shattock she would wait for the official invite letter [170]. This did not arrive and she contacted HR. AR from HR spoke with the claimant and emailed the letter to her [165].

30. The minutes of the grievance meeting are at [173 – 178]. At the meeting Mr Shattock told the claimant that the section of her grievance email relating to the disciplinary investigation would be dealt with via that process. The claimant stated that she understood and that it was because the disciplinary had happened that she had decided to come forward with

her grievance. The claimant also confirmed that she understood that the disciplinary had been delayed due to the grievance as it was necessary to understand her complaint before the suspension investigation continued. She also mentioned that she knew she had the option of an employment tribunal claim and mentioned trust and confidence being broken.

31. The claimant was asked to read and sign the notes of the grievance meeting. The claimant felt she was placed under undue pressure to do this as AR made a comment about his parking running out. She felt she then could not concentrate on the minutes. She signed two pages and took the rest away. The next day the claimant spent several hours going through the notes. She emailed Mr Shattock [166] saying her panic attacks had returned and she felt compelled to go over them again and again. She raised some points that she felt were not recorded in the minutes and said that the notes were different to her companion's.

32. On 24 November 2017 the claimant contacted HR for help who gave her some advice about submitting amended notes and who chased Mr Shattock and AR. Mr Shattock did not reply to the claimant until the 27 November 2017 when he was prompted to by HR [179 – 180]. Mr Shattock apologised for the delay and said that the claimant could submit changes by 1 December 2017. The delay and the limited time upset the claimant and she emailed Mr Shattock stating this and that she was having panic attacks and her medication had been doubled. She said she could not provide the changes in the time allowed [179]. In the later grievance appeal Mr Shattock stated he delayed in responding to the claimant because he did not know how to respond.

33. The claimant liaised with AR about the notes and about witnesses who could be spoken to. He confirmed on 28 November that it had been agreed with the claimant that the disciplinary investigation could now continue to run in parallel with the grievance investigation up to the point of deciding if there was a case to answer or not, until the grievance had been concluded [191]. The claimant expressed her distress at being in limbo and again said that her medical condition was worsening. In their email exchange the claimant stated that she had not said she was resigning and she did not intend to resign and that she had just said she felt that due to the breakdown in the work relationship initiated by CJ she would lose her job and she would be ready to take a transfer to another store.

34. On 8 December AR acknowledged he claimant's amendments and comments, stating that they would be used as part of the evidence gathered and taken into consideration [182]. During the course of the claimant's exchanges with AR he emailed to her the email that Mr Robinson had sent previously making the "epilogue" comment.

35. Mr Hale made contact with the claimant about taking a statement for the disciplinary process and they agreed to meet on 15 December. The claimant telephoned Mr Robinson on 14 December about two issues. Firstly, the claimant became locked out of the respondent's nexus computer system because to log in she needed to acknowledge receipt of Christmas vouchers and she had not received the vouchers. Secondly, she had been trying to contact Mr Hale about arrangements for the 15 December but could not get hold of him and there was nothing more she could do to organise the meeting. The claimant followed this up with an email [193- 194]. On 15 December Mr Robinson telephoned the claimant in response. The claimant became upset that he had telephoned her rather than contacting her in writing. She emailed Mr Robinson on 16 December stating she was expecting to receive an email from him and that any communication had to be in writing [198]. He responded to state he was not sure why the claimant expected an email as he had telephoned with an update, that the next meeting would be communicated by post, and he would not call again but reply via email at his earliest convenience [197].

36. In December 2017 grievance investigation meetings were held with CJ, and 3 other members of staff [200 – 209]. On 22 December 2017 the claimant was sent the grievance outcome [210 – 213]. Her grievance was not upheld. An offer was made of a facilitated conversation with CJ. The claimant lodged a grievance appeal [215].

37. On 6 January 2018 the claimant attended a disciplinary investigation meeting with Mr Hale [220 – 229]. She gave her account of the night in question. The claimant did not raise any objection to Mr Hale conducting the investigation and said she was very happy with the way it was conducted [228].

38. On 19 January 2018 the claimant attended a grievance appeal hearing with DN and AK [244 – 252]. Grievance appeal investigation meetings then took place with Mr Shattock AR and SW [254 – 255, 273 – 274].

39. On 8 February 2018 Mr Hale took statements from ML, CW and CT [259 – 272] for the purpose of the disciplinary investigation. On 9 February 2018 Mr Hale met again with the claimant and he put the accounts of these 3 individuals to the claimant for comment [230 -238]. She became very upset and was sick.

40. On 13 February 2018 the claimant visited her GP where she was noted to be completely distraught and she was started on antidepressant medication.

41. On 15 February 2018 the claimant received her grievance appeal outcome which was upheld in part [275 – 279]. It found that a letter should have been sent acknowledging the claimant's grievance and that it would have been best practice for Mr Robinson to also email a response. It also found that the claimant's nexus holiday record should have been checked. An apology was made for the epilogue comment which was upheld as inappropriate. The grievance appeal also found that a letter should have been sent to confirm the changed appointment with Mr Shattock. It found that the parking comment at the grievance meeting should not have been made as whilst there was no intent to pressure the claimant on timing, it did cause her to panic. The claimant's complaint about the delay in responding to her concerns about the grievance meeting minutes was also upheld. Her complaint that it took 14 emails to correct the notes was not upheld on the basis that the amendments were taken into account. The claimant's complaint about witnesses who were interviewed was not upheld as was a complaint that Mr Robinson had not sent a follow up email after a phone call. In relation to the substance of the claimant's grievance about CJ the original outcome was not changed on the basis that there was no corroboration of the claimant's account from witnesses. This was with one exception where it was found it was inappropriate to have a noticeboard in store recording underperforming cashiers. It was acknowledged that there was a breakdown in the claimant's working relationship with CJ and a facilitated conversation was proposed. The claimant was also offered a vacancy in Pontypool based on her 7.5 hour contract flexed to the needs of the store.

42. On 19 February 2018 the claimant had a serious panic attack and she was signed off work by her GP [282]. On 22 February she emailed AK and DB explaining she had continued to be very sick since the meeting on 9 February and she had been signed off work [288 – 290]. She asked if she could have longer to make a decision on the options in the grievance appeal outcome and asking for clarification as she would need 20 hours' worth of work to make a move to another store financially viable. She also asked whether a transfer would affect her suspension. AK responded to state the claimant had been taken out of suspension and put into sick leave [287 – 288]. AK explained that any transfer would be based on the claimant's existing 7.5 hours and there could be no guarantee of a set number of hours. AK also explained that a transfer would not affect the claimant's suspension as once the claimant was fit for work the suspension would be restarted and the disciplinary process continued. The claimant was told a formal disciplinary meeting would be organised with an independent manager and a decision made based on the evidence and mitigation. AK said that if the decision allowed a return to the workplace the transfer would be organised.

43. On 19 March 2018 Mr Hale completed his investigation report [324 – 325] concluding that there was a disciplinary case to answer in relation to the allegation the claimant had threatened to hit CJ on the head with her shoe at the area party which, it said, constitutes gross misconduct. The disciplinary proceedings did not progress to a hearing because of the claimant's ill health.

44. The claimant continued to be signed off work from 7 March 2018 with depression. She attended a series of welfare meetings on 29 March 2018, 27 April 2018 and 7 June 2018 [332 – 338, 342 – 345, 357 – 358]. AK also assisted the claimant with sick pay and applications for benefits and holiday pay.

45. At the 7 June 2018 welfare meeting AK told the claimant that CJ was no longer working for the first respondent and asked whether she would be willing to come back to work. The claimant said that she would now although there were a couple of stumbling blocks in the length of time she was suspended, the lack of action in relation to Mr Robinson and the damage to her reputation. AK made clear that the outstanding disciplinary would still have to be arranged which could result in no case to answer, warning or dismissal.

46. The claimant at the time was pleased but at a further meeting on 9 July 2018 [363 – 364] the claimant was struggling after a difficult health assessment and questioned how she could come back. She said she thought as CJ had gone it would all be done with.

47. At a meeting on 7th August 2018 [371 – 375] the claimant explained she had a limited capacity for work certificate from the DWP and that the DWP advice was to look after herself, not go back to Iceland and to move forward. She referred to her grievance outcome, saying she could not go to Pontypool on the hours available and that she thought retrospectively she should have let go at that time but she was still hoping to come back to work. She referred to feeling relief when she heard CJ had gone as he was the person who broke trust that Mr Robinson made worse. She again referred to Mr Robinson not suffering any consequence and as he was the area manager she did not think she could start again. She acknowledged that AK and DB had supported her throughout and she had decided to resign. AK asked the claimant to take a cooling off period and if she still wished to resign to put it in writing. The claimant did so on 8 August 2018 which is set out at [380 -381].

Summary of the law

48. The oral reasons provided a very short summary of the law applied by the Tribunal. These written reasons expand upon that.

Disability

49. Under section 6 of the Equality Act 2010 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.

Under section 212(2) substantial means "more than minor or trivial."

50. Under paragraph 2(1) of Part 1 of Schedule 1 to the Equality Act, the effect of an impairment is long term if –

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

51. Under paragraph 5(1) an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. "Measures" include medical treatment. When determining substantial adverse effect on normal day to day activities, the Tribunal therefore has to assess the effects of any condition absent mitigation by means of medication or other medical treatment.

52. "Likely" should be taken to mean "could well happen."

53. There is further guidance in the "Guidance for matters to be taken into account in determining questions relating to the definition of disability"

54. The Tribunal had regard to the decision in J v DLA Piper UKEAT/0263/09, referred to by the respondents' counsel, in which Mr Justice Underhill stated:

"40 Accordingly in our view the correct approach is as follows:

(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.

(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para. 38 above, to start making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long term basis), and to consider the question of impairment in the light of those findings …"

55. Mr Justice Underhill further stated, on identifying whether there is an impairment at all, particularly in relation to mental health conditions:

> *"42: "The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – 'adverse life events'. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use terms such as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a*

> *common sense observation that such reactions are not normally long lived."*

56. Mr Justice Underhill further identified at paragraph 44 of the judgment that terms such as "anxiety, stress, or depression" are often used as loose terms by laymen and some health professions and it is important to bear in mind that in considering both the impairment issue and the adverse effect issue tribunals may have to look behind the labels.

57. We also had regard to Singapore Airlines Ltd v Casado-Guijarro [2013] UKEAT/0386/13/BA which reiterated the position at law that a Tribunal cannot, when assessing whether a claimant is a disabled person at a particular point in time, take into account what subsequently happened to the individual. Assessing whether something is likely requires the focus to be on the evidence that was available at the particular time.

Disability discrimination – failure to make reasonable adjustments

58. Under Section 39(5) of the Equality Act an employer has a duty to make reasonable adjustments. Section 20 defines the duty to make reasonable adjustments, which comprises three possible scenarios. The first scenario is the one relied upon by the claimant in this case:

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

59. Section 21 provides that a failure to comply with that requirement is a failure to make reasonable adjustments, which amounts to discrimination.

60. Under paragraph 20 of Part 3 of Schedule 8 to the Act an employer will not be subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the claimant has a disability and is likely to be placed at the substantial disadvantage in question.

Disability discrimination – disability related harassment

61. Under Section 26 of the Equality Act, A harasses B if A engages in conduct related to a relevant protected characteristic (here disability) and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

62. In Peninsula Business Service Limited v Baker [2017] ICR 714 the Employment Appeal Tribunal held that to bring a complaint of disability related harassment a claimant generally has to show he had a disability for the purposes of section 6 of the Equality Act. It was not sufficient to merely assert that he had a disability. There are some exceptions for associative disability discrimination or where the concept of a protected characteristic is attributed to a victim by a discriminator or harasser (often termed conceptual or perceived discrimination).

Constructive Unfair Dismissal

63. Unfair dismissal claims are brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95 of that Act. The relevant part of Section 95 is Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> *"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."*

It is usually known as a "constructive dismissal".

64. Case law has established the following principles:

(1) Th employer must have committed a repudiatory breach of contract. A repudiatory breach is a significant breach going to the root of the contract. This is the abiding principle set out in Western Excavating v Sharp [1978] ICR 221.

(2) A repudiatory breach can be a breach of the implied term that is within every contract of employment 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 trust and confidence between employer and employee (Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347.)

(3) Whether an employer has committed a breach of that implied term must be judged objectively. It is not enough to show merely that an employer has behaved unreasonably. The line between serious unreasonableness and a breach is a fine one. A repudiatory breach does not occur simply because an employee feels they have been unreasonably treated nor does it occur when an employee believes it has.

(4) The employee must leave, in part at least, because of the breach.

(5) The employee must not waive the breach or affirm the contract by delaying resignation too long.

(6) There can be a breach of the implied term of trust and confidence where the components relied upon are not individually repudiatory but which cumulatively consist of a breach of that implied term.

(7) In appropriate cases, a "last straw" doctrine can apply. This states that if the employer's act which was the proximate cause of an employee's resignation was not by itself a fundamental breach of contract the employee can rely upon the employer's course of conduct considered as whole in establishing that he or she was constructively dismissed. However, London Borough of Waltham Forest v Omilaju [2005] IRLR 35 tells us that the "last straw" must contribute, however slightly, to the breach of trust and confidence. The last straw cannot be an entirely innocuous act or be something which is utterly trivial.

(8) In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal set out the questions that the tribunal must ask itself in a "last straw" case. These are:

(a) 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?

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

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

(d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a (repudiatory) breach.

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

65. In Price v Commissioners for Revenue and Customs UKEAT/0518/10/JOJ it was said that where the conduct complained about is delay there are two questions to be addressed. Firstly, was there reasonable and proper cause for the delay? And secondly, if not was the delay conduct by the employer calculated or likely to destroy or seriously damage the relationship of trust and confidence. These questions are not be answered by reference to the standard of the reasonable employer but on the basis of the Tribunal's own objective assessment.

66. A fundamental breach by an employer has to be "accepted" by the employee. In W.E. Cox Toner (International) Ltd v Crook [1981] IRLR 443 it was said:

> *"If one party (the guilty party) commits a repudiatory breach of the contract, the other party (the innocent party) can chose one of two courses: he can affirm the contract and insist on its further performance, or he can accepted the repudiation, in which case the contract is at an end…*
>
> *But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by an express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation…*
>
> *Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contractual obligation, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear he is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation…"*

67. In Hadji v St Luke's Plymouth UKEAT 0857/2012 the law of affirmation was summarised as follows:

> *(i) The employee must make up his mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. Western Excavating v Sharp [1978] QB 761… as modified by WE Cox Toner (International Ltd v Crook [1981] IRLR 443… and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.*
>
> *(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay – see Cox Toner para 13 p446.*

> *(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there as been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12 July 2011) paras 45/46.*
>
> *(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive; Fereday, para 44.*

68. The Employee must prove that an effective cause of his resignation was the employer's fundamental breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach; the breach must have played a part (see Nottingham County Council v Meikle [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13.

69. In Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908 the Court of Appeal held that a repudiatory breach cannot be unilaterally cured by the party in default. However, Lord Justice Sedley warned:

> "*A wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends."*

70. In Cartright & Others v Tetrad Limited [2015] UKEAT/0262/14, on the facts of the particular case, in a dispute about pay the claimant was held to have affirmed his contract after breach following a delay of 6 months. Feredey was a case involving a claimant who was dissatisfied with the outcome of a grievance process and an offer of possible alternative employment. The claimant in that case resigned just over a month later. The Tribunal found the claimant had affirmed the breach. The decision was upheld by the Employment Appeal Tribunal saying the Tribunal was entitled to take a prolonged delay of nearly 6 weeks between the grievance decision and the claimant's resignation as an implied affirmation bearing in mind the claimant was expecting the employer to perform their part of the contract by paying sick pay. The claimant was doing everything that a sick employee would have had to do, which was to claim sickness pay. She had behaved as if her contract with the respondent existed. There are some factual similarities with the claimant's situation. However, each case of course has to be decided on its own facts.

71. If it is established that the resignation meets the definition of a dismissal under section 95(1)(c), the employer has the burden of showing a potentially fair reason for dismissal before the general question of fairness arises under section 98(4).

Issues to be decided

72. The above legal framework sets out the legal issues to be decided. In terms of the conduct said by the claimant to amount to a repudiatory breach of contract, this is summarised within her two claim forms at [7] and [20]. The claimant's particularisation of her reasonable adjustments and disability related harassment claims are at [61-71] and is summarised in also in the respondents' proposed list of issues.

Discussion and Conclusions

Disability Discrimination

73. For the claimant to succeed in her complaint of disability discrimination by way of a failure to make reasonable adjustments she must have been a disabled person at the time of the alleged discrimination. The discriminatory acts that the claimant complains about relate to the period 20 October 2017 to 16 December 2017.

74. The burden of proof is on the claimant to show that at that time she had a mental impairment which had a substantial and long term adverse effect on her ability to carry out normal day to day activities. To be long term the substantial adverse effect had to be likely, at that time, to last for at least 12 months. Likely here means "could well happen."

75. The Tribunal is satisfied that during the period in question there was a substantial adverse effect on the claimant's normal day to day activities (applying the approach suggested in J – v DLA Piper). The contemporaneous documents show that the claimant, following her suspension, was struggling to concentrate with simple tasks (for example, approving meeting notes), she was unable to sleep, and was easily confused when trying to absorb information. She would ruminate some issues over and over. She was suffering bouts of vomiting and was not undertaking daily tasks of home living. Whilst the claimant was not signed off sick at that time as she was suspended, the Tribunal is satisfied that the claimant would not have been fit for work during that time. That is itself a normal day to day activity. It would also in turn incorporate other day to day activities such as accurately operating simple equipment or the

claimant socially engaging with others around her, that the claimant would have been unable to do.

76. However, the Tribunal is not satisfied that the claimant can show she met the test of this substantial adverse effect being "long term" as at the relevant date. I.e. that this substantial adverse effect was likely to last for at least 12 months presuming the claimant was not in receipt of medication or other treatment. It is important to bear in mind that this is not an assessment that can be undertaken using the power of hindsight. The claimant cannot look to what happened with her health after the 16 December 2017 to say that it was therefore likely in the period 20 October 2017 to 16 December 2017 the adverse effect was likely to last at least 12 months. The Tribunal has to assess it in the round on the basis of what was known at the time.

77. The claimant's symptoms were due to the impact upon her of the suspension and investigation for gross misconduct. It was a reaction on her part to life events she found distressing. The Tribunal does not consider we have sufficient evidence before us to demonstrate that as at that time the adverse effects were likely to last 12 months. The claimant had only had the symptoms for at most, approximately, 2 months. The Tribunal does not consider that at that point in time there was reason to suppose that the substantial adverse effects would have such a sustained impact upon the claimant as opposed to being a short term transitory reaction to a particular adverse life event. The Tribunal had particular regard to the claimant's contemporaneous GP records. These record a diagnosis of stress at work (as opposed to, for example, a diagnosis of depression) and the advice given to the claimant was to speak to the job centre and her bosses' boss. The Tribunal considers this indicates that at that time the claimant's GP considered the claimant's difficulties were a reaction to her situation which could be addressed and would be likely to be short lived [107].

78. If the claimant was not disabled at the relevant time there can be no failure to make reasonable adjustments. In any event the Tribunal would also have concluded that the respondents did not know and could not reasonably have been expected to know that the claimant was disabled at that time. Whilst the claimant was reporting some of her symptoms to individuals within the first respondent, the Tribunal does not consider that this reasonably should have put the respondents on notice that the claimant was a disabled person at that time, as opposed to them likewise concluding that this was a temporary reaction to adverse events the claimant was facing.

79. For the claimant's disability related harassment claim the alleged harasser must have engaged in unwanted conduct "related to" the protected

characteristic of disability. As set out in the summary of the legal principles above, the concept of being "related to" disability is wide enough to encompass an individual (or someone associated with them) with an actual disability or harassment related to a perceived disability. It does not cover someone who was most disabled and merely identifies themselves as having a disability. The claimant was not a disabled person at the material time. The Tribunal also does not consider that it has been demonstrated that at the relevant time the respondents perceived the claimant to be a disabled person, for the reasons already given in the reasonable adjustment complaint.

80. The claimant's disability discrimination complaints are therefore not well founded, do not succeed against either respondent and are dismissed.

Constructive Unfair Dismissal

81. The Tribunal carefully considered the criticisms that the claimant makes about the first respondent in support of her claim she was entitled to resign and consider herself constructively unfairly dismissed. The Tribunal does not consider that any of the acts relied upon by the claimant individually constitute a repudiatory breach of contract or more specifically a breach of the implied term of trust and confidence. Nor does the Tribunal consider that cumulatively those acts complained about form a course of conduct comprising several acts or omissions which cumulatively amount to a repudiatory breach or a breach of the implied term of trust and confidence.

82. We will briefly summarise why we reached that conclusion taking the claimant's criticism in turn.

<u>The claimant alleges that the allegation against her was false, was created by CJ and there was no cause to suspend her. The claimant also complains that the subsequent witness statements obtained against her in the disciplinary process are false</u>

83. The Tribunal considers that the first respondent had reasonable cause to suspend the claimant. CJ repeated what he said he had heard to Mr Robinson on the night of the party and to HR the following day. The Tribunal is satisfied the first respondent had to take the allegation seriously, it was an alleged threat of violence. That gave the first respondent sufficient grounds on which to suspend the claimant whilst the allegation was investigated.

84. There was no basis on which the first respondent could conclude at that point in time that the allegation was made maliciously. Indeed, the

allegation was subsequently supported by statements taken during the later disciplinary investigation. When the claimant raised a grievance against CJ alleging that he was ill disposed towards her, it was investigated by the first respondent and the disciplinary investigation placed on hold to allow the grievance to take priority. This was reasonable conduct by the first respondent.

85. The Tribunal also did not find it proven, on the balance of probabilities, that CJ had created the allegation against the claimant. There is no basis on which we could conclude or infer that the 3 witnesses had conspired with or at the direction of CJ to create false accounts. The claimant points to inconsistencies between the witness accounts and inconsistencies with other evidence. We have taken this into account. However, the Tribunal considers that the inconsistencies between the accounts actually tends to add credibility to there *not* being a conspiracy. It is not unusual if witnesses are giving an independent account for there to be differences between recollections – for witnesses to all use identical language can sometimes actually point more towards collusion. Here, there accounts all had at the heart of them an allegation that the claimant had made a comment in some way relating to using a shoe to impact upon CJ's head; whether actually meant or not. It was reasonable for the respondent to proceed with disciplinary proceedings based on that content.

<u>The claimant says the first respondent should not have suspended her without first undertaking an investigation /establishing the facts</u>

86. The Tribunal considers that the claimant here has not understood how suspension and disciplinary processes work. A suspension, such as in the claimant's case, is undertaken before any detailed investigation. This is because the suspension is necessary to protect those involved and protect the integrity of the investigation itself.

<u>The claimant complains that the suspension and subsequent disciplinary investigation should have been undertaken by a manager not present at the party as opposed to Mr Hale</u>

87. The Tribunal considers that as a matter of best practice it may have been sensible to use an outside manager. However, the first respondent had a logistical difficulty. As the incident occurred at an area party the area managers were in attendance at the party. Further the suspension in particular needed to be undertaken pretty promptly. The Tribunal also takes into account that there is no suggestion that Mr Hale was a witness to the particular events or that he compromised the investigation process in any way. The claimant did not complain about his involvement and indeed she complemented him on the way he conducted the first investigation meeting with her.

The suspension letter directed the claimant back to CJ

88. The Tribunal finds this should not have happened; the letter should have been amended. Set within an objective context it was however clumsiness on the part of HR rather than being deliberate.

The claimant alleges that the reasons for her suspension were not explained to her

89. The Tribunal has found as a matter of fact that the claimant was told and understood that the allegation related to an actual or threatened assault on CJ. It is accepted that in the early stages the claimant did not know the detail of the alleged assault in that it related in some way to a threat of use of a shoe. The Tribunal does not consider the first respondent acted unreasonably in limiting the detail given to the claimant at the initial stage. She understood the broad nature of the allegation and was able to give her account that she had not been near CJ or spoken to him or made an actual or threatened assault or acted inappropriately. The investigation had not yet happened when the claimant was suspended. The purpose of the future investigation was to obtain accounts and establish what had happened and which would lead to the framing of the specific allegations against the claimant prior to the disciplinary hearing stage and once the first respondent decided if there was a case to answer. Further once the witness accounts were taken the claimant was interviewed again and the specific allegations put to her. The Tribunal does not consider that the process adopted by the first respondent was unreasonable.

The claimant alleges that there was a delay in taking the disciplinary witness statements of over 3 months

90. As set out above, the disciplinary investigation was placed on hold to allow the grievance investigation to take priority given the nature of the complaint the claimant was making against CJ. The Tribunal does not consider the first respondent acted unreasonably. To have proceeded with the disciplinary investigation would have invited criticism from the claimant that there was not a fair investigation of her grievance against CJ who she said was motivated by ill will against her in making up the shoe threat complaint. The first respondent was overall keeping an eye on time scales. Once the stage one grievance meeting with the claimant was concluded AR discussed with the claimant and agreed with her that the disciplinary investigation could run in tandem until the point of deciding if there was a case to answer or not. The Tribunal considers that the first

respondent was here reasonably trying to balance the competing interests, including the claimant's concerns about her health. There has been no suggestion that witnesses said their memories were compromised by the delay. The procedure followed by the respondent was a reasonable one.

The failure to take a witness statement from CJ

91. The Tribunal considers that as a matter of best practice it may have been sensible to take a statement from CJ. He was the alleged victim and he apparently took the most contemporaneous accounts from the witnesses about the alleged shoe threat on the night in question. It could also have been explored why the names he gave HR differed to those interviewed by Mr Hale. However, the Tribunal takes into account that CJ was not a direct witness to the alleged threat; the primary evidence was always going to come from the three alleged direct witnesses to the alleged shoe threat. If the claimant had remained in employment and the disciplinary process had continued the claimant could always have requested that CJ be asked for his account.

The claimant states that other evidential matters were not investigated such as the alcohol consumption of others, inconsistencies in statements and evidence, and photographs to show she was wearing flat shoes on the night in question

92. It is important to remember that the disciplinary proceedings were at a relatively early stage at the time the claimant resigned. She had not been to a disciplinary hearing and the formal pack of papers had not been served on her. There was a process still to come in which the Tribunal considers it likely that the claimant would have had the opportunity to submit her own evidence, or ask the hearing officer to make further enquiries before reaching a conclusion, and to put across her concerns about inconsistencies. The Tribunal does not consider that the first respondent had pre-judged the outcome. It had already adopted a process of making sure that the claimant could comment on the evidence it was obtaining by asking the claimant to comment on the witness statements from the 3 colleagues. In the grievance process the first respondent also demonstrated a willingness to listen in speaking to a further witness and considering new evidence when provided by the claimant. Showing that the claimant was wearing flat shoes would also not dispose of the allegation against her given that one account was that the claimant had asked to borrow someone else's stiletto shoe or had said she wished she was wearing one.

Mr Hale's investigation report was sent back by HR on several occasions for editing

93. From the limited evidence available to the Tribunal about the nature of the editing the Tribunal does not consider the first respondent engaged in untoward conduct. It is the role of HR to assist managers in ensuring that investigation reports are properly structured with relevant content.

The claimant alleges that Mr Robinson did not respond to her first grievance email of 23 October 2017

94. Here the Tribunal agrees that the claimant's email did not amount, in substance, to a grievance. Mr Robinson did respond to it. He telephoned the claimant and the Tribunal has made a finding of fact he did discuss with her the suspension and what would happen next in the process. He also followed up with a short email explaining what kind of information would be needed to take a grievance forward. The Tribunal does not consider he acted unreasonably. He did not act unreasonably in not summarising the whole conversation with the claimant; he summarised what he understood to be the key points.

The epilogue email

95. The Tribunal agrees that this email was unprofessional and inappropriate in tone. Looking at the wider context however, it was not intended to be seen by the claimant. It also did not prevent the grievance process being started and Mr Robinson did not ultimately undertake the grievance process.

The claimant alleges that Mr Robinson did not answer her email of 26 October and she was invited to attend a grievance meeting when it was known she was on leave

96. The Tribunal can understand why the claimant found the sequence of events upsetting; from her perspective she did not get a response until she returned from Ireland to find a letter inviting her to a meeting she could not attend. However, looking objectively at the first respondent's conduct, the claimant's email of 26 October was dealt with promptly in that a grievance was opened that day and a letter was sent to the claimant inviting her to a grievance meeting. That the claimant's leave dates were not checked on nexus was an oversight, but one it is possible to see could happen when trying to act expeditiously to set a meeting up. As best practice it may have been wise for Mr Robinson to have also sent an email acknowledgment, particularly bearing in mind the claimant's expressed anxiety, and for him to have explained briefly what was happening. However, the general procedure adopted by the first respondent was not wholly unreasonable. Mr Robinson did also try to explain to the claimant what had happened.

The claimant alleges that Mr Robinson should not have phoned her on 9 November and that he was cold and callous

97. The Tribunal does not consider that Mr Robinson acted inappropriately. By that time the grievance investigation had been passed to Mr Shattock. It was reasonable for Mr Robinson to call the claimant to respond to the claimant's email about bringing a companion by asking her to liaise with Mr Shattock. Mr Robinson followed it up with an email with the contact details.

The arrangements for the grievance meeting were not confirmed until the claimant chased them

98. The Tribunal agrees that it should not have been necessary for the claimant to do this; albeit AR remedied the situation.

The claimant complains she was placed under pressure to sign the grievance meeting notes

99. The Tribunal finds that the comment about the parking timing running out was a clumsy one, albeit not one that the first respondent could reasonably have anticipated to have the effect on the claimant that it did. The Tribunal finds it was not said with the intention of inappropriately pressurising the claimant.

The claimant complains that there were inaccuracies in the grievance minutes, Mr Shattock delayed responding to her concerns and it took too many email exchanges to get her corrections and amendments dealt with

100. It is inevitable that individuals will have different recollections and take different notes of meetings. They are not verbatim accounts and indeed it is one reason why often each party has a notetaker there. It is usual for some time to be spent between the parties suggesting amendments and also, if they cannot be agreed, for the competing accounts to be put forward. It was therefore not unreasonable for the first respondent to engage in email correspondence with the claimant to resolve the minutes or to tell her that her amendments or versions would be taken into account; it was proper to do so. Mr Shattock should not have delayed responding to the claimant. He did not take action because he did not know what to do. He should have sent it to AR to resolve at an earlier stage.

Mr Robinson telephoned the claimant on 15 December when it is said he should have emailed the claimant

101. The claimant had telephoned Mr Robinson herself the day before. It was not unreasonable in those circumstances for Mr Robinson to telephone in response to the claimant's email of 14 December. This is particularly so bearing in mind the topics to be discussed were the Christmas vouchers, access to nexus and the meeting arrangements for the 15 December. Mr Robinson then emailed the claimant on 16 December after her email saying that all communications needed to be in writing, saying that the next meeting would be communicated by post and that he would not telephone her again and would make any contact by email. That met the claimant's request.

The claimant's grievance was not upheld

102. The claimant's grievance was listened to, investigated and responded to. When it was not upheld Mr Shattock provided a rationale for this, largely on the basis that there was no corroborating evidence; it was one person's word against the other. It was not an unreasonable approach or stance to take.

The claimant's grievance left the claimant with the same outcome and left lots unclear

103. The grievance appeal listened to the claimant and investigated new matters where it was considered appropriate. Some of the claimant's procedural concerns were upheld and apologies given. The complaint about the epilogue comment was upheld. It was found that Mr Shattock's approach in not upholding the substance of the complaints was an appropriate stance to take but the grievance appeal revisited the evidence and conclusions about the notice board recording underperforming cashiers. There was no unreasonable process and the conclusions reached were fairly open to the grievance appeal body. The claimant was offered a facilitated conversation with CJ and a vacancy in Pontypool based on her 7.5 hours contract. This was not an unreasonable approach. The claimant was given more time when she requested it. Her questions were promptly answered by AK who took great care in looking after the claimant.

The disciplinary case was not withdrawn when CJ left the organisation

104. There remained on the face of it a potentially serious conduct allegation against the claimant. It was not unreasonable for the first respondent to be clear that when the claimant was well enough she would have to attend the disciplinary hearing.

Summary

105. We have often used the word "reasonable" when evaluating the criticisms the claimant makes of the first respondent. It is, however, not the ultimate legal test but was said in Buckland to be a helpful tool in the Tribunal's factual analysis kit for deciding whether there has been a fundamental breach.

106. Some of the claimant's criticisms we have found to have some validity and some we have not. We took a step back and looked at those we found to have some validity. Overall the Tribunal did not consider, applying an objective analysis, that any individual criticism demonstrated that the first respondent acted without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Nor did it otherwise amount to a repudiatory breach of contract. Furthermore, when assessed cumulatively there was no course of conduct by the first respondent where cumulatively the first respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage mutual trust and confidence. Nor was there cumulatively any other repudiatory breach of contract. It is important to remember that the threshold her is a relatively high one; not all unreasonable behaviour amounts to a breach nor does an employee's sense that she has been treated unreasonably.

107. That is enough to dispose of the claimant's constructive unfair dismissal claim. But the Tribunal would add that even if a fundamental breach had been established the Tribunal would have in any event concluded that the claimant had impliedly affirmed the contract. The matters about which she complains long pre-date her resignation. There was a 6 month gap between the grievance appeal outcome and the claimant's resignation. The claimant herself said in the welfare meeting process that with hindsight she should have left at the grievance outcome stage. She agreed in evidence that she was hoping to return to work. The delay in resigning and the way the claimant behaved was consistent with keeping the contract alive. She was hoping to return to work, she attended welfare meetings, she engaged with AK, she obtained company sick pay. She chose to stay as an employee of the first respondent accepting their benefits. This is not the kind of case in which the claimant says that there was then a final straw prior to resignation.

108. It follows that the claimant resigned and was not dismissed. The constructive unfair dismissal claim cannot succeed and is dismissed.

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Employment Judge Harfield
Dated: 4 June 2020

JUDGMENT SENT TO THE PARTIES ON 11 June 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS