EMPLOYMENT TRIBUNALS

Claimant: Miss J Shaw

Respondent: Interserve Catering Services Limited

HELD AT: Manchester ON: 19 – 23 October 2020

In chambers: 25 November 2020

BEFORE: Employment Judge Porter
Mr D Williamson
Mr P Dobson

REPRESENTATION:

Claimant: In person assisted by her friend Mr I Robinson

Respondent: Miss S Tharoo of counsel

RESERVED JUDGMENT

1. The claimant was not dismissed.

2. The claim of unfair dismissal is not well-founded and is hereby dismissed.

3. The claim of disability discrimination under s13 Equality Act 2010 is not well-founded and is hereby dismissed.

REASONS

Issues to be determined

1. The parties had not agreed a List of Issues. It was noted and confirmed by the parties that earlier preliminary hearings had identified complaints of

constructive unfair dismissal and direct discrimination because of disability under s13 Equality Act 2010.

2. At a preliminary hearing on 25 August 2020 it was determined that the claimant was a disabled person within the meaning of the Equality Act in the period April – July 2019 and that the alleged discriminatory acts, for determination by this tribunal, were set out in paragraphs 13-24 of the Scott Schedule, (see pages 49 – 54 of the hearing bundle).

3. The claimant confirmed that:

   3.1. She relied on a breach of the implied term of trust and confidence in asserting that there was a fundamental breach of contract entitling her to resign;

   3.2. Each of the allegations relied upon were as set out in the Scott Schedule prepared when the claimant was legally represented;

   3.3. The claimant did not assert that suspension was a discriminatory act – she alleged that the manner in which she was suspended was a discriminatory act;

   3.4. The Scott Schedule correctly identified at paragraphs 13 – 24 the allegations of discriminatory treatment as being claims of direct discrimination under s13 Equality Act 2010 – the claimant did not pursue a claim of harassment under s26 Equality Act 2020.

4. The issues were therefore identified by the tribunal as:

   Unfair dismissal

   4.1. Was the claimant dismissed, that is

      4.1.1. did the respondent breach the so-called 'trust and confidence term', i.e. did it, 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;

      4.1.2. if so, did the claimant affirm the contract of employment before resigning?

      4.1.3. if not, did the claimant resign in response to the respondent's conduct

   Disability discrimination

4.2 Did the respondent subject the claimant to the treatment set out in allegations 13-24 of the Scott Schedule;

4.3 Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators;

4.4 If so, was this because of the claimant's disability.

Orders

5. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

6. At the outset of the hearing the respondent made application for leave to rely on additional documents recently disclosed to the claimant, together with supplementary witness statements from Nicola Edwards and Rachel Hamilton on the grounds that the claimant had raised additional allegations in her witness statement which needed to be addressed by further evidence and documents.

7. Initially the claimant objected to this application asserting that:

   7.1. She was no longer represented by her solicitor and since 9 October 2020 had been forced to consider a large volume of correspondence from the respondent's representative and had been put under considerable stress, increasing her anxiety and depression;

   7.2. A new bundle had been created which put her, as a litigant in person and a disabled person, to a great disadvantage;

   7.3. Some of the documents in the new bundle differed from documents previously disclosed between the claimant and respondent.

8. In addition, the claimant asserted that the new bundle did not contain all of the relevant documents.

9. EJ Porter advised the claimant of her right to make application for a postponement if she was not prepared to proceed and, in particular, if she had had insufficient time to prepare for this hearing following the withdrawal of her solicitor as her representative.

10. EJ Porter gave the claimant time to consider her position, with the assistance of her friend and lay representative Mr Robinson. EJ Porter advised the claimant that when the tribunal reconvened it would hear the claimant's representations relating to:

    10.1. Her objections to the respondent's application with reasons;

    10.2. Any request for a postponement of the hearing with reasons;

    10.3. A list of the documents which were missing from the bundles prepared by the respondent;

    10.4. Her allegation that some of the documents in the prepared bundles were either fabricated and/or had been altered from the original document.

11. When the tribunal reconvened Mr Robinson spoke on behalf of the claimant and confirmed that the claimant was happy with the bundles prepared by the respondent, she had no objection to the introduction of the new documents and supplemental witness statements. However, the claimant was not in a fit state to continue with the hearing today. She had been very confused and now accepted that all relevant documents were contained within the bundles prepared by the respondent. She had no additional documents and did not wish to pursue her allegation that certain documents had been fabricated and/or changed from the originals. Mr Robinson asked for a postponement until the following day. The respondent had no objection to that request, on the grounds that the tribunal still needed to carry out its reading exercise and little time would be lost by the requested postponement. EJ Porter sought clarity on whether the claimant wanted to pursue an application to postpone the entire hearing and the claimant confirmed that she did not.

12. With consent, the parties were released until the following day.

13. EJ Porter noted that the copy witness statement of the claimant's witness Diane O'Connell had been altered, in that certain paragraphs had been removed. EJ Porter noted that the claimant had, in correspondence with the tribunal, objected to the respondent's communication with Ms O'Connell, through which the respondent had sought a redaction of parts of Ms O'Connell's witness statement on the grounds that certain paragraphs breached the terms of a COT3 settlement between the respondent and Ms O'Connell.

14. The claimant confirmed that Ms O'Connell had agreed to certain amendments to her witness statement and the claimant was satisfied with, and accepted, Ms O'Connell's decision. The claimant pursued no further application at this stage.

15. On the second day of the hearing Mr Robinson made application to introduce new documents, which he had not yet copied to the respondent, namely:

    15.1. A fit note dated 4 April 2018 showing that the claimant was, contrary to the evidence of the respondent, absent from work by reason of ill-health on 18 April 2018;

    15.2. The grievance outcome letter actually received by the claimant, which was not the same as the grievance outcome letter disclosed by the respondent and contained at pages 203 and 204 of the bundle.

16. Time was taken to allow the claimant to send these new documents by email to the tribunal clerk for forwarding to the respondent. It was explained that the tribunal could not accept paper documents from either party during the course of the proceedings because of the safety measures adopted as a result of the Covid 19 pandemic.

17. On return to the tribunal counsel for the respondent confirmed that

    17.1. The respondent had no objection to the introduction of the fit note, which was introduced into the bundle at page no 392;

    17.2. The respondent objected to the claimant's request in relation to the purported grievance outcome letter received by her as the document provided by the claimant was a three page document, each page already in the bundle at pages 203, 204 (the grievance outcome letter sent by the respondent) and 232 (one of the pages of the grievance appeal outcome letter sent by the respondent)

18. Mr Robinson accepted that he had made a mistake and withdrew his application in relation to the disclosure of the grievance outcome letter. The claimant confirmed that the document at pages 203 and 204 of the bundle was the grievance outcome letter received by her, but that she had become confused as the papers had got mixed up when she put them away.

19. The claimant started giving her evidence on Day 2. At the conclusion of Day 2, EJ Porter noted that despite the assurances given by the claimant and Mr Robinson that all relevant documents were before the tribunal, the claimant repeatedly asserted in answers to questions in cross-examination that there were documents which supported her case but that they were not in the bundle, she had not been allowed to disclose them. EJ Porter advised the claimant that

    19.1. if there were any other relevant documents not currently contained in the bundle then the claimant should

19.1.1. Prepare of a list of any additional documents upon which she sought to rely; and

19.1.2. Send a copy of that list, together with copies of the listed documents, to the respondent by email before the start of the hearing the next day;

19.2. Her application for disclosure of additional documents would be considered at the outset of the next day's hearing.

20. On the third day of the hearing it was noted that the claimant had, since close of evidence the previous day, sent to the clerk to the tribunal two emails containing applications for leave to introduce new evidence into the bundle:

20.1. An email dated 20 October 2020 and timed at 19:18, requesting inclusion of a sicknote dated 29 December 2018 and an email dated 29 December 2018 from the claimant to Nikki Edwards attaching the sick note; and

20.2. An email dated 21 October 2020 and timed at 2:00 in which the claimant asserted that:

20.2.1. The documents previously disclosed and discussed with her legal representative had been significantly changed and the originals did not appear in the trial bundles;

20.2.2. The change to the documents in the trial bundles had adversely affected the ability of the claimant to answer questions in cross-examination;

20.2.3. Half of the documents in the claimant's bundle 3, attached to the email, did not exist in the trial bundle.

21. The claimant had copied her first email to the respondent. She had not copied her second application to the respondent, who was provided with a copy to enable counsel for the respondent to take instructions.

22. In relation to the application by email dated 20 October 2020 and timed at 19:18, the respondent did not object to the sicknote and e-mail being added to the evidence provided that the respondent was able to introduce text messages exchanged between the claimant and Nikki Edwards about her ill-health in the days before and after the email dated 29 December 2018.

23. The claimant had no objection to the introduction of these additional documents.

24. Accordingly, with consent, the following documents were added to the bundle:

    24.1. Fit note dated 29 December 2018 assessing the claimant as unfit to work from 29 December 2018 to 8 January 2019 (page 393);

    24.2. Email dated 29 December 2018 from the claimant to Nikki Edwards (page 394);

    24.3. Text messages between the claimant and Nikki Edwards between 27 December 2018 and 3 January 2019 (pages 395 – 398).

25. In relation to the application by email dated 21 October 2020 and timed at 2:00, the respondent asserted that each and every of the documents attached to the claimant's email were in the trial bundle between pages 164 and 289. The claimant's assertion that documents had been altered and/or omitted was completely false.

26. The tribunal adjourned the hearing to give the claimant the opportunity to review the bundles and to reply to the respondent's submission.

27. When the tribunal reconvened the claimant was unable to reply to the respondent's submission, was unable to identify any of her documents which were not in the existing trial bundle, was unable to identify any differences between her documents and those already in the tribunal bundle.

28. The claimant's application email dated 21 October 2020 and timed at 2:00 was therefore refused.

29. The claimant made application for an adjournment on the grounds that she could not work with the trial bundles. The claimant became upset and the tribunal adjourned to enable the claimant to compose herself and continue with her application for an adjournment.

30. When the tribunal returned the claimant asserted that she no longer wished to pursue any application for an adjournment.

31. By email dated 21 October 2020 timed at 11.32 the claimant made written application to disclose and introduce into the trial bundles the following additional documents:

    31.1. Emails dated 6 and 7 February 2019 from Rachel Hamilton to the claimant;

    31.2. Email dated 6 February 2019 from the claimant to Rachel Hamilton;

    31.3. Fit note dated 8 January 2019

32. That application was considered after lunch on the third day.

33. After hearing submissions the application was rejected on the grounds that these documents were already in the trial bundle at pages 123, 150 and 151.

34. By email dated 21 October 2020 timed at 23:08 the claimant made application to include further documents in the bundle. That application was considered at the outset of day 4 of the hearing. The respondent indicated that each one of the documents attached to the claimant's application, other than a two page letter dated 11 July 2019 from the respondent to the claimant in relation to the claimant's data subject access request, was included in the bundle. Counsel for the respondent identified each relevant page number for the first 7 documents attached to the claimant's application. After hearing submissions from the parties it was ordered that

    34.1. the claimant's application for inclusion of the letter dated 11 July 2019 in the trial bundle was successful and the documents was included in the bundle at pages 399 and 400;

    34.2. The claimant's application for inclusion of all the other documents attached to her application dated 21 October 2020, timed at 23:08, was refused on the grounds that all those documents were already contained in the bundle. EJ Porter refused the claimant's request that the respondent continue to identify each and every relevant page number as this was a waste of tribunal time. The relevant documents and page numbers could be readily identified from the Index. EJ Porter would give assistance to the claimant in the identification of the relevant page number as necessary during the course of the hearing.

35. Attached to the claimant's application dated 21 October 2020 was a copy of the original unredacted statement from Diane O'Connell. The claimant confirmed that she did not make any application for that document to be included in the evidence. The claimant confirmed that Diane O'Connell would rely on the evidence set out in the amended statement, as discussed on the first day of the hearing.

36. At the commencement of giving her evidence Diane O'Connell expressed concern about replying to questions in cross-examination which could be said to amount to a breach of the COT3 agreement with the respondent. EJ Porter assured Diane O'Connell that she was a witness of fact and that she should answer the questions asked of her by respondent's counsel with her evidence as to any of the relevant incidents she had witnessed. Ms O'Connell gave her evidence freely and did not during the course of giving her evidence raise any further concern about being restricted in her answers.

37. On 22 October 2020 the tribunal received an email from a member of the public, Malcolm Humphreys, asserting that he had made a complaint to the respondent on 10 July 2018 relating to an incident he had witnessed in the B&Q store between the claimant and her manager. The email was headed with this case number.

38. After the lunch break that day EJ Porter sought clarification from the parties as to whether they were aware of Mr Humphrey's email and, in particular, as an event stated to have been witnessed by a Malcolm Humphreys had been the subject of cross-examination the previous day, EJ Porter questioned whether the claimant had asked Mr Humphreys to write to the tribunal and/or to attend as her witness. The claimant asserted that she had not contacted Mr Humphreys and she did not intend to call him as a witness at the hearing. EJ Porter noted that the tribunal considered the evidence presented by the parties and did not invite or accept evidence offered by members of the public. As neither party applied for the evidence of Mr Humphreys to be considered by the tribunal it was ordered that the email of Mr Humphreys should be disregarded and should not form part of the evidence in the determination of this case.

39. During the cross-examination of Rachel Hamilton a dispute arose as to the attachments to an email sent by the claimant to Rachel Hamilton on 6 February 2019 (page 141) and in particular, whether one of the attachments (page 123A) had been sent in its complete form, as the copy in the bundle was not a complete copy of the sick note. EJ Porter ordered that a copy of the email, including attachments, be sent to the clerk to the tribunal, who would print off the email and attachments. The parties were provided with these copies to consider and it was noted and agreed that a complete copy of document 123A had been attached to the email and was included in the bundle.

Submissions

40. The claimant made no submissions on the law or the evidence. She did not wish to make any reply to the respondent's written submissions. She asserted that:

    40.1. the respondent had demolished her life and left her a disabled person;
    40.2. the respondent had done the same to three other people in the room.

41. Counsel for the respondent relied upon written submissions which the tribunal has considered with care but does not repeat here.

Format of the hearing

42. This hearing was heard partly in person. EJ Porter and Mr Dobson attended in person. The claimant and counsel for the claimant were in person throughout. A number of the witnesses and the panel member Mr Williamson attended remotely. This was not objected to by the parties. The form of remote hearing was by video, Code V, via the CVP platform. A full face to face hearing was not held because it was not practicable, no-one requested the same, the issues could be determined with one non-legal member participating, and some of the witnesses giving their evidence, by way of a remote hearing. The documents that the tribunal was referred to are in bundle of 400 pages, as noted in these reasons.

Evidence

43. The claimant gave evidence. In addition she relied upon the evidence of:
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43.1. Diane O'Connell, former work colleague;

43.2. Ian Robinson, friend and employee of B&Q at the site where the claimant worked (via CVP)>.

44. The respondent relied upon the evidence of:-

44.1. Nicola ("Nikki") Edwards, Account Support Manager;

44.2. Rachel Hamilton, Account Director (via CVP);

44.3. Susan Rollitt, Operations Manager;

44.4. David McNamara, former Operations Manager (via CVP);

44.5. John Snaith, General Catering Manager (via CVP).

45. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

46. A bundle of documents was presented by the respondent. That bundle was at first challenged and then agreed, as set out above. Additional documents were presented during the course of the Hearing, either in accordance with the Orders outlined above or with consent. Although the claimant continued to challenge the contents of the bundle during the course of the hearing, each of the challenges was considered by the tribunal, which was satisfied that the bundle hearing, as prepared by the respondent, contained copies of the relevant documents disclosed between the parties. References to page

numbers in these Reasons are references to the page numbers in the hearing Bundle.

Facts

47. Having considered all the evidence, the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

48. The respondent is a construction and facilities management company. It is part of the Interserve group and provides catering services to clients throughout the UK, to include services to B&Q at its stores and cafes.

49. Nikki Edwards has been employed in the role as Account Support Manager since December 2016. Her role involved the day to day running of 33 coffee shops for Interserve on the B&Q contract. She would support managers, complete orders, assist with management recruitment. She was a support mechanism for Cafe Managers in anything they needed. She was the first port of call, and David Myers (Operations Manager) was her line manager. She is familiar with Interserve's policies and procedures to include the Policy for Managing Disciplinary at pages 80 - 91 and the Policy for Equality and Diversity at pages 92 - 100.

50. The claimant was employed as a Cafe Manager at the B&Q store in Oldham and had been in this position for approximately 17 years, during which time her employer changed under a number of TUPE transfers. At the relevant time she was contracted to work 37.5 hours per week. Nikki Edwards was her line manager until May 2019, when Sue Rollitt (Operations Manager) took over from Nikki Edwards and became the claimant's line manager.

51. Some of the claimant's duties as a Cafe Manager were to plan, organise and monitor controls to ensure that the food quality, presentation and service was provided to the highest standards, to achieve and maintain food cost in accordance with budget, to display food in an attractive and appealing manner to the highest standards and to ensure all the operations of the cafe were conducted in accordance with company policy and procedures and the terms and conditions as outlined in Interserve's contract with B&Q (see job description of Cafe Manager at pages 109a - 109c).

52. The claimant was responsible for the preparation of rotas to ensure that a satisfactory standard of service was provided. Wherever possible 2/3 individuals will work in the coffee shop at Oldham along with the Cafe Manager. However, if people are absent from work due to sickness or for some other reason then, it causes issues. Sometimes arrangements are made for staff from other stores to provide cover. Sometimes the respondent

has to close a coffee shop, with the permission of B&Q, if there is insufficient staff to open it. The coffee shop can also be closed for a short time to enable staff to take a break.

53. Rachel Hamilton is employed by the respondent as a B&Q account director. She has held this position since 12 January 2006. In her role she is responsible for the management of the services the respondent provides to B&Q catering and cleaning. The operations managers report to her. They manage the site staff. Rachel Hamilton has known the claimant since the contract was awarded to Initial catering (now Interserve) in August 2010. The claimant has always been in periodic contact with Rachel Hamilton over the years, on several occasions, raising concerns with her directly about things she was not happy with

54. In October 2016 a new Operations Manager was appointed, Dave Myers. During 2017 Dave Myers implemented changes to the business operation, which changes had implications to staff levels across the region and within the claimant's café. The claimant struggled with the changes and paperwork built up. However, the claimant's evidence is that she adapted to this new way of working.

55. In April/May 2017 the claimant was doing a stock take, when Dave Myers touched her on the top *of* her head and asked where was her hat. A hat is required to be worn in the café.

[The claimant's evidence on this incident is inconsistent. She describes the action of Dave Myers as a "tap" and as a "slap", asserting that the words are the same. She has adduced no evidence from witnesses to the actual incident. Her witnesses can merely report what the claimant told them. The claimant did not make any formal complaint about this at the time. She discussed the incident informally with Rachel Hamilton, when she described Dave Myers' actions as touching and/or tapping her head. She did not, at that time, describe the action as an assault. The claimant raised the matter again at a meeting with Rachel Hamilton on 5 February 2019. By email dated 6 February 2019 (p151) the claimant described this as "patting me on the head". The claimant's evidence as to this incident is unsatisfactory. On balance, the tribunal does not accept the claimant's evidence that she was slapped on the head by Dave Myers. The tribunal accepts that there was some sort of unwelcome physical contact.]

56. Shortly after this incident the claimant discussed the actions of Dave Myers informally with Rachel Hamilton. The claimant told Rachel Hamilton that Dave Myers had touched/tapped her head and had pulled the hair of another member of staff. Rachel Hamilton investigated that and was told that Dave Myers had not pulled the member of staff's hair – saying that he may have

pointed to her head and asked where her hat was. Rachel Hamilton did not say to the claimant that there were a few teething problems throughout the company as to the way Dave Myers works. Rachel Hamilton took no further action in relation to the reporting by the claimant of the touch/tap by Dave Myers. The claimant did not request any formal action. She did not at the time raise a formal grievance or ask for a report on what action had been taken in relation to the incident.

[On this we accept the evidence of Rachel Hamilton.]

57. In or around July 2017 a customer of B&Q, Mr Humphreys, made a complaint about the behaviour of Dave Myers towards the manager of the café – that is the claimant (page 328). This complaint was, as was standard practice, investigated by the respondent. Mr Myers was asked for his comments and denied the accusation. The claimant raised no complaint about the actions of Mr Myers at the time.

58. In or around March 2018 there was a quarterly audit of the Oldham store when the score received a good score of 90%. Dave Myers, Nikki Edwards and the claimant sat down in the café to discuss the audit scores and action plan. Dave Myers did not raise his voice or degrade the claimant, he tried to explain to the claimant how manage her time more effectively and how to raise the score. The claimant did not like this and ran out of the toilet upset. Nikki Edwards went after the claimant to explain that Dave Myers was trying to help. Nikki Edwards did not tell Dave Myers to leave, did not walk him out. Dave Myers did not try to hug the claimant.

[On this the tribunal accepts the evidence of Nikki Edwards.]

59. On 3 April 2018 (page 373) the claimant sent an e-mail to John Ankers informing him that she having issues with work as she was working 8 – 12 hr shifts without breaks, that she had suffered muscle damage following a recent operation on her leg, and other issues. The claimant emailed John Ankers to ask for a joint meeting with John Ankers and Rachel Hamilton. John Ankers responded on 4 April 2018 (p373) and informed the claimant that since he no longer had an operational role, he considered that the best option for the claimant was to raise a grievance. He suggested that the claimant raise her concerns with Rachel Hamilton in writing.

60. The claimant did not have a meeting with Rachel Hamilton on 4 April 2018 – the claimant was absent from work by reason of ill-health on that date.

61. On 4 April 2018 the claimant sent an email to Rachel Hamilton referring to her working an 8/9 hour shift and sustaining muscle damage. Rachel Hamilton asked the claimant to talk to her as a matter of urgency. In an e-mail exchange, (pages 368 – 372) Rachel Hamilton sought further information

from the claimant and in particular asked whether the claimant had reported the injury on an accident report form, and reminded the claimant of the need to set out her complaints in a formal grievance procedure to enable them to be fully investigated.

62. By email dated 5 April 2018 the claimant set out her concerns including the failure to conduct a return to work meeting ("RTW"), staffing issues and inability to take holiday. The claimant gave a clear indication that she did not want to pursue a formal grievance.

63. By email dated 16 April 2018 (page 368) Rachel Hamilton confirmed that she had investigated the matters raised by the claimant and set out her response to the complaints. The email concludes:

> I am really keen to get you back to worked Tiff, however it is vitally important that you do not do this until you feel fit and able to do so. I appreciate your dedication to your role and know how important the café is to you, but your welfare is also extremely important.
> Please be assured that your RTW will be completed and any adjustments required will be considered and actioned. The very last thing I want is for you to put yourself into a position that is detrimental to your health and well-being, but you must alert us to any concerns you have regarding this.
> I recognise the fact that you are struggling for staffing and we need to understand the reasons behind this and work together to resolve.
> I will, I am sure be in site at some point in the future, in the meantime please do not hesitate to contact me again if you do not get the support required from the management team. I wish you a speedy recovery.

64. Rachel Hamilton did not receive any further contact from the claimant and therefore her belief was that the claimant's issues had been resolved. The claimant raised no further grievance or informal complaints about work/staffing issues until her email to Dave Myers on 7 December 2018 (see paragraph 67 below).

65. In or around October 2018 B&Q received a complaint from a customer alleging rude and aggressive behaviour by the claimant. In accordance with normal practice and procedure the respondent carried out an investigation of that complaint, as requested by B&Q. Nikki Edwards invited the claimant to an investigation meeting on 29 October 2018 to discuss an allegation of professional misconduct arising from the customer's complaint. Nikki Edwards carried out an investigation of the complaint, interviewed relevant witnesses, and gave the claimant the opportunity answer the allegation. After completing the investigation Nikki Edwards informed the claimant in writing that no formal action would be taken against her in relation to this complaint (p118).

66. Dave Myers did not, in a telephone call from the claimant on 29 November 2018, refuse to take the claimant's call, and did not refuse to discuss her concerns because he didn't work weekends.

[The tribunal rejects the claimant's evidence on this point. The claimant has been inconsistent in her evidence throughout. In making this finding the tribunal notes that neither the claimant nor the respondent has called Dave Myers to give evidence. It also notes that there is no reference to this alleged telephone call in the claimant's email to Dave Myers dated 7 December 2018 – see the following paragraph.]

67. On 7 December 2018 the claimant sent an email to Dave Myers (page 332) raising complaints about work and advising Dave Myers that she was going to see her GP to get a sick note as she needed a few days off to get herself together. The claimant raised concerns about struggling to work with a mouth infection, finding it impossible to run the shop with the team that she had, not being able to take her booked days' leave, and problems with staff not performing their duties. She said that she needed more help and more staff.

68. The claimant was absent from work on sick leave from 7 December 2018 to 21 January 2019.

69. The respondent accepts that the Oldham café had staffing issues during 2018. Staffing issues impacted every café in the region throughout 2018. There were staffing issues at the Oldham café in November/December 2018 caused by two staff members based at the Oldham café being absent due to sickness. The claimant has failed to provide satisfactory evidence as to how the staffing issue affected her and the ability to perform her duties. There is no satisfactory evidence to support the assertion that the claimant was required to work excessive hours to provide cover and/or that the staffing issue adversely affected her health and led to her absence from work. The claimant has produced no medical report. She has only relied upon fit notes provided by her GP to explain the reason for her absence. The sick notes refer to work related stress but the claimant has adduced no satisfactory evidence to support the assertion that her absence was caused by the conduct of the respondent. The respondent was prepared to close the café if it had insufficient staff. When the claimant went off sick on 15 December 2018, the café was closed. The claimant had not any time before then asked the respondent to close the café because of staff shortages.

70. On 15 December 2018 the claimant provided a Fit Note signing her unfit for work until 30 December 2018 due to anxiety, depression and work-related stress (see Fit Note at page 119). During December 2018 she provided 2 other Fit Notes

    70.1. 8 December signing her unfit for work until 17 December 2018 due to anxiety with depression, dental infection and work related stress (see page 120); and

70.2. 15 December 2018 signing her unfit for work due to anxiety, depression and work related stress until 30 December (see page 121).

During this time the claimant did not tell the respondent that she would not be able to return to work if the return to work interview was led by Dave Myers, did not at this time assert that her ill-health and absence arose by reason of the conduct of Dave Myers.

71. During the claimant's absence she engaged in an exchange of text messages p395-398) with Nikki Edwards. The claimant informed Nikki Edwards on 27 December 2018 that she was still on antibiotics, but hoped to resume work by the 2 or 3 January. The claimant also said she 'would like to see' Nikki Edwards before she returned to the café. The claimant did not in that exchange say that she was not prepared to attend a return to work meeting with anyone other than Nikki Edwards. She did not say that she refused to attend a return to work meeting with Dave Myers. Nikki Edwards responded by suggesting to the claimant that she see her doctor before returning to work. She also said she would not be able to meet the claimant until 7 January 2019. The claimant replied on 29 December 2019 with a GP certificate certifying her as unfit for work until 8 January 2019, saying that she had showed her GP Nikki Edwards' reply and Nikki Edwards was not able to do her 'return to work' until then (p393-394).

72. A return to work meeting was arranged between the claimant and Dave Myers on 9 January 2019. By email dated 8 January 2019 the claimant confirmed that she would be attending the meeting and said that she had some issues to discuss at that meeting. She did not say that she was not prepared to attend the meeting because it was with Dave Myers. She did not ask that the meeting take place with Nikki Edwards

73. By email dated 8 January 2019 Dave Myers replied confirming that the return to work interview would be to ascertain what support and guidance the claimant may need on her return to work. He commented that her complaints appeared to be by way of grievance and suggested that the claimant raise this through the correct process. He concluded his email "Whilst I am happy to listen to your concerns I believe there are some underlying issues that I am not comfortable to discuss at a return to work interview."

74. The claimant did not return to work on 9 January 2019. By email dated 9 January 2019 (p334) David Myers noted the claimant's continuing absence and advised the claimant that as she had been off work since 7 December 2018 her absence would now be classed as long-term sick and she would receive an invite letter to a welfare meeting and the respondent would be referring her for an occupational health assessment.

75. By letter dated 11 January 2019 (p124) Dave Myers invited the claimant to a welfare meeting on 17 January 2019 to discuss her absence from work. The claimant was advised that the purpose of the meeting was to explore:

- if and when she would be in a position to return to her job and
- if this was unlikely to be in the near future whether there was an alternative position which could be offered to the claimant more suitable to her state of health;
- and whether any reasonable adjustments could be made to work arrangements which might enable the claimant to return to work in some capacity.

The claimant was advised of her right to be accompanied at the meeting.

76. The respondent has a Managing capability – ill health policy (p360) which provides that the policy will apply where an employee's absence is 28 days or more and that the employee will be required to consent to be examined by the respondent's occupational health provider.

77. The claimant contacted HR on 14 January 2019 when she confirmed that she had received the welfare meeting invite but refused to attend a meeting with Dave Myers. She said that she wanted the meeting to be with Nikki Edwards. The respondent granted that request.

78. On 21 January 2019 the claimant attended a return to work interview with Nikki Edwards, who completed the document which is at page 143. Nikki Edwards explained to the claimant that she could return to work on a phased return on reduced hours if she wanted to and Nikki Edwards asked her what she wanted to do. The claimant's response was that she wanted a two-day handover with Phyllis Swarbrook (Relief Manager) and in her words '/ *just want to jump right back in'.* She said she had fully recovered from her illness, she wasn't taking anti-depressants, but that she was receiving counselling and when Nikki Edwards asked her what support she wanted she said she wanted help with paperwork and further HR training.

79. Nikki Edwards told the claimant that:

- she would complete the rota for week ending 24 January 2019;
- the claimant could complete the rota for the following two weeks with Phyllis;
- Phyllis was there to provide support to the claimant;
- Phyllis was there if she needed cover or support;
- John Ankers (Catering Operations Project Manager) would train her in relation to the extra help which she

wanted with onsite paperwork.

80. The claimant signed the return to work interview form, confirming the information contained within it to be true and accurate. The claimant did not ask for a phased return to work on reduced hours.

[On this the tribunal accepts the evidence of Nikki Edwards.]

81. On 22 January 2019 Nikki Edwards received an email from the claimant, who said she wanted to *'just go back in and get my shop back to its best'.* She did not ask for a phased return to work, nor did she ask for any adjustments to her role, her place of work or to her duties (p 145,146).

82. Nikki Edwards did prepare the rota for the week of the claimant's return and the claimant agreed her hours of work for the first two days of her return.

[On this the tribunal accepts the evidence of Nikki Edwards.]

83. During January 2019, during her sickness absence, the claimant sent a number of emails to HR raising complaints about work. The claimant indicated that she did not want to raise a formal grievance at that time. She asked for a meeting with Rachel Hamilton.

84. On 28 January 2019 Rachel Hamilton received an email from the claimant, who said that:

- her phased return to work had been *'somewhat of a shambles';*
- she had to ignore the *'phase bit'* and had worked full shifts on her own all day in the cafe.;
- she had received *'little or zero support from my managers'*

85. Rachel Hamilton considered the claimant's complaints and noted that:

- there was no documentation (return to work interview form nor Fit Notes in HR) confirming that her GP had recommended a phased return to work, nor did she appear to have asked for one at her return to work interview with Nikki Edwards;

- records showed that on her first day back at work the claimant worked 10.30am to 3.30 pm and the next day from 10.15am to close;

- Phyllis Swarbrook (Relief Manager) and another employee were also there – the claimant was not alone

86. On 5 February 2019 the claimant attended a meeting with Rachel Hamilton. The claimant presented a Fit Note (page 122) which had a box ticked for a

phased return. Rachel Hamilton noted that the box was also ticked to confirm that the claimant was not fit for work. She asked the claimant about this but the claimant was unable to provide an explanation. During that meeting the claimant:

- complained about David Myers touching her head, and the way in which Phyliss Swarbrook conducted herself;
- said that she loved her job, she was doing a fantastic job, loved her regular customers and how highly thought of she was in B&Q;
- requested some refresher training
- talked a lot about having stresses at home that she was receiving counselling for.

The claimant also expressed her opinion that everyone was "out to get her". Rachel Hamilton reassured the claimant that was absolutely not the case and that Rachel Hamilton was very keen to get the claimant back into work doing a great job.

87. Following the meeting Rachel Hamilton checked the fit note with HR who said that the Fit Note for the same period of time which had been retained in HR did not have the phased return to work box ticked.

88. By email dated 6 February 2019 (p151) Rachel Hamilton asked the claimant for:

88.1. further details of the incident re Dave Myers;
88.2. copies of her fit notes submitted in relation to her absence from work December 2018 – January 2019.

89. By email dated 6 February 2019 (p 151) the claimant provided Rachel Hamilton with copies of her Fit Notes and she said she could not remember when the incident with David Myers had occurred but thought it was April/May 2017. She described the incident as David Myers "patting me on the head".

90. The fit notes attached to the claimant's email included the fit notes at pages 122 and 123A of the bundle. Both of these documents had the box ticked for a phased return. The fit note at page 123A was a copy of a fit note previously disclosed to the respondent but with amendments. The claimant agreed in tribunal that she did not provide the respondent with any fit note recommending a phased return to work until 5/6 February 2019. The amended copy fit notes were provided by the claimant, attached to her email, clearly showing that they had been copied while lying on the claimant's

wooden floor at home. The claimant has failed to provide a satisfactory explanation as to when, or by whom, the fit notes were amended. The tribunal rejects the claimant's assertion that fit notes were amended/falsified by the respondent.

91. Rachel Hamilton took steps to resolve the issues raised by the claimant including arranging:

91.1. interviews for extra staff in the coffee shop; and

91.2. refresher training with John Ankers (Catering Operations Project Manager), someone the claimant appeared to trust and respect, to conduct the refresher training with her.

Rachel Hamilton told the claimant to contact Nikki Edwards in the short term for any day to day issues.

92. The claimant's appointment with Health Management, (Interserve's occupational health provider) took place on 6 February 2019 and on 11 February 2019 David Myers received a report. The claimant was deemed to be fit to continue in her role and the recommendation was that it would be good practice for the claimant and management to discuss the nature of her concerns and what action could be taken to resolve them.

93. Neither Natalie Rees nor Phyllis Swarbrook had been absent for 28 days or more consecutively. They were not called for welfare meetings under the Sickness Absence Policy.

[On this the tribunal accepts the evidence of the respondent. The claimant was not able to provide the dates when either of these individuals were absent]

94. By email dated 13 February 2019 (p156) the claimant raised a formal grievance by letter dated 12 February 2019 (p157) asserting:

- the respondent had failed in its duty of care to make reasonable adjustments after the claimant's recent return to work;
- the respondent had failed to comply to suggestions of a phased return;
- the claimant was working 8/9 and 10 hour days without a break in breach of working time regulations;

95. Sue Rollitt, Operations Manager, invited the claimant to a grievance hearing on 12 March 2019. The claimant was advised of her right to be accompanied.

96. The claimant was absent from work from 14 - 25 February 2019. She attended a return to work interview with Nikki Edwards on 25 February 2019 when Nikki Edwards asked the claimant whether she wanted a phased return and the claimant said no.

97. John Ankers attended the café to give the claimant the arranged refresher training on 25 February 2019. During the course of that training the claimant was asked questions about some financial discrepancies. When she objected to these questions the discussion was stopped and she was not asked any further questions about any financial discrepancies. The discussion about financial discrepancies was an informal discussion with the claimant about day-to-day business activities. No disciplinary action was taken against the claimant in relation to this matter.

98. The claimant was signed off work following an operation on her leg between 8 and 12 March 2019. There was a return to work interview with Nikki Edwards on 20 March 2019 when it was agreed that the claimant would work 10am – 4:30pm and she would decide the tasks which she was capable of doing.

99. The timesheets for the week ending 28 March and 4 April 2019 show that the claimant was working with two others in the coffee shop. She was not alone and worked generally 10 am – 4:30 shifts, which she had agreed at the return to work meeting

[*On this we accept the evidence of Nikki Edwards]*

100. On 2 April 2019 the claimant telephoned Nikki Edwards to say that a member of staff had called in sick and she had no cover at the cafe. Nikki Edwards agreed to sort it and she called Phyllis Swarbrook and asked her to go to Oldham to provide cover.

101. Phyllis Swarbrook attended the Oldham cafe and was not happy with what she found. When the claimant arrived later in the morning there was an altercation between them. The tribunal does not accept the evidence of the claimant that Phyliss Swarbrook screamed in her face. Word were exchanged. Neither employee was happy with the exchange. The claimant was very upset and left work.

102. Around 11am on 2 April 2019 Phyllis Swarbrook rang Nikki Edwards to tell her that the claimant had been nasty to her and then left the cafe leaving Phyllis on her own

103. Nikki Edwards tried to reach the claimant by email and asked for the claimant to telephone her but the claimant did not respond.

104. By email to Nikki Edwards dated 2 April 2019 (p180b) Phyllis Swarbrook provided her account of the incident with the claimant and raised concerns about the way in which the claimant was managing the Oldham café.

105. The claimant was absent from work by reason of ill-health from 2 – 22 April 2019.

106. On or around 5 April 2019 a complaint was made in relation to the discovery of a food item in the Oldham cafe which was being sold five days past its use by date – the date had been covered with a reduced sticker. As a consequence:

106.1. David Myers sent out an email (p181) to all cafe managers setting out what had occurred and asking managers to ensure that all their staff were fully trained on the correct procedures. The email did not identify either the claimant or the Oldham café; and

106.2. a news item was inserted into the respondent's newsletter on 9 April 2019 (p195) alerting staff to what had occurred and setting out the correct procedure. The news item did not identify either the claimant or the Oldham café.

107. The claimant was not questioned or investigated over this incident. No disciplinary action was taken against her in relation to the incident.

108. Susan Rollitt has worked for the respondent as an Operations Manager since 11 June 2012. She is home based and does not work out of an Interserve office. She was appointed to consider the claimant's grievance. At that time Ms Rollitt was the operations manager for cleaning and catering, managing 26 catering and cleaning outlets. She reported to Rachel Hamilton. Susan Rollitt is an experienced manager within the respondent company and has heard grievances many times before. She had not met the claimant at this time.

109. The claimant did not submit a further formal grievance on 4 April 2019 (p295-296). She did not make the respondent aware of any further formal grievance. She made no reference to such a further grievance either in the grievance hearing with Mrs Rollitt or in the grievance appeal hearing with Mr McNamara.

[On this the tribunal accepts the evidence of the respondent's witnesses. The claimant's evidence has been wholly inconsistent and she has produced no satisfactory evidence to support her assertion that she submitted a further grievance on 4 April 2019]

110. The grievance hearing was delayed for a number of reasons including non-availability of Mrs Rollitt and the claimant's requests for further time. On 8 April 2019 the claimant attended a grievance hearing with Mrs Rollitt. The claimant was accompanied by a trade union representative. At the start of the meeting the claimant provided Mrs Rollitt with a letter setting out further grounds of complaint (p297-298a), namely:

110.1. Lack of support with regards to the team - complaints about Natalie Rees and another employee failing to work delegated shift patterns; her team had been interviewed by a relief manager who had signed off all colleagues as trained but they were not trained; a colleague had been asked to spy and collect evidence on the claimant and report to Nikki Edwards and Phyllis Swarbrook; it was her belief that the company was trying to replace her with a lower paid manager;

110.2. Lack of support with regards to return to work and risk assessment - the relationship with Dave Myers had become strained; an incident had arose when she was abused by Phyllis Swarbrook;

110.3. Set up to fail by Dave Myers and Nikki Edwards regarding paperwork - the claimant had been accused of not being able to complete paperwork, a training session with Dave Myers turned into an investigation of discrepancies on tilling procedures;

110.4. her ops manager – David Myers – was unapproachable and capable of creating a dismissal

111. During the grievance hearing the claimant asserted that:

111.1. Interserve had failed as it had not followed up with her on her return to work, had not made adjustments for her following her return to work, and had ignored a fit note suggesting light duties and phased return to work;

111.2. she explained that in April 2017 Dave Myers had tapped her on her head when she was not wearing a catering hat and she complained that he made her feel worthless nervous and lacking confidence, and she didn't want to attend a return to work interview with him;

111.3. she had asked for help in the management of her team at Oldham but she did not receive this and had interviewed Natalie Rees and had discounted her because of her inflexibility. However, Natalie Rees had been employed by Phyllis Swarbrook when the claimant was absent from work and now Natalie was not doing the shifts and had no respect for the claimant;

111.4. after the claimant's return to work on 23 January 2019 she had received no support and although she was returning on a phased return she did a full day on her own in the café;

111.5. Phyllis Swarbrook had spoken to her awful manner and the claimant had become very upset;

111.6. Dave Myers had circulated an email about out of date sandwiches which she thought was aimed at her.

112. Mrs Rollitt asked the claimant what outcome she was looking for from her grievance. The claimant replied that all she wanted was to be left to do her job and for Natalie Rees not to work at the store.

113. Mrs Rollitt investigated the grievance by considering documents on file, including the fit notes and return to work interviews, emails that had been sent by Phyliis Swarbrook and Nikki Edwards about the incident in the cafe on 2 April 2019. She had a discussion with Natalie Rees about her problems at work and attendance. Mrs Rollitt did not interview either John Ankers or David Myers.

114. Having carried out her investigation Mrs Rollitt took the view that:

114.1. The main points of the grievance were:

114.1.1. The company had failed in their duty of care regarding the claimant’s return to work;
114.1.2. the employment of Natalie Rees;
114.1.3. feeling like she was set up to fail regarding Nikki Edwards and Dave Myers

114.2. the claimant had been having a difficult time adapting to the change from John Ankers being her immediate line manager for many years and then to Dave Myers, who had a very different style of management. She decided to put steps in place to assist the claimant with a further change of line manager.

115. Mrs Rollitt had a face-to-face meeting with the claimant on 17 April 2019 to provide her with the outcome of her grievance. During the meeting;

115.1. Mrs Rollitt told the claimant that she, Mrs Rollitt, would be taking over as her line manager and that they would work together to iron out any further issues the claimant still had;

115.2. Mrs Rollitt asked the claimant to let her know when the claimant was ready to return to work. It was agreed that the claimant would email Mrs Rollitt when she felt ready to return;

115.3. Mrs Rowlett introduced the claimant to Leslie Robb, an experienced manager and they together discussed how Mrs Rollitt managed things in her area. Mrs Rollitt tried to reassure the claimant as to what style of manager she was.

115.4. They discussed the staffing at Oldham and the discussion Mrs Rollitt had had with Natalie Rees about her problems at work;

115.5. they completed an action plan;

115.6. it was agreed that Leslie Robb would go into the cafe on a weekly basis to provide assistance to the claimant whether it was in training or showing her different ways of working.

116. The claimant returned to work on 23 April 2019. Mrs Rollitt helped the claimant sort out the office, addressed her paperwork, looked at training and manuals to ensure that they were up-to-date, and make sure that the claimant knew the new process of working. Mrs Rollitt discussed with the claimant the return to work of Natalie Rees from sickness absence and Natalie's request for a phased return. During their conversations Mrs Rollitt told the claimant how to complete paperwork, including timesheets, stressing that the claimant should follow the established procedures. Mrs Rollitt stressed the importance of completing paperwork accurately, trying to make sure that the claimant understood what was expected of her. Mrs Rollitt did not tell the claimant that she should complete timesheets to show that she was working in the cafe when in fact she was not and was taking time off in lieu.

[On this the tribunal accepts the evidence of Mrs Rollitt]

117. By letter dated 7 May 2019 (p203) Mrs Rollitt advised the claimant in writing of the outcome of her grievance. In relation to:

117.1. **The company had failed in their duty of care regarding her return to work** Mrs Rollitt concluded that the claimant had not submitted fit notes suggesting a phased return to work. However, the grievance under this head was partially upheld because Mrs Rollitt believed that
"due to the issues you are having, a phased return to work should have been explained to you…….. you should have received additional support when you returned to work…….. there was a time delay in organising your return to work
;

117.2. **The employment of Natalie Rees**. Again, this point was partially upheld. The reason given was:

I understand your frustrations regarding Natalie Rees that although you completed reviews, the issues raised were not taken up at the next level and dealt with. I can assure you that moving forwards Natalie's sickness and any other issues will be dealt with in a timely manner. We now have a procedure to follow and will ensure it is followed;

117.3. **feeling like she was set up to fail regarding Nikki Edwards and Dave Myers:** This aspect of the grievance was also partially upheld. Mrs Rollitt expressed her view that the arrangement for John Ankers to provide training on the paperwork was an arrangement made in good faith and was not intended to undermine the claimant or make her feel inadequate. Mrs Rollitt explained:

" However, I acknowledge that that is what John should have come to do, and if there were any discrepancies on the till then I agree with you that they should all be investigated, not just yours."

Mrs Rollitt confirmed that the claimant's cafe would move into Mrs Rollitt's region to enable them to work through any issues and to move forward. The claimant was advised of her right of appeal.

118. The claimant did appeal by letter received by the respondent on 15 May 2018 (p205), asserting that serious allegations mentioned in her initial grievance had not been considered. The claimant said she wished to revisit three points:

118.1. set up to fail by Dave Myers and Nikki Edwards including false investigations and false accusations;

118.2. bullying and harassment from area relief manager;

118.3. the management's inability to actually do what they accused the claimant of such as training, cash audits, right to work.

119. Mr David McNamara was appointed to consider the claimant's appeal. Mr McNamara was employed by the respondent as operations manager from August 2010 to June 2019. He worked only on the B&Q account, overseeing the services provided by the respondent to 85 B&Q stores. Although he had heard the name of the claimant before, he did not know the claimant and had not met her before conducting the appeal.

120. The claimant was advised of her right to be accompanied at the appeal hearing, which took place on 5 June 2019. Karen Gregory attended to take notes (p207). The claimant did not exercise her right to be accompanied by a trade union representative or work colleague at the appeal hearing. Her

request to be accompanied by a B&Q member of staff was rejected, because they worked for a client of the respondent and there was a conflict of interest.

121. During the appeal hearing the claimant gave further information about her allegations. She confirmed that:

121.1. her allegation against Dave Myers referred to a customer complaining about how Dave Myers had conducted himself in the meeting in the café, that the relationship between them had broken down at that point and he touched her on the head for not wearing a hat;

121.2. she accepted that she had been moved away from the management against whom she had complained but expressed the view that this was not enough, that the people should not be getting away with it;

121.3. Dave Myers had accused her of over dating sandwiches;

121.4. A false allegation was made that she had thrown a customer out of the café - referring to the complaint made by a customer of B&Q referred to at paragraph 64 above;

121.5. the claimant said that she had wanted to return to work on 2 January but nobody was available until 8 January and that she had asked that the return to work was not taken by Dave Myers because she did not feel safe with him;

121.6. she had given Nikki Edwards a fit to work note which stated a phased return;

121.7. a new member of staff got the claimant's job while she was off sick;

121.8. it was harassment when she received emails inviting her to an appointment with occupational health;

121.9. she had received an email/newsletter from Dave Myers which highlighted that the cafe had out of date food with the comment “the units manager had done this.” She believed the comment to be aimed at her;

121.10. in relation to the allegation about management's inability to do the work, she alleged that whilst on sickness absence staff members had been trained on paperwork and signed off as trained by Mrs Swarbrook but the individuals had not been trained and this had made it difficult for the claimant when she returned to work;

121.11. there had been a lack of support when she returned to work and she had provided fit notes with reference to a phased return but this did not happen.

122. Mr McNamara investigated the claimant's grievance appeal by considering the documentary evidence and talking to Mrs Sue Rollitt about the allegations relating to the running of the cafe and the actions of Phyllis Swarbrook. Mrs Rollitt interviewed Phyllis Swarbrook on 14 June 2019 (p222) to provide some further information. Nikki Edwards had provided a witness statement (p219). Mr McNamara did not interview Dave Myers about the allegations that he had been aggressive to the claimant in the cafe and had touched the claimant on the head.

123. Mr McNamara considered each of the points raised by the claimant. Mr McNamara reached the decision on the appeal outcome and drafted the outcome letter before he left the employment of the respondent on 14 June 2019. He followed the normal procedure of sending his letter to the HR Department for checking before it was sent to the claimant. The appeal outcome letter was sent by the respondent to the claimant on 24 June 2019 (p229 -233).

[On this we accept the evidence of Mr McNamara. We reject the claimant's assertion that the letter and outcome was done by someone else. There is no satisfactory evidence to support that assertion]

124. Extracts from the appeal outcome letter (p229) read as follows:

The main points of your grievance were as follows:

1. set up to fail by Dave Myers and Nikki Edwards including false investigations and false accusations;
2. bullying and harassment from area relief manager;
3. the management's inability to actually do what they accused me of such as training, cash audits, right to work.

I must also bring to your attention that the grievance points raised at today's meeting differ from the original grievance you raised and was heard and responded to by Sue Rollitt;

It is not company policy to listen to different allegations in an appeal meeting, but in the interest of seeking to resolve all of these matters for you I have listened, investigated and responded as you requested.
…..

Grievance point 1. Set up to fail by Dave Myers and Nikki Edwards including false investigations and false accusations.
You raised the concern that a customer complaint was received in B&Q which was escalated to Interserve. It identified that Dave Myers was speaking to you in an

aggressive and inappropriate manner in the cafe in front of customers and colleagues. It stated that he was raising his voice in an unprofessional, threatening, intimidating and confrontational tone.

Following investigation I have concerns over the validity, accuracy and origins of the complaint that was made. There are however some lessons to be taken from this situation and moving forward if a sensitive situation arises it must be dealt with away from the cafe area to avoid any unnecessary upset and distress. The complaint was fully investigated and documented at the time it was received by Interserve.

You raised an allegation that Dave Myers tapped you on the head, implying that you were not wearing your hat in work which you felt was inappropriate, threatening and bullying behaviour. This has been investigated and I can find no tangible evidence to support this allegation. Dave Myers is a seasoned and experienced operations manager, well accustomed to employment law and the correct way to conduct himself. He would not make any physical contact with any member of staff in any form as it is not the way in which he conducts himself and not acceptable.

You raised a complaint that Dave Myers included you into a group email when you were on sick leave. One of the emails specifically caused upset which showed a picture of an out of date food item with a comment "this is what a manager finds acceptable". In your opinion you feel that the comment was aimed you. This point has been fully investigated. Occasionally, including in company newsletters, we highlight and identified food safety issues/failings that have been found in our coffee shops. We do this not to cause offence bully or upset or to demotivate managers, we do it to build awareness and to ensure that all cafes understand what the required expectation is.

I also note that on further investigation it has been stated that you specifically requested to be included in the managers group emails to keep up-to-date with the cafe newsletters and so that you could be aware of the trading figures.

You raised that you sent an email asking for help and support to Dave Myers, he did not respond, and it was blankly ignored.

It is clear to me that your relationship with Dave Myers deteriorated, it completely broke down and any communication, be it through email, phone call or text message was aggravating the situation and causing further upset and distress for both parties. In this instance we have a duty of care for your well-being and moving you both away from the situation was the correct decision. This understandably is difficult for both parties concerned, however, it was necessary. I also think there has been a clash of personalities, you have found changing operation managers difficult from John Ankers to Dave Myers, both of whom have a different management style and approach, neither of which is wrong. I very much hope by moving Sue Rollitt into the role as Operations Manager, it more compliments your management style and that you now feel more settled and that between you are agreeing the way forward for your café.

…..

You allege that Nikki Edwards filled your role whilst you were on sick leave. This has been investigated. I can confirm that the job was advertised on Indeed, an interview

took place and the contract between the two parties confirms that she is a mobile manager and not the cafe manager of B&Q Oldham…..
I can find no evidence that indicates that you are set up to fail by Dave Myers and Nikki Edwards either by false investigations and false accusations. The full investigations have in fact indicated that both managers strongly rebuke these accusations and regard them as an indictment of their professional characters.

Outcome of grievance point 1 not upheld.

Grievance point 2..

Bullying and harassment in the workplace will not be tolerated. We discussed your allegations that Phyllis (Area Relief Manager) shouted at you, was aggressive invaded your personal space and intentionally planted out of date stock on display to damage your reputation and appear as if you had done it. All the points have now been investigated.... I can find no evidence of bullying and harassment.

Outcome of grievance point 2: Not upheld

Grievance point 3

Interserve management should complete one cash audit every year in each B&Q cafe... You raised a point that a cash audit was not completed in 2016. On investigation I can confirm that this was completed on 21 November 2016, conducted by Nikki Edwards and the staff on duty at the time of the audit were yourself and Diane. A set of action points was also issued following the audit. I have enclosed copies for your information.

When you returned from sick leave you felt that your new team in situ were not trained to the required standard and their knowledge was unsatisfactory, which reflected in their performance. You have also queried how they were trained, following their feedback, as it was a read and sign training session. After investigation I confirm that the training documents were completed. Although I recognise that the training should have been more effective and conducted in a different way, the cafe was short staffed and the trainer was placed under considerable pressure to get them trained quickly and keep the cafe open for trading. I do not recognise that the trainer was at fault. If there were gaps in the team's knowledge, it was created by the circumstances and lack of time available. Additional training will be arranged at site by Sue Rollitt.

I empathise and understand your frustration regarding Natalie Rees. However, after investigation, the probationary review completed by yourself highlighted that there were no performance shortfalls. The form was complimentary and in no way identified or illustrated that next steps should be taken to terminate her employment in probation. I have asked that Sue Rollitt provide training with you on how to complete and conduct a probation review which includes letters, next steps and an outcome. I hope you find this beneficial.

Natalie Rees has now returned to the business. I understand and appreciate that it may appear that her sickness is being treated differently from your own. Each referral to occupational health is different, however, the underlying reason is to

support, help and facilitate the return to work and that can only be done by sending letters to employees. This is not a form of victimisation or bullying.

It does appear that your relationship is fractured and I would suggest that a mediation meeting takes place to discuss differences and a way of working together. As the line manager we must find a way forward.
…
Outcome of grievance point 3: Not upheld

From the initial grievance
Grievance point – Failure in the company's duty of care when you returned to work and lack of support.

On further investigation it has come to light that on several occasions additional help was offered to you and you stated that you did not want the external help and would rather get on with it yourself with the team you had.

In the return to work meeting you had on 15 February 2019 with Nikki Edwards, a phased return was not mentioned. You were asked if there was anything needed to be done to support your return to work and you requested help with paperwork but not a change to your working hours or days.

You have now exercised your right of appeal under the company appeal procedure. This decision is final and there is no further right of review.

125. The claimant did not, during the appeal hearing make any reference to a second formal appeal submitted on 4 April 2019, did not provide Mr McNamara with a copy of the document at page 295-296.

[On this we accept the evidence of Mr McNamara.]

126. From May 2019 the Oldham café was moved to Mrs Rollitt's region. The claimant was not required to have any contact with Nikki Edwards or Dave Myers. She had the support of Mrs Rollitt and Leslie Robb. Natalie Rees returned to work at the Oldham café. Having investigated the claimant's complaints about Natalie Rees Mrs Rollitt was satisfied that with the correct support the claimant could manage Natalie Rees, who was happy to return to work at the Oldham café after a period of sickness.

127. On 13 June 2019 the claimant sent an email (p221) to Mrs Rollitt asking for Natalie Rees to be removed from the cafe, saying that Natalie was affecting her mental health and anxiety. Mrs Rollitt forwarded the email to HR for advice. Mrs Rollitt made contact with the claimant and arranged to meet to discuss Natalie Rees and rotas on 17 June 2019, away from the site in a local McDonald's.

128. When Mrs Rollitt took over the management of the Oldham cafe she was informed by Nikki Edwards of her suspicions that the claimant was not

working her contractual hours, that she was arriving at work later than her start time but was still writing the start time onto the timesheets.

129. B&Q have CCTV in operation and there are signs around the store notifying individuals that CCTV is in operation. It is the common practice of Interserv management to use that CCTV in investigating disciplinary matters. The claimant, as a long serving manager, was well aware of this.

130. John Ankers told Mrs Rollitt that he did go to B&Q and look at the CCTV to see if there was evidence of the claimant not working her full hours. He told Mrs Rollitt that he had sufficient evidence to conduct an investigation. However, as Mrs Rollitt had recently taken over at Oldham, she wanted the claimant to return from sickness absence and start afresh with her, and took no action on this. However, she then received a couple of complaints from staff who said that the claimant was not working her contractual hours. Mrs Roberts felt that she had no option but to act and to suspend the claimant from work pending a full investigation.

131. Mrs Rollitt works from home; she uses her car as an office, completing paperwork and meeting individuals in her car prior to a store or cafe opening. She decided to suspend the claimant from work and did so in her car in the car park outside McDonald's on 17 June 2019. Mrs Rollitt explained that she was suspending the claimant pending an investigation into timesheets, stealing company time.

132. The respondent has a disciplinary policy (p80). Extracts from which include the following:

> 3.1 No disciplinary action will be taken against an employee until the case has been fully investigated. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collection of evidence by the company for use at any disciplinary hearing
>
> 3.2 In some circumstances the company may need to suspend an employee from work, pending further investigations. Suspension is likely to be considered as necessary where there are allegations of gross misconduct.
>
> 3.3 During suspension, the employee may be refused access to the company's premises and that of its clients and denied contact with the company's employees or that of its clients, without the prior consent of the company and subject to such additional conditions as the company considers necessary.
>
> 3.4 The suspension will be confirmed in writing to the employee and reviewed to ensure that it is not protracted. While suspended, employees should not visit company or client premises or contact any clients, customers, suppliers, contractors or other employees, unless they have been authorised to do so. Suspension of this

kind is not a disciplinary penalty and does not imply that any decision has already been made about the allegations.

9.3 Examples of gross misconduct include but are not limited to the following:

- theft or unauthorised removal of company property or the property of an employee, worker, contractor, customer or member of the public

- fraud, forgery or other dishonesty including fabrication of expense claims and timesheets... falsifying company documents, accounts or any other document addressed to or issued by the company

133. The claimant's suspension was confirmed in writing by letter dated 19 June 2019 (p227) due to:

- dishonesty; falsification of timesheets
- breach of health and safety – B&Q visitors book does not match CCTV footage

134. Following the claimant's suspension Mrs Rollitt did not return to the Oldham cafe and tell all staff not to contact the claimant.

[On this the tribunal accepts the evidence of Mrs Rollitt. The claimant has adduced no satisfactory evidence to support her assertion.]

135. On 17 June 2019 Mrs Sue Rowlett did, as part of the investigation, view the CCTV at the Oldham B&Q store to check the claimant's timesheets against her attendance at the store without obtaining the claimant's express permission.

136. On or around 21 June 2019 John Ankers, as part of the investigation, removed CCTV footage from the B&Q store.

137. The respondent did as part of the investigation view CCTV footage from the B&Q store, without obtaining the claimant's express permission.

138. The claimant did not make a complaint to the Information Commissioner, which was upheld, about the respondent's use of the CCTV in this investigation.

[There is no satisfactory evidence to support the evidence of the claimant on this point.]

139. By letter dated 24 June 2019 (p224) the claimant was invited to attend an investigation meeting with John Ankers on 1 July 2019 to discuss the allegations of:

- dishonesty; falsification of timesheets
- breach of health and safety – B&Q visitors book does not match CCTV footage

140. The claimant requested that the investigation hearing be postponed to a later date. This request was granted and she was invited to a further investigation meeting on 4 July 2019. The allegations for investigation remained the same (p236).

141. At the investigation meeting with John Ankers on 4 July 2019:

141.1. The claimant was told that the allegations related to the falsification of time sheets and stealing circa 12 hours from the company;

141.2. the claimant pointed out that she was concerned about the use of the CCTV and her images being obtained and retained on the managers laptop;

141.3. The claimant challenged the impartiality of John Ankers.

The hearing was then adjourned.

142. After the meeting the claimant raised a complaint about the impartiality of John Ankers as investigating officer (p242). A new investigating officer , Mr John Snaith, was appointed.

143. The claimant started to look for alternative employment after the meeting with John Ankers.

[This is stated in the claimant's witness statement.]

144. By letter dated 12 July 2019 (p245) the claimant was invited to an investigation meeting on 17 July 2019 with Mr Snaith. The letter confirmed that the investigation related to

- Dishonesty; falsification of timesheets

- Loss of trust – making false statements regarding hours of work

145. Mr John Smith has been employed by the respondent as a general catering manager since November 2018. He has dealt with numerous HR investigations, redundancy procedures and disciplinaries. Prior to conducting the investigation he had never met the claimant nor had any contact with her.

146. During the course of the investigation:

- witness statements were obtained from two of the employees working at the Oldham cafe who had made complaints about the claimant's attendance – Debbie Bardsley (p244a) and Dionne Holt (p244c);

- copies of timesheets for the relevant periods signed by the claimant were obtained

147. The claimant attended the investigation meeting on 17 July 2019 and, as she had a medical condition of anxiety and depression, was allowed to be accompanied by a work colleague, Diane O'Connell. Karen Gregory attended to take notes (p252).

148. During the investigation meeting with Mr Snaith the claimant:

148.1. Asked Mr Snaith to explain the change in allegations and the meaning of the allegation of loss of trust, asserting that she did not understand that. Mr Snaith said that this was merely a fact finding exercise and it was not for him to answer questions at that stage;

148.2. acknowledged that she knew the allegations related to hours not worked by her as she had claimed on the timesheets;

148.3. said that she had a verbal agreements with Sue Rollitt, who had told her to work within her timesheets, that she could manage her own time;

148.4. said that she would often work from home;

148.5. confirmed that it was her signature on the timesheets;

148.6. Questioned whether some of the timesheets had been tampered with;

148.7. Said that she worked a lot of overtime which was not paid and she took “loo” time (time off in lieu);

148.8. Said that she came in late sometimes to take hours back;

148.9. All she had done was manage her own time.

149. Mrs Sue Rollitt provided a statement as part of the investigation (p269), in which she stated that:

149.1. she had never agreed for the claimant to work from home;

149.2. there had been no discussion about the claimant being paid for work undertaken at home

150. At some time prior to 17 July 2019 the claimant applied for a job with Compass Group. By letter dated 17 July 2019 (p275) the claimant was offered a job by Compass Group to commence on 22 July 2019. The claimant took up that offer of employment, from which she earned a higher salary than that which she enjoyed from her employment with the respondent.

[The claimant's evidence on this has been wholly unsatisfactory as to when she applied for this post and the reasons for doing so.]

151. Mr John Snaith prepared an investigation report recommending that matter proceed to a disciplinary hearing.

152. By newsletter sent out on 12 July 2019 the respondent announced that Dave Myers would take over the management of catering in the Northern region (which geographically would include Oldham cafe) whilst Mrs Rollitt would manage the cleaning contracts (p248). This newsletter was intentionally not sent to the claimant because Mrs Rollitt did not send it to the managers who worked under her as she wanted to discuss the changes with them individually. The claimant received a copy of this newsletter from her friend Diane O'Connell. The claimant did not make any enquiries with the respondent as to whether this meant that Dave Myers would be her Operations Manager again.

153. The respondent had not made the decision to make Dave Myers the claimant's manager again. It had deliberately taken the Oldham café outside of Dave Myers region in response to the breakdown in relationship between Dave Myers and the claimant. It was the respondent's intention that Mrs Rollitt continue to manage the claimant.

[The tribunal accepts the evidence of the respondent's witnesses on this point.]

154. On 22 July 2019 the respondent received a written resignation from the claimant (page 287) which was incorrectly dated as 20 June 2019. The resignation letter reads

> It is with great sadness I am forced to hand you my resignation with immediate effect. I feel the company has had me on trial for no reason. With no resulting outcome.
> I cannot continue to be treated in a victimising bullying and humiliating way. As this is having a detrimental impact on my mental health and well-being.

The claimant's evidence on when she decided to resign and when she prepared the letter of resignation is wholly unsatisfactory. On balance the

tribunal finds that the claimant wrote and sent this letter shortly before it was received by the respondent on 22 July 2019, and after the claimant had been successful in obtaining employment elsewhere.

155. The claimant did from time to time complete her timesheets to show her working at the cafe for certain number of days/hours when in fact she was not working but was taking time off in lieu for hours worked over time. The respondent does not pay its managers for hours worked over time and taking time off in lieu is the only method of getting the unpaid hours back.

[This is the evidence of the claimant]

156. It is not the respondent's normal practice to instruct employees to complete their timesheets to show time taken off in lieu as hours actually worked. Mrs Rollitt did not instruct the claimant to do this.

[The tribunal accepts the evidence of the respondent on this point. The claimant's assertion that she was allowed not to work at the cafe, to take time off in lieu for overtime worked in previous weeks, to stay at home but at the same time instructed to record in her timesheets that she was working those hours in the café is simply not credible. The claimant has adduced no satisfactory evidence to support that assertion. The claimant has adduced no satisfactory evidence to show the number of hours overtime worked and when she took those hours in lieu, when she stayed at home but filled her timesheet in as if she was at work.]

The Law

Unfair dismissal

157. The tribunal has considered the relevant law including in particular:

- ss 95(1)(c) and 136(1)(c) Employment Rights Act 1996 ("ERA"); and
- **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221;** and
- the summary of the principles of law which apply in claims of constructive dismissal as set out by the Court of Appeal in **London Borough of Waltham Forest v Omilaju 2005 IRLR 35**.

158. In order to claim constructive dismissal, the employee must establish that:

- there was a fundamental breach of contract on the part of the employer

- the employer's breach caused the employee to resign
- the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

159. The first question is therefore whether the employer committed a fundamental breach of the terms, express or implied, of the claimant's contract of employment. A Tribunal must decide in each case whether a breach of contract is sufficiently serious to enable the innocent party to repudiate the contract. This is a question of fact and degree.

160. In **Malik and anor v Bank of Credit and Commerce International SA 1997 ICR 606** the House of Lords held that a term is to be implied into all contracts of employment stating that an employer will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term of trust and confidence is "inevitably" fundamental. **Morrow v Safeway Stores plc 2002 IRLR 9**. Brown-Wilkinson J in **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666** EAT described how a breach of this implied term might arise: "*To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*".

161. The tribunal notes that a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident even though the "last straw" by itself does not amount to a breach of contract. In **Lewis v Motor World Garages Limited 1985** IRLR 465 Neill LJ said that "the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term "of trust and confidence." Glidewell LJ said "*(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so…. The question is, does the cumulative series of acts taken together amount to a breach of the implied term?*"

162. An employee can rely upon past breaches, even if alleged to have been affirmed, if the employee resigns in response to further acts by the employer (Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833). 31.

163. The tribunal notes the **Omilaju** case, specifically the paragraphs considering the question of what is the necessary quality of a final straw. W Dyson LJ's states that:

> "*A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term…The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. I see no need to characterise the final straw as "unreasonable "or "blameworthy*".

Dyson LJ continues:

> "*21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust an confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employee has committed a series of acts which amount to a breach of the implied trust and confidence, but the employee does not resign his employment. Instead he shoulders on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.*
>
> *22. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely or mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective*."

164. The employers' repudiatory breach must be the effective cause of the employee's resignation but it does not have to be the sole cause. **Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493 EAT**. It is not necessary for an employee, in order to prove that a resignation was caused by a breach of contract, to inform the employer immediately of the reasons for his or her resignation. It is for the Tribunal in each case to determine, as a matter of fact, whether or not the employee resigned in response to the employers' breach rather than for some other reason. **Weathersfield Ltd t/a Van and Truck Rentals v Sargent 1999 IRLR 94**.

Disability Discrimination

165. Section 39 Equality Act 2010 provides:-

(2) An employer (A) must not discriminate against an employee of A's (B)-

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment

166. Previous case law is of assistance in defining the meaning of "detriment". In the case of **Ministry of Defence v. Jeremiah [1998] ICR 13 CA** (a sex discrimination case), the Court of Appeal took a wide view of the words "*any other detriment*" indicating that it meant simply "*putting under a disadvantage*". The House of Lords in **Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** (a race discrimination case) held that in order for there to be a detriment the Tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work. While an unjustified sense of grievance cannot amount to a detriment, it is unnecessary for the claimant to demonstrate some physical or economic consequence.

167. Section 136 Equality Act 2010 provides:

Burden of Proof

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

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

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

168. Section 13 Equality Act 2010 provides:

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

169. Section 23 Equality Act 2010 provides:-

> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case;

170. When considering the appropriate comparator we note that like must be compared with like. Previous case law is of assistance in this exercise. Relevant circumstances to consider include those that the alleged discriminator takes into account when deciding to treat the claimant as he did. **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337.** If no actual comparator can be shown then the tribunal is under a duty to test the claimant's treatment against a hypothetical comparator. **Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting (2002) ICR 646.**

171. We have considered the decision of the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332**, and its observations on the correct approach to the burden of proof in discrimination cases. We note the Court of Appeal's decision in **Igen Ltd v Wong [2005] IRLR 258** where the **Barton** guidelines were amended and clarified and it was confirmed that the correct approach, in applying the burden of proof regulations, is to adopt a two stage approach namely (1) has the claimant proved, on the balance of probabilities) the existence of facts from which the tribunal could, in the absence of an adequate explanation, conclude that the respondent has committed an act of unlawful discrimination? and, if so, (2) has the respondent proved that it did not commit (or is not to be treated as having committed) the unlawful act? We note also the case of **Madarassy v Nomura [2007] IRLR 246**, which confirmed the guidance in **Igen.**

172. In **The Law Society v Bahl 2003 [IRLR] 640** the EAT held that a Tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. The tribunal must consider all the relevant circumstances to determine the reason for the unreasonable treatment.

173. We also note the decision in the case of **Hammonds LLP v C Mwitta [2010] UKEAT** in which the EAT (Slade J) reiterated that the possibility that a respondent "could have" committed an act of discrimination is insufficient to establish a prima facie case so as to move the burden of proof to the respondent for the purposes of (now) s136 Equality Act 2010. The tribunal must find facts from which they could conclude that there had been discrimination on the grounds of race. The absence of an explanation for differential treatment may not be relied upon to establish the prima facie case.

174. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

175. This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

Constructive Unfair dismissal

176. The first question is whether the respondent committed a fundamental breach of contract entitling the claimant to resign.

177. The claimant asserts that the 24 issues identified in the Scott Schedule (p49-54) amount to breaches of the implied term of mutual trust and confidence. Where an employee relies upon a series of acts, the 'last straw act' in response to which the employee resigns must contribute something, 'however slightly' to the breach of the implied term, although it need not be unreasonable or blameworthy conduct (see Omilaju v LB Waltham Forest [2005] 1 All ER 75 above). The claimant alleges that the last straw act was*:*

Allegation 24 - Interserve reinstating Dave Myers as manager knowing issues with claimant.

However, Dave Myers was not reinstated as the claimant's manager and the claimant was not notified that he would be. The claimant simply relies on the wording of the newsletter (see paragraphs 152 and 153 above). The conduct of the respondent in issuing that newsletter, in deciding an operational change, which had no effect on the claimant whatsoever, was not in any way blameworthy, even to a trivial extent. The newsletter was intentionally not sent to the claimant, she was not made aware of what it might mean for her as she was on suspension, and she did not seek any clarity from the respondent before resigning. In all the circumstances the tribunal finds that the alleged final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence. In those circumstances, the tribunal accepts the submission of the respondent that the tribunal is not required to consider the earlier matters and finds that there was no fundamental breach of contract entitling the claimant to resign, the claimant was not dismissed.

Further, and in the alternative.

153. The tribunal has considered each of the allegations and, whether separately or cumulatively, they amount to a breach of the implied term. We

have tried to address the allegations in chronological, rather than numerical, order.

154. *Allegation 1: Slap on Claimant's head by Dave Myers for not wearing hat – about May 2017- Dave Myers.*

The claimant alleges that she was slapped on the head by Dave Myers in around April/May 2017. The claimant's evidence on this is inconsistent and unsatisfactory. She describes the action of Dave Myers as a "tap" and as a "slap", asserting that the words are the same. She did not make a formal complaint about this at the time. She discussed the incident informally with Rachel Hamilton, when she described Dave Myers actions as a tap. She did not, at that time, describe the action as an assault. The tribunal does not accept the claimant's evidence that she was slapped by Dave Myers. She made no complaint at the time, either about Dave Myers' actions or Rachel Hamilton's failure to investigate the incident and/or take action against Dave Myers. The claimant's evidence as to this incident is unsatisfactory. The claimant has, with the passage of time, exaggerated the incident and the effect on her. On balance, the tribunal does not accept the assertion that either the tap or touch on the head, or the respondent's response to the incident , raised formally some 2 years after the event, seriously damaged the implied trust and confidence between employer and employee.

155. *Allegation 2: Customer witnessed senior management bullying and berating of claimant in front of customers and staff*.

The claimant alleges that she was bullied and berated in front of customers and staff by Dave Myers. Again, the claimant's evidence about this incident is inconsistent and unsatisfactory. The Further and Better Particulars of claim (p45) and Scott Schedule (p49), prepared when the claimant had legal representation, identifies the incident as taking place in July 2017. In tribunal the claimant asserts that this incident took place in 2018. There is no satisfactory evidence to support the assertion that the claimant was bullied and berated in front of customers at any time. The tribunal accepts the evidence of Nikki Edwards and finds that on one occasion in or around March 2018 the claimant was upset by some of the comments made by Dave Myers in a business meeting (see paragraph 58 above). However, there is no satisfactory evidence to support the assertion that in making his comments Dave Myers acted in a bullying, berating or otherwise inappropriate manner. The fact that the claimant did not like the comments, disagreed with them and was upset by them, does not mean that the comments were inappropriate or made in breach of the implied duty of trust and confidence. The tribunal finds that the incident as described by the claimant did not occur and that there is no satisfactory evidence that Dave Myers did, without reasonable and proper cause, conduct himself in a manner likely to destroy or seriously damage the relationship of trust and confidence

156. *Allegation 3: Email to John Ankers informing having issues with work as working 8 – 12 hr shifts without breaks and recent operation. Asking for help and no back to work interview*.

We refer to our findings at paragraph 59 above. The claimant emailed John Ankers to ask for a meeting on 3 April 2018. John Ankers responded promptly and informed her that since he no longer had an operational role, he considered that her best option was to raise a grievance. He suggested that the claimant raise her concerns with Rachel Hamilton. The claimant did so. John Ankers did not behave in an inappropriate manner. He did not, without reasonable and proper cause, conduct himself in a manner likely to destroy or seriously damage the relationship of trust and confidence;

157. *Allegation 4: Claimant complained in "off the record" meeting with Rachel Hamilton that felt no adjustment made regards to her staff as on own 5 days after operation. Also discussed with her the incident of being slapped across the head for no hat.*

We refer to our findings at paragraphs 56 - 57 and 60 - 64 above. The claimant did, shortly after the incident in 2017, raise with Rachel Hamilton the allegation that Dave Myers had touched/ tapped the claimant on the head. However, the claimant raised no grievance about it and did not at the time describe the tap as a physical assault. The claimant took the matter no further until the meeting with Rachel Hamilton on 5 February 2019. The claimant did not, in 2017, express any dissatisfaction with the way in which the respondent addressed the claimant's complaint. There was no meeting between the claimant and Rachel Hamilton on 4 April 2018. The claimant was absent by reason of ill-health at that time. The claimant did raise a complaint with Rachel Hamilton about staffing issues and adjustments after an operation by email. Rachel Hamilton responded by email, asking for further details and telling the claimant that any complaints should be raised in a formal grievance. The claimant was assured that her return to work would be completed and that any adjustments required would be considered and actioned. Rachel Hamilton recognised that the claimant was struggling for staffing and noted the need to understand the reasons behind this and to work together to resolve it. Rachel Hamilton concluded by telling the claimant to contact her if she did not get the support required from the management team. Rachel Hamilton did not receive any further contact from the claimant and therefore it was her honest and genuine belief that the claimant's issues had been resolved. The claimant raised no further grievance or informal complaints about work issues until her email later in the year. Rachel Hamilton did not, in relation to either of these two actions, without reasonable and proper cause, conduct herself in a manner likely to destroy or seriously damage the relationship of trust and confidence;

158. *Allegation 5: Invited in for investigation meeting for "apparent unprofessional behaviour and bringing company into disrepute-no independent note taker. Outcome no case to answer*.

We refer to our findings at paragraph 65. It was appropriate for the respondent to investigate a customer complaint when asked by its client to do so. The claimant accepted this in cross-examination. A reasonable investigation was conducted, including a meeting with the claimant and interviews with witnesses. The investigation was dealt with promptly and resulted in a decision not to pursue any formal action against the claimant. The respondent did not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence.

159. *Allegation 6. Request for staff as affecting her performance ignored despite knowing could not cope.*

There is no satisfactory evidence that the claimant, from early 2018, made repeated requests for staff or made the respondent aware that she could not cope. Rachel Hamilton investigated the complaint in April 2018, stressed the need to address the staffing issue and telling the claimant to contact her again and/or raise a grievance if not satisfied with progress. There is no satisfactory evidence to support the assertion that the claimant worked excessive hours during 2018. The claimant has failed to provide satisfactory evidence as to the number of hours worked by her and/or the occasions upon which she discussed her problems with management. There is no satisfactory evidence to support the assertion that the claimant's requests were ignored or that the respondent knew that the claimant could not cope.

160. *Allegation 7 Operation manager refused to discuss claimant's call despite being very distressed stating that "doesn't work weekends" and in fact would be coming to see her about another manager and hung up on her.*

This complaint refers to an alleged telephone call with Dave Myers. We refer to our finding at paragraph 66 above. On balance, the tribunal finds that this alleged telephone call with Dave Myers did not take place.

161. *Allegation 8. Email to senior requesting full staff. Claimant struggling with staff for nearly 1 year prior and not addressed despite being raised by claimant and knowing suffering from stress and depression.*

We refer to our findings at paragraphs 67 – 77. This complaint refers to the email to Dave Myers on 7 December 2018. The respondent accepts that the Oldham café had staffing issues during 2018. The claimant accepts that staffing issues impacted every café in the region throughout 2018. The issues in November/December 2018 were caused by two staff members based at

the Oldham café being absent due to sickness. The claimant has failed to provide satisfactory evidence as to how the staffing issue affected her and the ability to perform her duties. There is no satisfactory evidence to support the assertion that the claimant was required to work excessive hours to provide cover and/or that the staffing issue adversely affected her health and led to her absence from work. The claimant has produced no medical report. She has only relied upon fit notes provided by her GP to explain the reason for her absence. The sick notes refer to work related stress but the claimant has adduced no satisfactory evidence to support the assertion that her absence was caused by the conduct of the respondent. The GP's fit notes are based on the assertions made the claimant to her GP during any consultation. The claimant has not provided any satisfactory evidence as to what steps the respondent could have taken to address and/or resolve the staffing issues. It is clear that the respondent was prepared to close the café if it had insufficient staff. When the claimant went off sick on 15 December 2018, the café was closed. The claimant has not any time before then asked the respondent to close the café because of staff shortages. To the contrary the claimant asserts that she was particularly upset that the café had to close. However, the tribunal is satisfied that this was a reasonable business decision. The respondent did not without proper cause act in a way to undermine the term of trust and confidence. In any event, the tribunal is not satisfied that the temporary closure of the café adversely affected the claimant. She has put forward no satisfactory evidence to support an assertion that the closure of the café put her at any disadvantage, for example, in relation to performance indicators or bonus payments.

162. *Allegation 9: Email to Nicky Edwards stating would like to return, refused back to work interview as alleging no one available for back to work interview until 8 January 2019 following four weeks sick*.

We refer to our findings at paragraphs 70-74 above. The claimant was not refused a return to work interview. The claimant informed Nikki Edwards on 27 December 2018 that she was still on antibiotics, but hoped to resume work by the 2/3 January. She also said she 'would like to see' Nikki before she returned to the café. Nikki Edwards responded by suggesting to the claimant that she see her doctor before returning to work, and said she would not be able to meet until 7 January 2019. This did not prevent the claimant from returning to work if she was fit and able to do so. Dave Myers was scheduled to conduct a return to work meeting on 9 January 2019. At no time before then did the claimant inform the respondent that she could not, or would not, conduct a return to work meeting with him, that his presence was a bar to her return. The claimant's email to Dave Myers on 8 January 2019 shows that she was willing to meet with him. When the claimant contacted HR on 14 January 2019, refusing to attend a meeting with Dave Myers, and said that she wanted the meeting to be with Nikki Edwards, a return to work meeting was organised with Nikki Edwards. The respondent acted reasonably

throughout this process. It did not without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence;

163. *Allegation 10: Claimant had welfare meeting and occupational health meeting yet other member of staff did not despite being off for almost 3 months. Claimant raised this with senior staff member.*

The tribunal refers to its findings at paragraphs 75, 76 and 93. The invitation to a welfare meeting and an OH assessment were clearly in line with the respondent's procedure. The claimant had been absent for more than 28 days. Neither Natalie Rees nor Phyllis Swarbrick had been absent for 28 days or more consecutively such that the policy applied to them. The respondent did not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence;

164. *Allegation 11: Claimant suppose(d) to have refresher training as had been off for weeks. Instead respondent began questions which appeared to be an investigation for discrepancies on till. Other members on till but only highlighted claimant's. Questions were asked in an intimidating manner.*

We refer to our finding at paragraph 97 above. During the course of some refresher training on 25 February 2019 the claimant was asked questions about some financial discrepancies. This was an informal discussion with the claimant about pertinent operating matters which did not lead to any further discussion or action. As soon as the claimant objected about this, the discussion was stopped. The claimant was not asked about any further discrepancies. An employer is entitled to raise pertinent questions of its employees in an informal setting, even in training. The fact that the claimant was asked such questions, as opposed to other employees in the café, during that training session was not unreasonable. The claimant, as manager, can be expected to answer questions relevant to the successful running of the café. The respondent did not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence;

165. Allegation 23: *Verbally abusive to claimant as screaming in face – 2 April 2019 – Phillis Swarbrick.(referred to in evidence as Phyllis Swarbrook)*

We refer to our findings of fact at paragraph 100-102 above. There was clearly an altercation between the claimant and Phyliss Swarbrook about the state of the café and the training of staff. Both employees raised a complaint about the other. The tribunal does not accept the claimant's evidence that Phyliss Swarbrook screamed in her face. Employees do have disagreements from time to time. There is no suggestion that either Phyliss Swarbrook was in

the habit of verbally abusing staff or that the respondent was aware of that. To the contrary Phyliss Swarbrook clearly responded to a plea for help because the claimant was short-staffed at Oldham, and she made her own complaint about the claimant's behaviour. There is no satisfactory evidence that the incident was anything more than an altercation between two employees who did not get along. The claimant responded to that by leaving work and going off sick. Neither she nor Phyliss Swarbrook were disciplined for their behaviour that day. The respondent did not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence.

166. *Allegation 22: Complaint directed at claimant of non-compliance with food regulations when claimant is not present as a bullying tactic causing further stress - April 2019- Dave Myers.*

We refer to our findings of fact at paragraphs 106 -107 above. This allegation is completely without merit. The email did not mention either the claimant or the Oldham café. The news item inserted into the newsletter did not mention either the claimant or the Oldham café. The claimant was not questioned or investigated over the matter. No complaint was directed at her as alleged. The respondent, in sending the email and putting the item in the newsletter, did not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence.

167. *Allegation 19: Appeal outcome received 24th June 2019 re issues raised with managers all not upheld but all previously partially upheld with no explanation – 2019 – Dave Myers, Nicky Edwards, Dave McManara*

This allegation relates to the claimant's grievance appeal. The tribunal has considered the claimant's complaints and the grievance process overall. above. The claimant raised a grievance by email dated 13 February 2019 (see paragraph 94.) She raised three points:

- the respondent had failed in its duty of care to make reasonable adjustments after the claimant's recent return to work;
- the respondent has failed to comply the suggested phased return;
- the claimant was working 8/9 and 10 hour days without a break in breach of working time regulations;

The claimant attended a grievance meeting with Sue Rollitt on 8 April 2019 (see paragraph 110 above) when the claimant provided further detailed complaints both verbally and in writing (297-298A). The claimant received an outcome in relation to the three matters Sue Rollitt considered arose from her complaint on 7 May 2019 (see paragraph 117):

- The company had failed in their duty of care regarding her return to work

- The employment of Natalie Rees.

- feeling like she was set up to fail regarding Nikki Edwards and Dave Myers.

The claimant then appealed (see paragraph 118 above) suggesting that three matters she considered that she had raised with Sue Rollitt had not been dealt with as part of the grievance. She asked that they be considered at the appeal stage, namely:

- set up to fail by Dave Myers and Nikki Edwards including false investigations and false accusations;

- bullying and harassment from area relief manager (Phyllis Swarbrook);

- the management's inability to actually do what they accused the claimant of such as training, cash audits, right to work.

In the outcome letter (see paragraphs 123-124 above) Mr Mc Namara noted that the claimant was, in her appeal, essentially raising three matters which had not been determined at the grievance stage. He noted that whilst it was not company policy to listen to different allegations at the appeal stage, he had done so 'in the interests of seeking to resolve all of these matters' for the claimant. He then went on to consider the three matters the claimant had raised in her appeal, but did not uphold any of them.

168. There was some confusion during the grievance process. The claimant did not raise entirely new points at the appeal stage. The tribunal notes in particular that the claimant had clearly raised complaints during the grievance process:

168.1. That she had been set up to fail by Dave Myers and Nikki Edwards. In her grievance outcome letter Mrs Rollitt restricted her reply to the complaint about being questioned on financial irregularities during training by John Ankers. She did not address the allegations, made at the grievance hearing, about Dave Myers tapping her on the head and publicly criticising her about the out of date sandwiches;

168.2. That someone else being given her job – Mrs Rollitt made no finding on that, although it may have been relevant to the accusation that the claimant had been set up to fail;

168.3. about the actions of Phyliss Swarbrook – Mrs Rollitt made no finding on that.

169. Allegation 19 strictly relates to the appeal outcome letter, not the grievance outcome. However, the wording of the appeal letter (paragraph 118 above) clearly shows that the claimant was concerned that her grievances had not been addressed in full. The tribunal would agree that there was some confusion as to what had been decided by Mr McNamara as an appeal outcome of the original grievance and what had been decided by him in relation to any new complaints. The confusion partly arose because the claimant added to her complaints, to her examples, as time progressed. However, it is clear that Mr McNamara made a reasonable and genuine attempt to investigate and make a finding on each of the complaints raised before him. The investigation could have been more thorough. He did not, for example, interview Dave Myers. He relied for the large part on the documentary evidence. Mr McNamara set out in detail his findings. Allegation 19 relates to the confusion between old and new complaints. However, the allegation does not actually raise a challenge to the findings. It is noted that the claimant did not seek any clarification of the findings of Mr McNamara before her resignation.

170. The tribunal has considered the handling of the grievance and appeal and notes the attempts by the grievance and appeal officers to understand the complaints, to resolve them, and set the claimant in place for continued successful employment. The key outcome of the grievance was to ensure that there was a change in line management to avoid the difficulties which the claimant had experienced with the change in line management. The appeal officer suggested mediation as a possible way forward for continuing difficulties with Natalie Rees. In all the circumstances the tribunal finds that the handling of the grievance and grievance appeal was reasonable. There was a confusion in the appeal outcome letter. However, the confusion was minor and by itself did not constitute a breach of contract. The respondent did not, in the handling of the grievance and appeal, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence.

171. In making this finding the tribunal rejects the claimant's assertions that she presented an additional appeal on 4 April 2019 (referred to in written submissions as the disputed grievance), which was ignored, and that Mr McNamara had not made the decision on the appeal. Those assertions are not supported by any satisfactory evidence and are without merit. The

claimant did not submit a further grievance on 4 April 2019. Mr McNamara did write the appeal letter.

172. *Allegation 12 Suspension of claimant with no warning in a McDonald's car park after alleging to want to discuss rotas and arranging meeting on this basis – 17 June 2019 – Sue Rollitt*
Allegation 13. Failing to follow procedure for suspension.

173. We refer to our findings at paragraphs 127, 128, 130 - 133. Mrs Rollitt suspended the claimant while they were both seated in Mrs Rollitt's car, which was parked in the McDonald's car park. The tribunal accepts the evidence of Mrs Rollitt that the meeting had not been "engineered" in advance to suspend the claimant. Mrs Rollitt had agreed to meet the claimant on 17 June 2019 to discuss rota and staffing issues, but was then made aware of allegations from employees at the Oldham café that the claimant was not attending work when rostered to do so. Mrs Rollitt had been informed by Nikki Edwards and John Ankers that there were concerns about the claimant claiming for hours not worked but she had decided to give the claimant a fresh start. Receipt of complaints from existing members of staff made her feel that she had no option but to suspend the claimant pending a full investigation. This was a reasonable step. There was no breach of the disciplinary procedure. The claimant was not entitled to notice of the meeting, was not entitled to representation at the meeting. It is perhaps unfortunate that the suspension took place in the car in the car park of McDonald's but there was nothing sinister in that. Mrs Rollitt worked from home and did not have an office. It was reasonable to suspend the claimant while sitting in her car rather than suspend the claimant in McDonalds or at the Oldham café, in front of work colleagues and friends. The tribunal rejects the claimant's assertion that this was humiliating because members of the public, walking in the car park could see what was going on. It is very difficult to understand why the claimant would think that members of the public would have any interest in two women sitting in a car park together talking. It is, of course, understandable that the claimant would be upset to be suspended. The tribunal sympathises with the claimant on that. However, the respondent had good reason to suspend, it did so in accordance with its disciplinary procedure which set no established place or procedure, except to say that the suspension should be confirmed in writing : it was. In all the circumstances the tribunal finds that, in the act and manner of suspension, the respondent did not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence.

174. Allegation 20: *Staff being asked not contact claimant after suspension- 1 June 2019 in full view of customers – Sue Rollitt*

We refer to our finding of fact at paragraph 134 above. Sue Rollitt did not do this. There is no satisfactory evidence to support this allegation, which is without merit.

175. *Allegation 14: CCTV viewed from B&Q security by Sue Rollitt without claimant permission or prior information and in breach of ACAS policy – 17 June 2019*
Allegation 15: John Ankers removed CCTV discs/images from the security guard at B&Q without claimant's permission in an attempt to find evidence on claimant- 21 June 2019
Allegation 17: claimant images obtained by Interserve and other non-related staff being aware – 17 June 2019 onwards - John Anker and Sue Rollitt

The CCTV, owned and operated by B&Q in the Oldham store, was viewed by the respondent as part of an investigation into the allegation that the claimant was not working the number of hours claimed by her on her timesheets. The respondent has on many previous occasions viewed such CCTV footage where concerns were raised about the actions of their staff. The claimant, as a long serving manager, was fully aware of that. The respondent was reasonable in deciding that the claimant's permission was not required. This was a public place – a B&Q store, in which signs were displayed to inform people that CCTV was in operation. The claimant's assertion that she made a complaint to the Information Commissioner which was upheld, resulting in disciplinary action being taken against B&Q, is not supported by any satisfactory evidence. The tribunal does not accept that such complaints were made or upheld. The claimant was clearly upset by the use of the CCTV. However, the decision to use the CCTV was reasonable. The respondent did not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence.

176. Allegation 18: *investigation meeting adjourned when claimant pointed out that she was concerned that the images were obtained and on managers laptop – 4 July 2019 – John Ankers*

It is clear that John Ankers was originally appointed as investigating officer and invited the claimant to an investigation meeting. The meeting was adjourned and a new investigating officer, Mr John Snaith, was appointed after the claimant raised concerns about Mr Ankers having the CCTV on his lap top and questioned his impartiality. The respondent acted reasonably in response to the claimant's complaints. The respondent did not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence.

177. *Allegation 16: Change of allegations of suspension without explanation in investigation, knowing that the claimant was suffering from anxiety stress and depression – 19 June 2019 – 12 July 2019 – Sue Rollitt and John Snaith*

Allegation 21: Change of allegations and not clarified when asked what this was about and no supply evidence despite agreement to – 12 July 2019 - *Sue Rollitt and John Snaith* .

The claimant received a number of invitations to investigation meetings. Each of the invitation letters did set out the allegations to be investigated. The suspension letter and initial invitation letter – see paragraphs 133 and 139 above - listed the allegations as:

- dishonesty; falsification of timesheets
- breach of health and safety – B&Q's visitors book does not match CCTV footage

After the claimant raised her concerns about the use of the CCTV, the respondent changed the allegations to (see invitation letter referred to in paragraph 142 above):

- Dishonesty; falsification of timesheets
- Loss of trust – making false statements regarding hours of work

Mr Snaith investigated those two allegations. The removal of the allegation re CCTV did not disadvantage the claimant in any way. The allegations against the claimant were clear – that she had claimed to be working hours when she was not in attendance at the Oldham café. The claimant did ask Mr Snaith to explain the change in the allegations and asked for the definition of loss of trust. Mr Snaith stated that this was a fact-finding exercise and he was not there to answer questions at this stage. The claimant understood the allegations. She well understood how serious the allegations were. Indeed, she accepted that she did include hours on her timesheets when she was not working but was taking time off in lieu, when she was not working at the Oldham café but was working elsewhere. The change in the allegation was a reasonable step. The refusal of Mr Snaith to explain the change in allegations at that stage, to explain the meaning of loss of trust, did not disadvantage the claimant. The respondent did not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence.

178. We refer to our finding above in relation to the Allegation 24.

179. Having considered each allegation in turn, the tribunal has considered the actions of the respondent as a whole. The tribunal finds that, contrary to the allegations by the claimant, the respondent has exercised its duty of care to the claimant, has offered her support when needed, has responded to the claimant's complaints and requests for help. There is no satisfactory evidence to support the claimant's assertions that the respondent was "out to get her", that it had determined to remove her from office to replace her with a lower-

paid employee, that she was forced to work excessive hours and her complaints were ignored. To the contrary, the respondent reacted positively to the claimant's complaints about Dave Myers and Nikki Edwards. The respondent did not accept that the complaints were well-founded but did transfer line management of the claimant to Sue Rollitt, recognising that there had been a breakdown in the relationship between the claimant and Dave Myers. From January 2019 the claimant was not required to have any contact with Dave Myers at work. Mrs Rollitt took steps to ensure that the claimant would have appropriate support under her line of management. There was no decision to put the claimant back under the management of Dave Myers. The newsletter received by the claimant from a friend did not say that. Viewed overall the tribunal finds that the respondent did not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence.

180. There was no fundamental breach of contract entitling the claimant to resign. The claimant was not dismissed.

Further and in the alternative

181. If the tribunal is wrong on that, if there was a fundamental breach of contract entitling the claimant to resign, then the tribunal has gone on to consider whether the claimant resigned in response to that breach.

182. At the time of her resignation the claimant was suspended and facing allegations of gross misconduct. The tribunal does not accept the claimant's evidence, and the evidence of her witness Diane O'Connell, that she completed her time sheets accurately, that there was an arrangement to include in timesheets hours not worked but taken as time off in lieu. Having attended the investigation meeting, and seen the evidence of incorrectly completed timesheets, the claimant must have known that dismissal was a real possibility. It is her own evidence that after the investigation meeting with John Ankers she started to look for another job. The claimant's evidence has been inconsistent and unsatisfactory. She has raised complaints about the respondent which are completely without merit. In all the circumstances the tribunal rejects the evidence of the claimant as to the reason for her resignation, rejects her evidence that she resigned in response to the respondent's repudiatory conduct, and finds that the claimant resigned to avoid the possibility of being dismissed for gross misconduct. In the alternative, the tribunal finds that the claimant resigned to take up the offer of employment from the Compass Group, a more highly paid job.

183. The claimant was not dismissed.

184. The claim of unfair dismissal is not well-founded.

Direct Discrimination

185. – The tribunal has considered each of the allegations of direct discrimination, as set out in allegations 13-24 of the Scott Schedule.

186. *Allegation 13. Failing to follow procedure for suspension.*

The respondent did not fail to follow the procedure for suspension. The complaint is about the way in which the suspension was carried out, not the decision to suspend itself. The claimant has not identified an appropriate actual comparator. The tribunal is satisfied that Mrs Rollitt would have used her car to carry out a suspension for a non-disabled employee. Mrs Rollitt worked from home and used her car as her office. There was no difference in treatment. In any event, there are no facts from which the tribunal could infer that the reason for any difference in treatment was the claimant's disability. Mrs Rollitt was aware that the claimant had been absent from work over a considerable period with anxiety and depression. However, the knowledge of the disability is not enough. There are no facts to suggest that Mrs Rollitt was motivated in any way by the claimant's disability.

This allegation of direct discrimination is not well-founded.

187. *Allegation 14: CCTV viewed from B&Q security by Sue Rollitt without claimant permission or prior information and in breach of ACAS policy – 17 June 2019*
Allegation 15: John Ankers removed CCTV discs/images from the security guard at B&Q without claimant's permission in an attempt to find evidence on claimant- 21 June 2019
Allegation 17: claimant images obtained by Interserve and other non-related staff being aware – 17 June 2019 onwards - John Anker and Sue Rollitt

The respondent did view the CCTV images. The tribunal refers to its findings above. The claimant has not identified an appropriate actual comparator. The tribunal is satisfied that CCTV images would have been considered as part of an investigation into a hypothetical comparator – a non-disabled employee against whom complaints had been raised of falsifying time sheets. The respondent did from time to time use the CCTV in the course of disciplinary procedures. That is not disputed by the claimant. There was no difference in treatment.

This allegation of direct discrimination is not well-founded.

188. *Allegation 16: Change of allegations of suspension without explanation in investigation, knowing that the claimant was suffering from anxiety stress and depression – 19 June 2019 – 12 July 2019 – Sue Rollitt and John Snaith*

Allegation 21: Change of allegations and not clarified when asked what this was about and no supply evidence despite agreement to – 12 July 2019 - *Sue Rollitt and John Snaith*.

The claimant has not identified an appropriate actual comparator. The tribunal is satisfied that a hypothetical comparator – a non-disabled employee who at and following as investigation meeting had complained about the use of CCTV- would have been treated in the same way – the allegation would have been changed. Further, the tribunal is satisfied that Mr Snaith would have treated a hypothetical comparator – a non-disabled employee attending an investigation meeting for the same allegations – in the same way. He would have told the hypothetical comparator that this was a fact-finding exercise and he was not there to answer questions at that stage. There was no difference in treatment. In any event, there are no facts from which the tribunal could infer that the reason for any difference in treatment was the claimant's disability.

This allegation of direct discrimination is not well-founded.

189. Allegation 18: *investigation meeting adjourned when claimant pointed out that she was concerned that the images were obtained and on managers laptop – 4 July 2019 – John Ankers*

The claimant has not identified an appropriate actual comparator. The tribunal is satisfied that a hypothetical comparator – a non-disabled employee who at an investigation meeting had complained about images being obtained and on the managers laptop- would have been treated in the same way. There was no difference in treatment. In any event, there are no facts from which the tribunal could infer that the reason for any difference in treatment was the claimant's disability.

This allegation of direct discrimination is not well-founded.

190. *Allegation 19: Appeal outcome received 24th June 2019 re issues raised with managers all not upheld but all previously partially upheld with no explanation – 2019 – Dave Myers, Nicky Edwards, Dave McManara*

We refer to our findings above in relation to the conduct of the grievance and appeal. The claimant has not identified an appropriate actual comparator. The tribunal is satisfied that a hypothetical comparator – a non-disabled employee who had raised a grievance and appeal in the same terms- would have been treated in the same way. Both Mrs Rollitt and Mr McNamara did their best to identify the claimant's complaints and to address them. The claimant has not suggested how they would have treated a non-disabled person any differently. There was no difference in treatment. In any event, there are no

facts from which the tribunal could infer that the reason for any difference in treatment was the claimant's disability.

This allegation of direct discrimination is not well-founded.

191. Allegation 20: *Staff being asked not contact claimant after suspension- 1 June 2019 in full view of customers – Sue Rollitt*

We refer to our findings above. This did not happen. Mrs Sue Rollitt did not engage in such conduct.

This allegation of direct discrimination is not well-founded.

192. *Allegation 22: Complaint directed at claimant of non-compliance with food regulations when claimant is not present as a bullying tactic causing further stress - April 2019- Dave Myers.*

We refer to our findings above. This did not happen. No such complaint was directed at the claimant. The respondent/Dave Myers did not engage in such conduct.

This allegation of direct discrimination is not well-founded.

193. Allegation 23: *Verbally abusive to claimant as screaming in face – 2 April 2019 – Phillis Swarbrick.(referred to in evidence as Phyllis Swarbrook)*

We refer to our findings above. The tribunal does not accept that Phyllis Swarbrook screamed in the claimant's face. She did not engage in such conduct. There was an altercation between the claimant and Phyliss Swarbrook and the claimant was upset by that. The claimant has not identified an appropriate actual comparator. There is no satisfactory evidence to support a finding that Phyliss Swarbrook would have treated a hypothetical comparator any differently. In her email to Nikki Edwards Phyllis Swarbrook made it clear that she did not think much of the way that the claimant was running the Oldham café, did not think much of the claimant not thanking her for turning up at short notice to provide cover. The tribunal is satisfied that Phyllis Swarbrook would have treated a non-disabled manager, who ran the café like the claimant, who did not thank her for providing emergency cover, in the same way. There was no difference in treatment. In any event, there are no facts from which the tribunal could infer that the reason for any difference in treatment was the claimant's disability.

This allegation of direct discrimination is not well-founded.

194. Allegation 24 - Interserve reinstating Dave Myers as manager.

We refer to our findings above. This did not happen. Dave Myers was not reinstated as the claimant's manager. The respondent did not send the email about the organisational changes to the claimant. There was no unfavourable treatment of the claimant.

This allegation of direct discrimination is not well-founded.

195. Each of the allegations of direct discrimination is not well-founded. The claim of direct discrimination is unsuccessful

Employment Judge Porter
Date: 11 December 2020

JUDGMENT SENT TO THE PARTIES ON
18 December 2020

FOR THE TRIBUNAL