EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110616/2019

Held in Glasgow on 2, 3, 4 and 5 March 2020
Members' meetings on 21 and 28 May 2020

Employment Judge S MacLean
Tribunal Member P McCall
Tribunal Member S Singh

Ms A Monti	**Claimant** **Represented by:** **Mr A Crammond - Barrister**
Marks and Spencer Group Plc	**Respondent** **Represented by:** **Mr J Anderson - Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The Tribunal finds and declares that the respondent unlawfully discriminated against and victimised the claimant, contrary to section 39 of the Equality Act 2010, and her complaint of discrimination contrary to sections 19 and 27 of the Equality Act 2010 succeed.

2. The Tribunal finds and declares that the respondent subjected the claimant to a detriment, contrary to section 48 of the Employment Rights Act 1996 and her complaint under section 47E of the Employment Rights Act 1996.

3. In respect of unlawful discrimination, the Tribunal orders that the respondent shall pay to the claimant compensation for loss of earnings amounting to **SEVEN THOUSAND ONE HUNDRED AND FIFTY-FOUR POUNDS AND FORTY-SEVEN PENCE (£7,154.47).**

4. In respect of injury to the claimant's feelings the Tribunal also orders that the respondents shall pay to the claimant a further amount of **ELEVEN THOUSAND POUNDS (£11,000)** for her injured feelings**.**

5. In terms of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, it is further ordered that the respondent shall pay to the claimant the additional sum of **ONE THOUSAND ONE HUNDRED AND NINE POUNDS AND FIFTY SIX PENCE (£1,109.56)** representing the total of (a) interest of **two hundred and seventy two pounds and ninety six pence (£272.96)** on the claimant's loss of earning of £7,154.47, calculated at the appropriate interest rate of eight percent per annum by reference to the mid-point between 7 July 2019 (date of the first act of discrimination) and 18 June 2020 (being the date of this Judgment); and (b) interest of **eight hundred and thirty six pounds and sixty pence (£836.60)** on the injury to feelings award of £11,000 calculated at the appropriate interest rate of eight percent per annum for the period between 7 July 2019 and 18 June 2020 being the date of this Judgment.

REASONS

Introduction

1. The claimant sent a claim form to the Tribunal on 5 September 2019 claiming:

1.1. Direct disability discrimination (section 13 of the Equality Act 2010 (EqA)). The claimant claims that the respondent discriminated against her by treating her less favourably because of her mother's disability than it treats or would treat others. Acts of less favourable treatment were defined as (i) declining her flexible working request (FWR); (ii) imposing a change in her employment contract in relation to working hours; and (iii) asking her whether she had considered stepping down to a customer assistant role.

1.2. Victimisation (section 27 of the EqA). The claimant claims that the respondent victimised her by imposing a change to her employment contract and that it did so because she had done a protected act by (i)

making a FWR to ask the respondent adhere to her contractual hours only because of her mother's disability and caring responsibilities and raising a grievance; and (ii) raising a grievance.

1.3. Indirect sex discrimination (section 19 of the EqA). The claimant claims that the respondent indirectly discriminated against her in its applications of its policies and process: the requirement to work a late shift; the requirement for the team leaders to work a night shift once per week (the PCP) puts women at a disadvantage because they are more likely than their male colleagues to be the primary carer for disabled parents and/or children and therefore this requirement puts them and puts the claimant at a particular disadvantage compared to male colleagues.

2. The respondent admits that the claimant's mother was disabled in terms of section 6 of the EqA. The respondent denies discrimination as alleged or at all.

3. Having heard representations for the parties at the start of the hearing the Tribunal allowed the claimant to amend the claim form to include a claim under section 47E of the Employment Rights Act 1996 (the ERA). The claimant claimed that the respondent subjected her to a detriment because she made (or proposed to make) a FWR (under section 80H of the ERA) and as a result she suffered the detriments upon which she relies in respect of her victimisation claim under section 27 of the EqA.

4. The claimant gave evidence on her own account. For the respondent, the Tribunal heard evidence from Linda Stewart, formerly Section Manager; Beth Moran, Clothes and Home Commercial Manager; and Amy Cherry, Store Manager, Cumbernauld. The Tribunal was also referred to a joint set of productions.

5. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to an understanding the important parts of the evidence. Mr Crammond and Mr Anderson provided the Tribunal with written submissions which they gave orally when the evidence finished. The submissions were carefully considered by the Tribunal. For ease they summarised below in the

order that the Tribunal considered the issues rather than in the order presented by the representatives at the hearing.

6. The Tribunal's approach was to consider the issues that it had to determine which were as follows:

6.1 Direct disability discrimination

6.1.1 Was the claimant treated less favourably because of her mother's disability within the meaning of section 13 of the EqA? The claimant relies on the following as less favourable treatment:

6.1.1.1 Her FWR made on 8 March 2019 was declined in a letter dated 5 April 2019 (the First Act). The claimant seeks to compare herself with Angela Laird who was moved from permanent late shifts onto permanent day shifts. Alternatively, the claimant compares herself to a hypothetical colleague who needs and/or requests flexible working due to caring responsibilities but not in respect of a disabled close relative e.g. due to the care of her non-disabled children.

6.1.1.2 Her employment contract was changed with effect from 7 July 2019 in relation to her working hours (the Second Act). The claimant compares herself to a hypothetical colleague who was also a section coordinator and who the below PCP applied to but who did not have caring responsibilities owing to a disabled parent.

6.1.1.3 On 4 July 2019, the claimant was offered the option of stepping down to a sales adviser role (the Third Act). The claimant compares herself to a hypothetical colleague who was also a section coordinator and who the below PCP applied but who did not have caring responsibilities owing to a disabled parent.

6.2 Victimisation

6.2.1 Did the claimant carry out a protected act and/or did the respondent believe the claimant had done or may do a protected act under section 27 of the EqA. The claimant claims that the following are constituted protected acts:

6.2.1.1 Her FWR made on 8 March 2019 constituted a protected act because it was made because of her mother's disability and/or the claimant's caring responsibilities.

6.2.1.2 The raising of her grievance.

6.2.2 Did the respondent subject the claimant to a detriment because of (a) a protected act and/or (b) because the respondent believed the claimant had done or may do a protected act? The claimant claims that the respondent subjected her to the following detriments:

6.2.2.1 Changed her contract of employment with effect from 7 July 2019 in relation to her working hours;

6.2.2.2 Stopped her company sick pay (CSP) from 11 August 2019.

6.3 Detriment for making flexible working requests

6.3.1 Did the respondent subject the claimant to a detriment by any act or deliberate failure to act? The claimant asserts that the alleged detriments under section 27 above amount to detriments and/or caused her to suffer detriments by the respondent's act or failure to act.

6.3.2 If so, was the same done on the ground that the claimant made or proposed to make an application under section 80F of the ERA: her making of a FWR?

6.4 Indirect sex discrimination

6.4.1 Was the provision criterion or practice (PCP) applied to the claimant? The claimant relies on a requirement for section coordinators to work a late/night shift.

6.4.2 Was the PCP applied (or would be applied) to persons with whom the claimant does not share the protected characteristic?

6.4.3 Did it put or would put persons with whom the claimant shares the characteristic (women) at a particular disadvantage when compared with persons with whom the claimant does not share the protected characteristic? The claimant claims that women are more likely than men to be the primary carer for disabled and/or elderly parents (and mothers) and therefore find it harder to comply with the PCP.

6.4.3.1 When answering this question, is the Tribunal required to consider or compare using a pool for comparison at all? If so, what is the correct pool for comparison?

6.4.3.2 Within that pool for comparison, did the PCP put women at a particular disadvantage?

6.4.4 Did the PCP put or would put the claimant at that disadvantage? The claimant claims that she was placed at a disadvantage because (i) her mother was disabled, and/or (ii) the claimant was the primary carer for her mother and she found it harder to comply with the PCP than her male colleagues who were less likely to care for disabled and/or elderly parents.

6.4.5 Is the PCP a proportionate means of achieving a legitimate aim? The respondent asserts that the PCP was a proportionate means of ensuring adequate staffing cover.

6.5 Time limits

6.5.1 In respect of any complaint within the EqA, was it brought within the primary time limit as provided for in section 123 of the EqA.

6.5.2 In respect of any complaint not brought within the primary time limit, is it just and equitable to extend time.

6.6 Remedy

6.6.1 Should the Tribunal make a declaration under section 124(2) of the EqA and/or section 49 of the ERA?

6.6.2 Should the Tribunal make a recommendation under section 124(2)(c) of the EqA? The claimant claims that the Tribunal should make a recommendation that she should be allowed to continue day shifts as per the arrangements in place from 2016.

6.6.3 Is the claimant entitled to compensation? If so, what compensation is the claimant to be awarded?

6.6.4 In respect of the indirect discrimination claim, does section 119(5) of the EqA apply?

Relevant law

7. Direct discrimination is defined in section 13 of the EqA. The provision is satisfied if there is less favourable treatment because of a protected characteristic. There must be less favourable treatment than an actual or hypothetical comparator whose circumstances are not materially different from the claimant (section 23 of the EqA).

8. Section 19 of the EqA defines indirect discrimination. The requirements of the section state that a PCP is discriminatory in relation to protected characteristic if: (a) the respondent applies or would apply the PCP to persons with whom the claimant does not share the characteristic; (b) it puts or would put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it; (c) it puts, or would put, the claimant at that disadvantage; and (d) the respondent cannot show it to be a proportionate means of achieving a legitimate aim.

9. Section 23 of the EqA states that on a comparison of cases for the purposes of section 13, 14 and 19 of the EqA, there must be no material difference between the circumstances relating to each case. Section 23(2) of the EqA specifically states that the circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13 of the EqA the protected characteristic is disability.

10. Section 27(1) of the EqA defines victimisation as subjecting a person to a detriment because they have done, or it is believed they will do a protected act. A protected act is bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing anything for the purposes or in connection with the EqA; or making an allegation that the employer or another person has contravened the EqA. Allegations need not be express. A "detriment" exists if a reasonable worker would or might take the view that the treatment accorded to them had, in all the circumstances, been to her detriment. The Tribunal should look at the "reason why" issue which. It requires consideration of the employer's motivation (conscious or unconscious).

11. Section 39 of the EqA provides that an employer must not discriminate against an employee by subjecting the employee to any detriment.

12. Section 136 of the EqA provides that if there are facts from which the court decides, in the absence of any other explanation, that a person contravened the provisions of the EqA the court must hold that the contravention occurred.

13. Section 47E of the ERA defines the right not to be subject to detriment on the grounds that an application has been made under section 80H of the ERA (a flexible working request). It requires the suffering of a detriment; and the detriment was by an act or deliberate failure to act. It also requires that the act or deliberate failure to act is done "on the ground that" the claimant made (or proposed to make) an application pursuant to section 80F of the ERA (a flexible working request).

14. Section 48(2) of the ERA confirms that on such a complaint it is for the respondent to show the ground on which the act or deliberate failure to act was done.

Findings in fact

Background

15. The respondent is a company carrying on business as the retailer with stores throughout Great Britain. The respondent employs around 80,000 employees in Great Britain.

16. The respondent recruits from the general public. Men and women can apply for all positions including section coordinators. Both men and women require to work a late shift (5pm to 9pm). Women are more likely to be carers than men. The respondent's female employees are more likely to be carers than its male employees.

17. The respondent has a store at Braehead, Glasgow (Braehead). It is a large store with floor space extending to 78,000 square foot with around 33,000 square foot being on the top floor. The respondent employs approximately 416 employees at Braehead including 22 section managers and 22 section coordinators.

18. There are five section managers and five section coordinators working on the top floor. The five section coordinators working on the top floor are all female.

19. Braehead has departments to which customer assistants, section coordinators and section managers are allocated. Food and Womenswear are located on the lower floor. On the top floor Menswear, Kidswear, Lingerie, Homeware; and the Bank and Bureau are located.

20. Section coordinators have responsibilities for allocating work to customer assistants, dealing with customer complaints, ensuring standards are met for the next shift. They have a higher level of till authorisation than customer assistants. Section coordinators report to the section managers who

oversee the department, deal with customer queries; the cashing up process; and liaise with the commercial manager. The commercial manager reports to the store manager.

21. While staff are allocated to departments there is flexibility to move between departments and floors. The biggest customer demand is during the dayshift when more section coordinators and section managers are on shift.

22. The respondent has employed the claimant at Braehead since 1999. Around 2016, the claimant stepped down from her role as section manager to section coordinator due to her caring responsibilities for her mother. The claimant has worked as a section coordinator in Kidswear since 2016.

23. At all material times the claimant's mother was and is a disabled person for the purposes of section 6 of the EqA due to the level of daily care she requires. She was diagnosed with dementia in or around 2015. The claimant's mother also suffers from arthritis and osteoporosis which affects her hands and her ability to walk; her condition has a substantial impact on her ability to carry out day to day activities including (but not limited to) her ability to: remember to take her medication; personal hygiene; get dressed; prepare and eat food. At all material times the claimant was the primary carer of her disabled mother.

Informal Flexible Working Requests

24. The respondent has a flexible working policy (the FWP) which sets outs its policy and procedure about flexible working requests. It provides that all employees regardless of length of service may make an informal request for flexible working by meeting their line manager and talking through their request.

25. On 29 August 2016 the claimant met her then line manager Amechi Umunna, Section Manager to discuss how the respondent could support the claimant's caring responsibilities for her mother.

26. The claimant explained that she was the primary carer for her mother who resides with her. The claimant is a single parent to a son (then aged 12).

The claimant's mother requires support with personal hygiene, cooking and feeding. The claimant has no other permanent support for her mother although the claimant's sister provides some support at weekends.

27. The claimant asked for support in her request not to work late nights and keep to her contracted 30 hours a week on the following shift pattern: week 1 Monday to Friday 9am to 3.30pm; week 2 Monday to Wednesday and Friday 9am to 3.30pm and Saturday 11.30am to 6pm.

28. After discussion it was agreed that the claimant would work 9am to 3.30pm during the week and continue to cover late on alternate Saturdays by working 12.30pm to 7pm. The agreement and the claimant's caring responsibilities were detailed in a carer's passport which also recorded that the line manager would review the circumstances with the claimant every couple of months (the Carer's Passport).

29. The arrangement continued. From time to time when the claimant was able to organise with her family alternative caring support for her mother the claimant volunteered to work late shift and/or through the night (TTN) (9pm to 9am).

30. In the summer of 2018, one of the section coordinators (Gillian) went on maternity leave. She worked 18 hours per week which included two late shifts on a Tuesday and Friday. While Gillian was on maternity leave, her late shifts were absorbed by the other section coordinators working on the top floor who were asked to volunteer to work a weekday late shift. The claimant liaised with her sister and when possible the claimant would volunteer to work a weekday late shift usually at the beginning of the week on average once every two weeks.

31. The claimant was sick absent from work from 6 September 2018 to 22 October 2018 for an elective operation followed by a period of recovery. On her return to work she attended a meeting with her line manager Linda Stewart, Section Manager.

32. Ms Stewart had been a section manager for 38 years. She had line managed the claimant nine years previously. They had a good working relationship.

33. In early November 2018 the claimant became aware that her sister who provided some support in relation to her mother's care was also to go into hospital for an operation in November 2018. The claimant knew that this would impact on her ability to volunteer to work a late shift. The claimant mentioned this Ms Stewart and Elaine Lawson who was then the commercial manager.

34. From November 2018 the claimant continued to be included in the rota to work a weekly late shift. The claimant felt increasingly under pressure to work late shifts. The claimant found this particularly difficult as between 5pm and 9pm, she required to cook a meal for her mother and prepare her mother for bed. It was important that the claimant did the caring because of her mother's dementia. Matters were compounded when the claimant's brother-in-law took became unwell which meant that the assistance from her sister in providing care for her mother became even more limited. The claimant struggled with her caring responsibilities and the pressure to work a regular weekly late shift.

35. In early 2019, the claimant continued to be rostered for a late night every week. The claimant explained again to Ms Stewart about her inability to work a late shift because of the claimant's caring responsibilities.

36. Around 21 January 2019, Ms Stewart spoke to the claimant about changing her shift patterns so that the claimant worked one late shift every week on a rota basis with the other section coordinators. The claimant reiterated that she was not able to work late nights due to her caring responsibilities for her mother. The claimant said that she was willing to help on an informal basis and reminded Ms Stewart about the Carer's Passport.

37. Ms Stewart contacted the People Policy Specialists (PPS) in late January 2019 about the Carer's Passport and the claimant saying that she could not work a weekday late night. Ms Stewart asked about options including forcing the change on the claimant or demoting her. The PPS advisor explained the

risks of such an approach. It was suggested that Ms Stewart be clear that she wanted to be fair and consistent across section coordinators and everyone was to pick up one late shift.

38. Ms Stewart spoke to the other section managers working on the top floor. A view was reached that as there were five section coordinators each would need to pick up a late night. Ms Stewart considered that it would be unfair or unreasonable for the claimant not to do so.

39. Ms Stewart spoke again to the claimant around 1 February 2019 and reiterated that the claimant required to work one late night per week. The claimant was asked if anyone else could support with caring for her mother. The claimant explained her mother had dementia and bowel problems following bowel cancer. The claimant left food for her mother, but her mother's condition deteriorated in late afternoon. Her sister had been in hospital and had other caring responsibilities. The claimant did not want to commit to the rota but would help out on an ad hoc basis. The claimant explained that she had no help from social services and could not afford to pay for a carer.

40. Ms Stewart asked the claimant to work the rota. She would speak to the claimant in March 2019 about formally changing her shift patterns if the claimant did not do so.

41. The claimant continued to be rostered to work a weekly late shift. The claimant felt that she was letting everyone down. She was under pressure because she could not commit to doing a late shift every week because of lack of support from her relatives in assisting her mother's care. The claimant felt that she was being harassed to work a weekly weekday late shift and that she was receiving no support from the respondent in relation to her caring needs.

Formal Flexible Working Request – 8 March 2019

42. The FWP also provides that employees with at least 26 weeks' continuous service and who have not made a formal flexible working request within the

last 12 months have the right to formally request flexible working. There is no requirement to first raise the matter informally.

43. On 8 March 2019, the claimant submitted a formal flexible working request asking to work her existing contracted hours (the FWR). The claimant explained that the reason for her request was because she was a carer for her mother whom she needed to support and care for to live an independent life. The claimant wanted to make a permanent request so that she was not under pressure from colleagues and managers consistently asking her why she could not work late nights. The claimant was requesting to work the hours in her contract without the pressure to pick up late nights which she could not do due to her role as a carer for her mother. The claimant indicated that she would be willing to continue to work late until 7pm when the doors closed on the Saturday to cover the late-night trade. She could also flex her day working when off on the Thursday and that she would help out and work during peak trading as and when possible and going forward if she could she would let her line manager know. The claimant could not however commit to a permanent change of working a late night through the week until 9pm or later as she needed to be home to feed her mother and son. She was a single parent with very limited support. The support she did have was no longer available to her. The claimant wished to be able to come to work without the stress of letting anyone down because she could not commit to working late night. The claimant did not state on the FWR that her mother was disabled.

44. The FWR was acknowledged by Fiona Braeburn, Policy Advisor who encouraged the claimant if there was an opportunity to review and agree the request informally with her line manager. The claimant had already discussed the request informally with Ms Stewart in January/February 2019.

45. Ms Braeburn sent the FWR to the Braehead store manager advising that if possible, the request should be resolved informally. If there is no opportunity for informal resolution then under the formal process the claimant's line manager should be appointed to manage the request "but if they are

unavailable or unsuitable, for example if they have already considered the request informally then another manager should be appointed".

46. Ms Stewart was upset that the claimant has raised the FWR which challenged her earlier decision. Nonetheless she handled and dealt with the FWR.

47. The claimant was called to a meeting with Miss Stewart to discuss the FWR which took place on 28 March 2019 (the FWR Meeting). The claimant declined to be accompanied by a colleague or a business involvement group representative. The claimant was given an opportunity to explain in more detail why she was requesting flexible working. Ms Stewart asked the claimant why it was not possible for her to pick up one late night during the week. The claimant explained that she was on her own with a teenage son who was sitting exams. She cared for her elderly mother who is aged 86 and suffered from dementia. Her mother also had other health issues as a result of being nursed through lung cancer and bowel cancer. She was prone to having episodes of accidents (involuntary bowel movements). The claimant needed to watch her mother's eating routine and habits. Her mother could not use a cooker because she was prone to leaving on the gas and being in danger. The support the claimant had from her sister was extremely limited now as her sister's husband had taken a turn for the worst. He suffered from severe arthritis and his mobility was very limited. Her sister's time was taken up caring for her husband. The claimant explained that due to financial commitments, she was unable to pay for external carers. The claimant was asked if there was any way she could drop her hours in one day to pick up a late on a temporary basis to be reviewed. The claimant said that she could not afford to drop her hours as she was the only source of income for her and her son. He was too young to sit with his grandmother. The claimant was asked whether she would consider moving to another store and said that it would depend on the logistics like travelling. The claimant was asked if her brother could look after her mother. The claimant explained that her mother would not let him shower her and get her dressed for bed. The claimant was also asked how she would feel if she was given four weeks to

change her contract. The claimant indicated that she was disgusted given the size and number of section coordinators who worked at Braehead. The claimant explained that during the day, her mother was in the house watching television and that the claimant left a sandwich for her. The claimant was advised that Ms Stewart would consider the matter and revert to her.

48. Ms Stewart was going on holiday. She did not check if there were any vacancies across the region.

49. Ms Stewart contacted the PPS on 4 April 2019 saying that what could be offered was (1) move one of the claimant's shifts to starting later and extend her other shifts so that the claimant was not losing hours and this would give her time to see her mother before leaving the house; (2) move to another store that could accommodate her hours with no late night trading as a section coordinator; (3) step down to customer assistant as "we need fairness and consistency with the section coordinators on the sales floor and with the business evolving everyone needs to play their part".

50. The PPS advised Ms Stewart of the reasons why a request could be declined and the need for the reasons for this. The alternatives were discussed, and Ms Stewart was advised that the request can be accepted if it did not meet the reasons.

51. On 5 April 2019 Ms Stewart advised the claimant in writing that she was unable to accept the FWR because of the detrimental effect on the ability to meet customer demands; inability to reorganise work amongst existing staff; and inability to recruit additional staff. Ms Stewart said that she had taken into account that the claimant was a single parent caring for her elderly mother who was 86 years of age and suffering from dementia and occasional bowel issues. However, the section coordinator role within the top floor in Braehead was such that each coordinator was required to work one late night per week. Ms Stewart said she also took account of the fact that the claimant was unable to rely on family help on weekdays and it was not financially viable for her to pay for outside care. There was also

consideration that the claimant was unable to commit to a late night shift every week. The claimant's view that another section coordinator could pick up an extra night on her behalf was in Ms Stewart's view unfair.

52. Ms Stewart also stated that she was willing to consider if there were any alternative working pattern changes that could meet the claimant's needs. However, the discussion of hours would need to include one weekday late night per week. The claimant was informed of her right of appeal.

53. The right of appeal is under the respondent's appeal policy (AP). It involves completing a standard form. The grounds of appeal are: the manager's decision was not fair and reasonable; new information had come to light; the company procedure was not followed. An impartial manager with authority to make the final decision will be appointed.

54. Angela Laird is a section coordinator at Braehead working in Womenswear. The respondent asked her to move from a permanent late shift in Womenswear to a mid-shift (11am to 7pm). As a result a vacancy for a late shift section coordinator in Womenswear arose. The claimant became aware of this after her FWR was refused.

55. On 12 April 2019 the claimant exercised her right of appeal against the refusal to allow the FWR. An FWR appeal hearing took place on 25 April 2019. The claimant attended and was accompanied by a trade union representative. The FWR appeal hearing was conducted by Beth Moran, who had been appointed commercial manager at Braehead.

56. The claimant said that since the rejection of the FWR, a vacancy had arisen for a daytime section coordinator on the lower floor in Womenswear. Ms Moran said that recruitment was in a different business unit as Kidswear section coordinators would not be affected by the vacancy. The claimant pointed out that they were all part of the one team. Ms Moran said that the Womenswear vacancy was a replacement and in any event that happened after the decision to refuse the FWR. The claimant raised a number of alternative options.

57. Afterwards Ms Moran investigated why the replacement in Womenswear was not on a like for like basis: the section co-ordinator who had left worked early morning and the replacement worked between 1pm to 9pm. Ms Moran was informed that this was where the hours were needed and there was no budget to move the replacement to the top floor.

58. Ms Moran spoke to Ms Stewart who said that she had spoken to the other section managers on the top floor who said that the section coordinators on the top floor already worked a late night and were not prepared to permanently pick up an extra night. Ms Stewart did not consider that it was fair to ask the claimant's colleagues to pick up an extra night.

59. Ms Moran met with the claimant on 8 May 2019. The claimant reiterated that she made the FWR because she felt pressured into working a late night and could not commit to doing so every week. When an opportunity arose, she would offer to work a late shift which was what she had done on a number of occasions. The claimant explained what was involved in caring for her mother; the strain on her own mental health and the minimal support from her family.

60. On 8 May 2019, Ms Moran wrote to the claimant advising that the vacancy in Womenswear for a day time section coordinator only became available after her FWR was refused and therefore could not be taken into consideration at the time. In the event, this vacancy was replaced by a permanent late-night vacancy which would not have suited the claimant's needs or have been relevant when the decision was made. Ms Moran said that Ms Stewart had explored whether any of the existing section coordinators on the top floor would be willing to pick up an additional late night which they could not do. There were no other vacancies within Braehead. In respect of the refusal of the FWR, Ms Moran said that the claimant was offered a number of options to help support her to work a late night: firstly a set late night each week; secondly working a 5pm to 9pm on the late shift spread the remaining two hours across the four other shifts going from 9am to 3.30pm to 9am to 4pm. The claimant was also asked if she had the ability to work a late night every second week to support where

possible, but the claimant could not do this. Ms Moran considered that Ms Stewart's decision was fair and reasonable. All the section coordinators on the top floor had been asked to pick up one late night a week to support late night trading and to provide leadership/support to late night colleagues. The other business units on the lower floor, Womenswear and Foods have a set late night coordinator in the late shift. However, when on holiday other section coordinators pick up late nights to ensure that all trading hours are covered. The FWR decision was upheld. The claimant required to pick up a weekday late night. The respondent would support her by reviewing her contract and instead of offering a full late night if suitable she could have a set late night or work 5pm to 9pm on her late shift.

Variation to Contract of Employment – 10 June 2019

61. On 10 June 2019, Ms Stewart met with the claimant to discuss the respondent's resourcing issues. Ms Stewart proposed that the claimant change her working pattern to ensure that there was alignment with customer demand. Ms Stewart said that the claimant required to pick up one late night currently 9pm finish every week and one Saturday every four weeks until 7pm. The claimant reiterated that her mother suffered from dementia and required a structured routine around teatime and bedtimes as she becomes confused and agitated. Ms Stewart maintained that there was a need to consider the consistency of the other section coordinators' working patterns and the operational demands of the store and its trading hours. Ms Stewart decided that the changes were reasonable; there was a compelling business reason. The flexibility clause in the claimant's contract of employment meant that the respondent had the right to proceed with the changes. Ms Stewart gave the claimant four weeks' notice of the change in working pattern that would take effect on 7 July 2019. She also told the claimant if she did not accept the new working pattern by the week commencing 7 July 2019 this would be investigated and could lead to disciplinary action which ultimately could result in the claimant's dismissal.

62. On 12 June 2019, Ms Stewart issued the claimant with a "letter of change" giving her four weeks' notice that with effect from 7 July 2019, she would

require to work one late night currently finishing at 9pm each week and work one Saturday every four weeks until 7pm. The letter stated that these changes were required to ensure that there was sufficient section coordinator resource to cover all late-night trading and all section coordinators were treated equally in this regard. The letter confirmed that failure to accept the change could result in disciplinary action including dismissal.

Grievance – 14 June 2019

63. The respondent has a grievance policy (the GP) which sets outs its policy and procedure about an employee's concerns, problems or complaints. It provides for informal resolution (facilitated conversations and mediation) and formal resolution heard by an independent manager with a right of appeal under the AP.

64. On 14 June 2019, the claimant submitted a formal grievance form to the respondent (the Grievance). The claimant complained about her working hours in that there had been no formal consultation with her about the changes to her contract only notice of the change being imposed; and the process and procedure in relation to her FWR was not followed as she had no notice of the FWR Meeting and the minutes of that meeting were not agreed and signed.

65. In the Grievance the claimant stated, "I understand the need for staff to cover late night and the detrimental effect on customers this is having on them, however this is having a detrimental effect on both myself and my family. My relationships with the rest of my siblings is now very strained, and I am beginning to feel very isolated both in and out of work. My health is being affected by stress, with some hair loss, and my endometriosis flaring up and causing severe pain, along with very bad headaches. I am struggling to get out of bed in the mornings to attend work and I am slipping into a depression."

66. The claimant went on sick leave on 2 July 2019 by reason of work-related stress. She has not returned to work.

67. A grievance hearing took place on 4 July 2019 and was conducted by Amy Cherry, Store Manager, Cumbernauld. The Cumbernauld store is a Simply Food outlet. The claimant was accompanied.

68. Ms Cherry did not know the claimant. During the grievance hearing the claimant explained that her disabled mother for whom she cared needed the most care between 5pm to 9pm to provide her a hot meal and put her to bed. One of the options explored by Ms Cherry was whether the claimant would be willing to step down to a customer assistant role. The claimant said that this was not financially viable.

69. The grievance outcome was confirmed to the claimant in writing that the Grievance was not being upheld and the letter confirmed that she had the right of appeal.

70. The claimant appealed on 17 July 2019. The appeal was rejected on 30 July 2019 because it did not satisfy the appeal criteria under the AP.

Absence Management

71. The respondent has a sickness absence policy (the SAP) which sets outs its policy and procedure when dealing with sickness related absences. Any employee sick absent for any reason for more than four weeks is considered as long-term ill health and will be invited to a long-term ill health meeting to discuss their absence.

72. Employees with more than six months' continuous employment are entitled to company sick pay (CSP). The claimant's allowance was full basic pay for up to 20 weeks in any rolling 12-month period. CSP is non-contractual and discretionary. It may not be paid where there is evidence that a colleague is absent as they are unhappy with the outcome of a grievance or appeal.

73. The claimant had been feeling anxious, demoralised and depressed. She was stressed; she had hair loss and the endometriosis in relation to which she had been absent in September/October 2018 has flared up and she had very bad headaches.

74. On 30 July 2019 Ms Stewart wrote to the claimant inviting her to a long term ill health meeting on 6 August 2019 and of the right to be accompanied. The claimant's statement of fitness to work was due for review on 28 August 2019.

75. At the ill health meeting the claimant was unaccompanied. She explained that she had good and bad days. On the bad days she could hardly get out of bed. Ms Stewart asked what she could do to support the claimant and the reason she did not want to come back to work. The claimant said that she was sitting there because of the decisions Ms Stewart had made. It was not possible for the claimant to work late nights. Ms Stewart was aware of that; refused the FWR and imposed changes to the claimant's contract which could result in her being dismissed. The claimant felt unsupported and needed an honest conversation. The claimant explained that she had been employed for twenty years and felt she was not being supported and that there was an agenda. Ms Stewart said that it was a store operation decision that stood and when the claimant returned she needed to work a late shift. The claimant stated that, "My doctor says I am unfit to work and I'm not thinking clearly". Ms Stewart asked what she could do to get the claimant back to work as the situation was not going to change. The claimant stated that, "I do not know the answer. I'm struggling mentally. I can hardly even look at tomorrow. I don't know how long I am going to feel like this." The claimant asked to terminate the ill health meeting as she could not focus and was not getting time to respond.

76. The ill health meeting was adjourned to allow Ms Stewart to take advice from PPS. She did not do so. When the ill health meeting reconvened Ms Stewart said it was her decision and pay was at the respondent's discretion; the claimant was unhappy with the grievance process. The claimant said that she was not off because of the process but because of stress. The claimant was absent before the grievance process. She had been struggling at home with the caring responsibility and the stress of working a weekly late night and explaining her situation. When she would be fit to return to work was a matter for her doctor because she was not fit mentally to make big decisions.

Ms Stewart said that she was making the decision to stop the claimant's CSP as she did not see the claimant coming back. At some stage the claimant would need to come back and accept the outcome of the grievance and appeal which the claimant needed to accept. The claimant said that she wanted to get fit to get back. Ms Stewart said that the respondent could not sustain this length of time if there was no date of return. The claimant again reiterated that it was down to her doctor and the decision not to pay CSP added to the stress as the claimant was the only source of income for her family; if she could have returned she would have. Ms Stewart said that CSP would be stopped from 11 August 2019.

77. Gillian returned from maternity leave on or around July/August 2019.

78. The claimant submitted a further sick note. Her face had come out in hives and she was really struggling. There was no sign of a return to work. Ms Stewart still wanted to withhold CSP. PPS advised Ms Stewart that it was a discretionary matter for her, and she should consider if it felt right and what effect it was having on the claimant. Ms Stewart considered that there was nothing she could do, and the claimant needed to move forward.

79. The claimant's mother was becoming more confused and agitated. The claimant felt worthless and not good enough to do her job. The clamant thought that because she was at home all the time her mother was becoming too dependent on her and they were constantly battling. The claimant needed to do something for herself; keep her mind focussed; get out of the house and build her confidence to get back to work. She applied successfully to college to study HND in IT administration. The first year is an HNC with an option to extend to complete an HND. It involves attending college two and half days per week. This allowed the claimant to keep her mother in a routine while the claimant was not working giving the claimant less hassle when she returned to work.

80. By letter dated 11 September 2019, the claimant was informed that she required to attend a further ill health review meeting with Ms Stewart on 17 September 2019.

81. At the ill health meeting the claimant explained that she had a panic attack when attending Braehead for the meeting. She felt victimised and bullied because she had made the FWR. The decision to stop CSP had made things difficult at home. The claimant felt she was a failure. Her situation at home had got worse. Although she had an extended family she did not get support from them for her mother although her sister-in-law had been around more. She thought she could come to Braehead but from the state she was in attending the meeting she realised that she was not ready to return to work. She needed time to ease back. The claimant pointed out that the late-night roster had never been filled as section coordinators were pulled to fill TTN.

82. Around 23 September 2019, the respondent invited the claimant to apply for a full-time section coordinator early shift which had arisen in at Braehead. This role was for 37 and a half hours. The claimant asked if the hours could be adjusted to 30 hours per week. She was advised that it could not. The claimant was unable to apply for the post.

83. Ms Stewart retired on 1 October 2019. Ms Moran assumed responsibility for managing the claimant's absence. The claimant provided a sick line up to 5 December 2019.

84. Ms Moran discussed options for a phased return to work with the claimant at an ill health meeting on 29 October 2019. The claimant said that she was not on medication as she was reluctant to do so. She was using other strategies and taking a day at a time. She was open to looking at all vacancies. The claimant said that working towards a late night was not viable while she had caring responsibilities for her mother. Each option offered by Ms Moran involved working a late night either from 5pm to 9pm or a set late night every two weeks. Ms Moran said that since the claimant raised the issue of pulling late night section coordinators to cover TTN this has stopped except when there are last minute changes.

85. The claimant continued to provide sick lines up to 12 March 2020. The claimant attended an ill health meeting with Ms Moran on 13 February 2020.

The claimant was in a more positive frame of mind although was in a low mood over Christmas and was prescribed anti-depressants which she did not take. She is using other coping strategies. There was discussion about occupational health referral. Ms Moran set out the claimant's options:

85.1 One late night every two weeks (two per month) instead of one every week.

85.2 A set late night of her choosing rather instead of a rotational basis.

85.3 phased return to two late nights per month.

85.4 An 8pm finish on the late night rather than 9pm.

85.5 A 5pm to 9pm shift on the late night smoothing the remaining two hours into the claimant's shift.

86. The claimant said that she could start anytime from 6am but could not stay past 4pm. Ms Moran referred to an upcoming vacancy in Menswear which facilitated a reduction in hours and not to work a late night at this stage. The counter part to the vacancy worked two late nights per week and on their holidays the claimant would require to pick up one of those late nights with advance notice. The claimant was also advised that if her absence continued at the current level or deteriorate then one of the possible outcomes would be dismissal on the grounds of her incapacity to return to work/fulfil her role in the foreseeable future. The matters discussed were confirmed in a letter.

87. On 25 February 2020 the claimant contacted Ms Moran about the vacancy. The claimant enquired if there was any flexibility with the days. She was at college which at present was on Monday, Tuesday and Wednesday until May 2020. Ms Moran said that she needed cover on a Monday. If the claimant did not accept the days, the vacancy would go out to the store.

88. Since the claimant's absence, her role has been covered by Tracey Shields, who was formerly a customer assistant and has been training to cover the section coordinator role.

89. The claimant's net monthly salary between April 2019 to June 2019 was £1,117.82. Her CSP was stopped on 11 August 2019. Between September 2019 and October 2019, she received statutory sick pay. The claimant's financial loss until the end of March 2020 is £7,154.47.

Observations on witnesses and conflict on evidence

90. The Tribunal considered that the claimant gave her evidence in a calm, understated and dignified manner. The Tribunal's impression was that the claimant is a conscientious and loyal employee of the respondent who did her best within the parameters that she found herself. The Tribunal had no hesitation in finding her to be a credible and reliable witness.

91. Ms Stewart was no longer an employee of the respondent when she was giving evidence at the final hearing. However, the respondent had employed her for more than forty years, thirty-eight of which were as a section manager. Most of the events about which the Tribunal was concerned took place nine months before Ms Stewart's retirement. The Tribunal's impression was that Ms Stewart's approach towards other section managers was to take the path of least resistance. The Tribunal felt that her view of fairness lacked understanding of anyone who had a different life experience from her own. The claimant was the only colleague whom Ms Stewart line managed. Given that the claimant is conscientious and experienced not only as a section coordinator but also as a section manager the Tribunal found Ms Stewart's lack of personal and professional support towards the claimant all the more surprising. The Tribunal's view was that in any discussion with other section managers Ms Stewart made little or no effort to advance the claimant's position or find a solution for her. The Tribunal felt that in her dealings with the claimant throughout 2019 but particularly in August 2019 Ms Stewart was devoid of empathy for or understanding of the depth of despair that the claimant was feeling.

92. Ms Moran was instructing Mr Anderson but did not sit in the hearing room while the claimant was giving evidence. The Tribunal considered that Ms Moran had a high level of confidence in her own ability no doubt bolstered

by her promotion to commercial manager in Braehead in April 2019 where she started 13 years previously as a customer assistant. The Tribunal's impression was that there was information which Ms Moran considered important and was intent on saying regardless of what she was asked. She often did not listen to the question asked over which she had a tendency to talk and she was argumentative under cross examination. The Tribunal considered that she was reluctant to make any concessions which made her at times unconvincing. While the Tribunal appreciated that Ms Moran was a witness for the respondent, she came across as indifferent toward the claimant's situation and the impact that it had on her health and ability to work.

93. Ms Cherry gave her evidence in a straightforward manner and reiterated the position taken by her in contemporaneous correspondence. The Tribunal's impression was that Ms Cherry could not relate to the situation in which the claimant's found herself.

94. In relation to matters which the claimant alleges were acts of discrimination there is no dispute: the claimant was required to work a weekly late shift; she made a FWR which was refused; a change to her contract of employment was imposed upon her; and her CSP was stopped. The respondent conceded that the claimant's mother was a disabled person within the meaning of section 6 of the EqA.

95. There was some conflicting evidence. The Tribunal found the claimant's evidence to be more convincing than that of the respondent's witnesses as she answered the questioned asked and made appropriate concessions. The respondent's witnesses tended to answer the questions that they wanted to be asked to reinforce the message that they wanted to convey to the Tribunal.

96. The Tribunal had the following observations on the evidence.

97. The claimant said that Ms Stewart was aware of the Carer's Passport and the nature of her caring responsibilities for her mother. Ms Stewart said that until January 2019 she was unaware of the Carer's Passport or the

claimant's caring responsibilities. The Tribunal felt that while Ms Stewart may not have seen the Carer's Passport it was highly unlikely given the number of years that they had worked together on the top floor; Ms Stewart's line management of the claimant since October 2018; their return to work meeting in October 2018; and the challenges experienced by the claimant agreeing to a weekly late shift from November 2018 onwards that Ms Stewart would have been unaware of the Carer's Passport and the claimant's caring responsibilities until January 2019. There seemed to the Tribunal no reason for the claimant to keep this confidential from Ms Stewart.

98. The ET3 response referred to a review of resource levels in January 2019 as a result of which it was identified that there was a lack of section coordinator resource to cover late shift on weekdays. The claimant was unaware of this. The Tribunal did not consider that the evidence of the respondent's witnesses was convincing on this point. The Tribunal accepted that Gillian was on maternity leave and her absence was being covered by the other section coordinators on the top floor but that had been ongoing since July 2018. The claimant had been on sick leave but had returned in late October 2018 and while not able to commit to a weekly late shift she offered to work a late shift when she could. From the evidence before it the Tribunal had difficulty understanding if there was a lack of resource why the review did not take place earlier given the peak retail period in December 2018. If there was such a review in January 2019 there was no supporting documentation about who undertook the review nor was it communicated to the claimant.

99. There was conflicting evidence about the reasons for the claimant's sick absence in August 2019. Ms Stewart says that the claimant was absent because she was unhappy about the outcome of the Grievance. The claimant's evidence was that she was not absent because of the outcome of the Grievance which her absence predated but was unfit to work on medical advice because of stress. She was struggling with caring for her mother and the impact of this on her relationship with her family and her

employer. The Tribunal appreciated that the claimant was disappointed about the outcome of the Grievance and in the circumstances Ms Stewart's continued involvement in managing her absence. However, from the contemporaneous notes of the ill health meetings the Tribunal had no doubt that the claimant was suffering from stress due to work and her caring responsibilities for her mother which had exacerbated to the point that the claimant's mental health was affected and she was not fit to work.

100. The Tribunal heard a considerable amount of evidence about the alleged business need for the respondent to have a section coordinator on the top floor working every weekday late shift. The Tribunal was not convinced particularly given Ms Stewarts' evidence as a manager at the time that there was a significant change in business demand and need save for the intervening Christmas peak. While the Tribunal accepted that it might be helpful to have a section coordinator and a section manager on the top floor during weekday late shift that need was not so real that section coordinators were not pulled to TTN or cover was deemed essential during maternity or planned sickness leave.

Submissions for the claimant

101. The claimant's claims are well founded, and the Tribunal was invited to give judgment in her favour. The claims are made in addition to and/or in the alternative and the submissions should be read accordingly.

Direct discrimination – section 13 of the EqA

102. The claimant says that she has been treated less favourably because of her mother's disability. She relies upon an actual comparator: Angela Laird. Alternatively, she relies upon a hypothetical comparator.

103. The claimant says that she was treated less favourably in the following ways:

103.1 Her FWR made on 8 March 2019 was declined in a letter dated 5 April 2019 (the First Act). The claimant seeks to compare herself with Angela Laird who was moved from permanent late shifts onto

permanent day shifts. Alternatively, the claimant compares herself to a hypothetical colleague who needs and/or requests flexible working due to caring responsibilities for a close relative who was is non-disabled.

103.2 Her employment contract was changed with effect from 7 July 2019 in relation to her working hours (the Second Act). The claimant compares herself to a hypothetical colleague who was also a section coordinator and who the below PCP applied but to who did not have caring responsibilities owing to a disabled parent.

103.3 On 4 July 2019, the claimant was offered the option of stepping down to a customer assistant role (the Third Act). The claimant compares herself to a hypothetical colleague who was also a section coordinator and who the below PCP applied but who did not have caring responsibilities owing to a disabled parent.

104. The claimant says that her treatment was less favourable and applying the "reason why" test it was because of her mother's disability or her association with her disabled mother. The less favourable treatment is so untoward that there must be some ulterior reason; someone with caring responsibilities for someone other than a disabled person would not have faced the same treatment – for example Gillian's maternity leave was absorbed but the claimant was given no such flexibility. There was also flexibility around Ms Laird's move. There was also Ms Stewart's mind-set that the claimant was using her mother's disability and the need to care for her as an excuse. The disability of the claimant's mother and the claimant being a carer was in Ms Stewart's mind and rationale.

Victimisation – section 27 of the EqA

105. The claimant says that she made two protected acts: (a) making the FWR on 8 March 2019 and (b) raising a grievance dated 14 June 2019. These acts are protected acts within the meaning of section 27(2)(c) and/or (d).

106. The FWR refers to the claimant's caring responsibilities of her mother. Such caring responsibilities arose in direct consequence of the claimant's mother's disability. The claimant refers to the pressures put on her and/or the harassment in being asked why she could not assist late shifts, the only reason that she was not able to undertake late shifts being directly and entirely related to her mother's disability. Context is everything – she had a Carers Passport; it was well known to the respondent that her mother was disabled and the claimant has until that time been accommodated in terms of her adjusted hours. She need not be express about her reference to her mother and her desire to have adjusted/accommodated hours in the above context. She had been put under increasing pressure to do late shifts by Ms Stewart and harassed by having to explain why she could not do late shifts because of her need to care for her disabled mother.

107. The Grievance states that the claimant is making an allegation of discrimination and/or doing some other thing under the EqA. Further or alternatively, the respondent believed that the claimant had done or may do a protected act.

108. Accordingly, the claimant has the protection of section 27 of the EqA.

109. The respondent has acted and/or deliberately failed to act and/or (and/or as a result) the claimant has suffered the following detriments (which it is submitted are either not the subject of dispute or cannot reasonably be so): (a) the imposition of a change to her contract in relation to her working hours; and (b) stopping CPS.

110. There is disadvantage and detriment to the claimant. She is being required to work contractual hours (and which is repeatedly raised to her) which conflict with her requirements to care for her disabled mother; she has suffered from poor mental health as a result; it has caused her to be absent from work for a prolonged period of time; and she has, even during that time, had her CPS stopped. She has suffered workplace disadvantage and her job security substantially impacted (with an impact on her continued/future

career), and financial and mental health detriment. The disadvantage and detriment are ongoing to the claimant, who remains off sick from work.

111. The detriment was because she made the FWR and/or the detriment was as a result of the making of the FWR and/or the raising of the Grievance. Further or alternatively, the respondent acted in the way that it did because it believed the claimant had done or may do a protected act.

112. The FWR and/or Grievance were a direct challenge to Ms Stewart's decisions and authority. She is the person then making the decisions above. They are complaints relating to discrimination and harassment which the claimant had received at having to explain her inability to do the late shifts expected of her due to her need to care for disabled mother. Ms Stewart handled and dealt with the FWR (despite it being in essence a challenge to her earlier management) and she raises a connection to the Grievance in her purported decision making as to CSP. Ms Stewart accepted in evidence she was "upset" that the claimant had raised the FWR. It is submitted that she was more than upset: she was annoyed with the claimant for making the challenge.

113. The decision to permanently alter the claimant's contract, when she had for three years and with the benefit of the Carers' Passport, worked the hours without late shift and without issue is extreme and disproportionate. It comes after the claimant raised the FWR – Ms Stewart had at least seven months of managing her to enforce such a change and, indeed, nearly two months even after the January 2019 discussion to enforce a change, but the same comes only after the FWR is made. It is the opposite of what the claimant sought in her FWR. It is a way of Ms Stewart letting the claimant know who is boss and/or digging her heels in in direct reply to the FWR. Similarly, with the decision to stop CSP.

114. The respondent's suggestion that enforcing the working hours change was to give claimant certainty and support her is simply implausible: an adverse inference ought to be drawn from this obviously false attempt by the respondent to explain the reasoning for its actions. No one else suffered the

same treatment. The claimant was plainly singled out by Ms Stewart. There is no good business basis for the imposition of the contract change and/or without allowing an alternative for what is a few hours' worth of work in any one week on the late shift. The need and demands of the business had not changed and the (agreed and longstanding) arrangement regarding the claimant's working hours worked. Where there are numerous and obvious reasonable alternatives not considered, explored or implemented, a clear adverse inference is that there is an ulterior reason for Ms Stewart's actions.

115. It was obvious what a serious effect – in terms of the claimant's ability work, her mental health and financially – it would have to impose a change in contractual hours on the claimant. This is merely compounded further by the decision to stop the CPS.

116. As to the CPS, there is no good reason for the treatment of the claimant within this policy. She is off work with work related stress (as the fit notes prove) – Ms Stewart appeared to accept this in cross examination. The attempt to shoe-horn the decision to stop the claimant's CSP into the suggestion she is not happy with the Grievance is a strained and implausible one: she is plainly suffering work related stress because of the respondent's discriminatory decisions and goes off sick before the grievance process concludes. There is no good reason within the policy or at all to exercise the discretion in the way that Ms Stewart (the very person who is the subject of the claimant's complaints) did. She decides only weeks into the claimant's sickness absence, despite the usual approach being she would be permitted 20 weeks of CPS, that the claimant is not getting CSP.

117. The claimant received no notice that the decision may be made. Ms Stewart purports to seek HR advice, but she did not receive any and did not postpone her decision in order to do so. She clearly intended to stop the claimant's pay before this meeting and before discussing it with the claimant. She does it without even going through any process, such as speaking to Occupational Health first or speaking at all with claimant about what impact it would have to stop her CPS.

118. HR advice which was provided does not appear to have been entirely supportive. The reference after this time to "still" wanting to withhold pay would suggest an element of disagreement from HR on this.

119. The decisions to impose contract changes and/or cut company sick pay are proximate in time to the two protected acts – all happening within a short space of time from one another;

120. There are numerous and various alternatives to imposing the requirements upon the claimant. This is especially so for a large and resourceful organisation such as the respondent. Put another way, it is clear that if the respondent wanted to accommodate the claimant it could and it would be surprising if it could not. This is all for the sake of a few hours work in one week;

121. The discriminatory impact of the decisions on the claimant is substantial and significant whereas any alleged (but denied) business impact (as further addressed below) can only possibly be small and insignificant. The balance in the decision-making rationale of the respondent is very much out of kilter.

122. The adverse inference to be drawn from all of this is that the actions in imposing obviously detrimental contract terms and cutting CSP are done for an ulterior reason (whether consciously or subconsciously) – namely, as retaliation/digging in of the heels/ showing the claimant who is boss because she raised the FWR and/or Grievance alleging discrimination. In any event, whether intentional or otherwise, it is difficult to avoid the conclusion that the making of the FWR and/or the Grievance did not cause or in some way impact (whether consciously or subconsciously) the decisions made to impose a contractual change and/or stop CSP;

123. The prima facie burden is clearly crossed by claimant and R falls well short of being able to prove a non-discriminatory reason for its actions. Discrimination must therefore be found (section 136 of the EqA.)

Detriment on the ground of making a FWR – section 47E of the ERA

124. In support of this the claimant repeats the above in support. In addition, the detriments and actions/deliberate failures to act are set out above.

125. The FWR need not be a protected act for this claim to succeed. The making of the FWR is itself sufficient to be a protected ground upon which an employee cannot be subject to a detriment.

126. The burden of proving the reason for the detriments lies specifically and expressly with respondent who has failed to prove a reason which is not the making of the FWR. For similar reasons as above, the rationale and reasons of the respondent do not withstand proper scrutiny and the real reason for the same is as above and/or because the claimant made or propose to make a FWR.

127. As to causation, the test is set out above: it is sufficient that the making of the FWR materially influenced in a more than trivial sense the act or deliberate failure to act. In the present case, the evidence plainly indicates that, at the very least, the making of the FWR more than materially influenced the respondent in a more than a trivial sense.

Indirect sex discrimination – section 19 of the EqA

<u>PCP</u>

128. The respondent did impose a PCP which it appears to accept. The Tribunal is well placed to determine the relevant PCP causing disparate impact. The present case is one or more of the following: the requirement to work late shift; the requirement for section co-ordinators to work late shift (whether across the full store and/or the top floor); and/or the requirement for section co-ordinators to work at least one late shift per week.

129. There is no real dispute as to this on the evidence. Moreover, the requirements are clear on the evidence and the requirements to do so are set out in the outcome of the FWR, the outcome of the appeal, the letter imposing a specific contract change on the claimant the outcome of the

grievance and the continued requirements and references to the same in the numerous meetings thereafter. Even any and all "options" presented to the claimant required her to work a late shift.

130. Any such "options" as respondent may present as being the correct PCP applied are not appropriate in line with the above case law, are not the PCP applied and would be too narrow and restrictive to be a PCP.

131. Regardless of the PCP applied in this case, it is averred that the outcome is the same: there is indirect discrimination as a result of a PCP applied by the respondent. This a case which falls into the typical and obvious indirect discrimination category. Further it must be the case that such PCP was imposed and imposed upon claimant intentionally.

Applied, or would apply, to those not sharing the claimant's protected characteristic

132. It does not appear to be a dispute that the PCP was, or would be, applied to those with whom the claimant does not share the characteristic. It is apparent that male section coordinators working on the first floor may be required to work on the top floor and the requirement would apply to them. Even if no males are currently employed on the first floor as section coordinators, it is apparent that the respondent would employ such males into those positions and therefore the PCP would be so applied to them. Ms Stewart's evidence obviously and entirely supports this: she readily accepted this as fact. It is unattractive for the respondent to suggest otherwise and, in any event, this is not how the respondent has pleaded its case. The PCP is both applied to males and/or would be applied to males.

It puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom claimant does not share it

133. There was the necessary and obvious disparate impact: it did, or would, put women at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic (i.e. men).

134. There is no requirement in law for there to be a pool of comparators specified by the Tribunal. A pool is not necessary in this case: the Tribunal can and should find disparate treatment without the need for a pool of comparators.

135. This is one of those cases which are obvious and well known as being detrimental to females: carers are more likely to be carers than males, especially of parents and, more particularly, mothers.

136. If the Tribunal requires to or wishes to have a pool of comparators for comparison, it is submitted that the appropriate comparison in the present case is men generally/from the public. In support, the claimant avers that:

136.1 The respondent is large employer, which employs (or would employ) people (including men) from any section of the public at large, including for the section coordinator roles and including males. Ms Stewart confirmed this. Accordingly, men in general terms would be the appropriate pool of comparators as this is whom the respondent does or would employ: these are whom the PCP is or would be applied to;

136.2 It is obvious that working late shift would create a disadvantage to a carer: it is at a time when said disabled person has important and heightened care needs, e.g. to be fed, dressed and made ready for bed;

136.3 The Carers UK document provides: women are more likely to be carers than men. Whilst statistical evidence is not actually necessary, this is good evidence (and there is no contrary statistical or any evidence from the respondent on this) which supports the claimant's position and provides a sound evidential basis upon which the Tribunal can and should reach its conclusions as to likely disparate treatment as a result of the PCP. The figures and conclusion in the report more than show a particular disadvantage in line with the above case law. Indeed, the examples given in the respondent's own policies insofar as they relate to carers are both examples of female carers;

136.4 In any event, even if the Tribunal applied its industrial knowledge and experience, that women are more likely to be carers for disabled parents (and indeed carers generally) than males. This is a social fact and one which the Tribunal will likely have its own industrial experience and knowledge of, which it can and should apply;

136.5 All of the above is perpetuated further in the context of an elderly mother who would be more likely to receive care from their female child for reasons of dignity, privacy and the like;

136.6 There is no contrary evidence to any of the above which would indicate that females are not more likely to be disadvantaged by needing to work late shifts;

137. As to the suggestion that the appropriate pool (if needed at all) is the staff at Braehead (or some other narrower pool such as the top floor of the store), the claimant avers that:

137.1 Such a pool on the facts of this case would be far too narrow a pool. The Tribunal should not construe any pool too narrowly, especially when this is such a large employer whose staff come from any section of the public at large and would and could include males – as above;

137.2 It is irrelevant if not all persons within the disadvantaged group actually suffer a disadvantage – the above case law supports this;

137.3 In any event there is no or no sufficient evidence (and which evidence would be in the gift of the respondent to give if it existed) to explain or make the staff at Braehead any different to the general public (from where they are employed). Indeed, given that the respondent employs from members of the general public, it would be surprising if matters were any different at Braehead. The respondent's policies give three examples, two of which are relating to carers and both of which are examples of *females* having caring needs, one of which includes caring for her mother. None of the

evidence would support that any such small a pool ought to be used and/or that even if such a pool was to be used there is anything other than a disparate impact on women as a result of the PCP above: those women are, statistically and otherwise, more likely than men to be carers for disabled parents (or generally).

It puts, or would put, B at that disadvantage

138. The claimant avers that that the PCP plainly did put her at a disadvantage. The evidence is clear and speaks for itself on this issue. She repeats the above in support.

The respondent cannot show it to be a proportionate means of achieving a legitimate aim

139. As to justification the claimant says that there was no legitimate aim pursued by the respondent and in so far as there was a legitimate aim, the same was not proportionately pursued by the respondent.

140. As to legitimate aim

140.1. The respondent avers there is a need to ensure adequate staffing cover – it is denied that the absence of a section coordinator on late shift every night of the week in this department rendered staffing cover inadequate and given the size and availability of other resource to the respondent.

140.2. The alleged business need was either non-existent, very limited such as not to be legitimate and/or was not a real pressing need which can constitute a legitimate aim for the respondent (nor was it the real aim being pursued) in line with the above case law.

140.3. It remains unclear why the contracts which the respondent had with other staff were not sufficient for it to cover the late shift, even if required. This has been the case for years and there was – as both Ms Stewart and Ms Moran accept no change in demand save for the intervening Christmas peaks.

140.4. The respondent purports to rely upon a review in January 2019. Put shortly, there is not a shred of any documentary evidence of this review.

140.5. Insufficient and inadequate evidence of business need and legitimate aim has been adduced by the respondent.

140.6. This is not a legitimate aim which falls within the definition provided for by law (above) in any event

141. As to proportionately pursued, the claimant referred to the above; there was no legitimate aim and the respondent failed to establish that the PCP applied is justified.

142. The alleged business need to have adequate staffing is extremely limited at best. Section managers cover the floor. The alleged need for section coordinators appeared to be premised on three things: (i) cover when cashing up – a period of 45 minutes at best; (ii) during a break of the manager – a 30 minute period; and (iii) a vague notion of "leadership" in an organisation where flexibility, staff empowerment, staff progression and inter-changeable staff appear to be the practice or encouraged. The (already marginal) requirement to cover 4 hours in a week actually becomes 1¼ hours of demand for a section coordinator in reality. The alleged need is neither real, nor any more than trivial.

143. The manner in which the respondent sought to achieve its alleged legitimate aim and the steps taken in order to do so were not reasonably necessary and were entirely disproportionate. The requirement to work late shifts as a blanket requirement was beyond what was either reasonable or necessary to achieve the alleged aims of the respondent.

144. Ms Stewart readily made a concession in cross examination, when put to her, that the adverse impact upon the claimant of the requirement to do late shift outweighed the respondent's business needs. This is telling, given she is the line manager on the ground dealing with this and knows the (alleged) business needs at the material time.

145. There is simply no (or no good explanation) as to why there becomes a requirement that all of the top floor must do one late night shift a week. Business demand and need did not change suddenly or at all in the numerous years previous when the arrangement which the claimant had regarding her working hours and her helping out when she was able worked. The respondent's suggestion in its pleadings that there was a store review in January 2019 is one not only not borne out on the evidence, but appears to be simply wrong: adverse inferences ought to be drawn against the respondent.

146. The claimant had agreed working hours from 2016 and for a period of three years, helping out when she was able. The arrangement worked. There was no need to change it and certainly no business need such as demand, customer experience, etc. The respondent is a large and well-resourced employer, with numerous financial and human resources as its disposal.

147. The discriminatory impact of the PCP on the claimant is undoubtedly substantial and significant. She was placed in an invidious position by the respondent. Her responsibilities to her disabled mother meant that she was unable to commit to permanent and regular late shift hours. The impact upon her as a result of the PCP applied was huge: it meant she was not in effect able to work her contract of employment (which was imposed upon her), her job security was thrown up in the air and she became at risk of disciplinary if she did not comply, she suffered in terms of her mental health and suffered financially as a result. This is in stark contrast to the minimal business need gained by requiring the claimant to work late shift.

148. From the evidence it is apparent that the respondent could have managed and perfectly adequately without needing anyone at all to cover the few hours per week which the claimant was being required to undertake. To not simply impose the requirement upon the claimant at all would have been a reasonable and proportionate, less discriminatory alternative. She was willing and able to assist where she could and all she sought was for her already agreed hours to continue as she had done for three years.

149. In any event, it is apparent that there is little to no cost, problem or adverse effect upon the respondent should it have followed one of the various and numerous alternatives to imposing the same on the claimant to get that few hours of work covered. Various examples were put throughout the internal processes, which were either not considered, not considered/investigated properly by the respondent, or implemented when they reasonably ought to have been. Further reference is made to the cross examination of the respondent's witnesses on the issue.

150. The respondent suggests that alternatives were put to the claimant. The respondent's position in this regard is fundamentally flawed. None of the alternatives are reasonable, proportionate and, importantly, all continue to impose the need to work a late shift such an imposition on the claimant was neither reasonable nor reasonably necessary.

151. Insofar as cost is a factor – which it appears to be in terms of hiring someone else to do those hours or asking someone to work overtime to cover those hours – the same is insufficient rationale for not taking steps to avoid the disadvantage caused. The cost of having someone cover the hours the claimant could not do was minimal: £9 per hour over 4 hours.

152. The Tribunal is to undertake an objective balancing exercise. It is clear that the respondent did not proportionately pursue any legitimate aim. The impact to the respondent is either small to non-existent; whereas the impact and discriminatory impact of the PCP on the claimant (a long serving employee) is substantial and in reality has caused her to be out of the workplace for a substantial period of time and with a substantial impact on her mental health and financial income.

153. On a general level, it is inconceivable that an organisation the size and resource of the respondent could not accommodate the needs of the claimant: so surprising, that it simply cannot be the case that any legitimate aim as may exist (and which is denied) has been proportionately pursued.

Time bar

154. It is not clear on what basis it is asserted that the discrimination claims are out of time. The same are plainly in time and were brought well within the relevant three months period (and bearing in mind the ACAS dates of Early Conciliation).

155. In any event, in order to preserve the claimant's position, she relies upon conduct extending over time, a continuing state of discriminatory affairs and/or the just and equitable extension in all of the circumstances (there being and having been no prejudice to the respondent at all in defending these proceedings). The claims ought therefore are to be permitted to be entertained by the Tribunal.

Remedy

156. The claimant seeks: declarations; compensation; and a recommendation.

157. As to declarations and compensation, the same are available under both the EqA (section 124 of the EQA) and the ERA (section 49 of the ERA). It is submitted that this includes with respect to injury to feelings.

158. The claimant refers to her schedule of loss and the supporting payslip/ wages documents. It is not understood, subject to the clams succeeding principle, that there is any dispute as to the actual figures used for the calculations of loss of earnings. The claimant's losses are ongoing. She remains absent from work and continues to suffer loss of earnings.

159. The claimant has suffered loss of earnings by reason of her being off sick. Her absence due to sickness, for work related stress, is caused by the respondent's discriminatory actions. It is clear and obvious that this is the case, both as to the reason for her being off sick (work related stress) and in time (she goes off sick soon after the imposition of the contract changes). The respondent's discrimination of the claimant has caused her absence and therefore the losses arising as a result; and/or the claimant suffered the loss of the remainder of what would have been her CSP that she would have received but for the discriminatory application of the discretion to cut her

contractual sick pay by the respondent. Her CSP was stopped after approximately five/six weeks.

160. As to injury to feelings, the claimant says that there is more than just one act of discrimination; there are multiple types of discrimination, including victimisation and which occurred even when she was already off sick with work related stress; this is over a prolonged period of time; the impact upon her has been long lasting and she has been out of work for a substantial period of time as a result; she has been unable to maintain work and maintain her caring needs together, whereas she had done so successfully for the three years preceding these events; all of this taking place in a large and resourceful organisation; even during sickness absence, the respondent repeats and refers to the very thing that it knows causes the problem for the claimant - the imposition of the requirement to work late shift – as if it does not already know the problem; the injury to the claimant's feelings has been significant. The claimant also claims interest. The Tribunal is referred to the schedule of loss in this regard.

161. The Tribunal is reminded that any sums which the claimant ought to ensure properly account for any tax and national insurance which may be payable: i.e. she must not be under-compensated by reason of any tax and national insurance requiring to be paid. If and insofar as any grossing up is required, the Tribunal is invited to undertake the exercise; alternatively, give directions to the parties following judgment to seek to try and agree the appropriate grossing up exercise to undertake and/or sums which are payable to ensure the claimant is properly and fully compensated.

162. As to the recommendation, it is entirely reasonable and practicable. The recommendation made would be of benefit: the claimant remains employed. Moreover, it would plainly obviate (alternatively, reduce) the effect of the matters to which these proceedings relate. The recommendation is to simply permit what was happening for years prior to the events which give rise to this claim and which would be of benefit to allow.

163. Further, insofar as the respondent seeks to rely upon section 124 of the EqA relating to remedy and seeking to avoid compensation for indirect discrimination, it is averred in the above circumstances, the necessary intention is apparent and existed. In any event, the section requires the Tribunal to only consider the other remedies first: it is not a bar to compensation in circumstances where the Tribunal has considered (and even wishes to make) other orders/ remedies. Accordingly, this section does not and should not prevent compensation being award for the indirect discrimination claim.

164. The claimant referred the Tribunal to the following cases: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; Greater Manchester Police v Bailey [2017] EWCA Civ 425; Nagarajan v London Regional Transport [1999] IRLR 572; Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830; Cornelius v University College of Swansea [1987] IRLR 141; Facet v NHS Manchester [2012] IRLR 64, [2012] ICR 372, CA; Harrod v Chief Constable of West Midlands Police [2017] IRLR 539; United First Partners Research v Carreras [2018] EWCA Civ 323; Jones v University of Manchester [1993] IRLR 218; Allonby v Accrington and Rossendale College [2001] IRLR 364 CA; British Airways Plc v Starmer [2005] IRLR 862, EAT; Pendleton v Derbyshire County Council [2016] IRLR 580, EAT; CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia [2015] IRLR 746; McNeil v Revenue and Customs Commissioners [2019] IRLR 915; Homer v Chief Constable of West Yorkshire Police [2012] ICR 704; Eweida v British Airways [2010] IRLR 322, CA; Essop and Others v The Home Office and Others [2017] IRLR 558; London Underground v Edwards (No 2) [1999] IRLR 364; MacCulloch v ICI [2008] IRLR 846, EAT; Lockwood v [2013] IRLR 941; Starmer v British Airways [2005] IRLR 862; Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317; Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26; Hardys & Hansons plc v Lax [2005] IRLR 726; Seldon v Clarkson, Wright and Jakes [2012] IRLR 590); R (Elias) v Secretary of State for Defence [2006] IRLR 934: Allen v GMB [2008] IRLR 690; Coleman v Attridge Law C-303/06 [2008] IRLR 722; Lisboa v Realpubs Ltd

UKEAT/0224/10 [2011] EqLR 267; McCorry v McKeith [2017] IRLR 253; EAD Solicitors LLP v Abrams [2015] IRLR 978.

Submissions for the respondent

165. This is not a case in which in order to successfully defend the claim, the respondent requires the Tribunal to excessively criticise the claimant. Rather, an application of the law to the reasonable facts of this case means that the claims must fail. The Tribunal is asked to dismiss the claims of the claimant.

Direct discrimination- section 13 of the EqA

166. The respondent says that the claimant's complaints fail due to the lack of "because of" and the need to generate a comparator with the meaning of section 23 of the EqA.

167. In relation to the First Act, the claimant relies on Ms Laird as a comparator. However, Ms Laird is not someone with no material difference to the claimant as Ms Laird did not make a FWR and does not have caring responsibilities.

168. A hypothetical comparator would be someone who has all the claimant's features, including someone who has made a FWR and who has to care for a close relative who was not disabled.

169. In respect of all the alleged acts of less favourable treatment the claimant was not able to advance how she was treated less favourably in comparison.

170. In respect of the Second Act this did not occur because of the associated disability. The hypothetical comparator who was refusing to work the pattern that was required would have been treated the same way.

171. In respect of the Third Act, this was again not because of the associated disability. Someone else in the claimant's position who was refusing to work the pattern required would have been treated the same way.

Victimisation – section 27 of the EqA

172. The claimant relies on two protected acts: (a) making the FWR on 8 March 2019 and (b) raising a grievance dated 14 June 2019. These acts are protected acts within the meaning of section 27(2)(c) and/or (d).

173. The FWR does not fall within the broadest element of section 27: section 27(2)(c) "doing any other thing for the purposes of or in connection with this act." Discrimination is not alluded to.

174. Part of the Grievance is capable of amounting to a protected act. Importantly however, the claimant must causally establish the link between the element that is protected "discriminated against by association" from all of the other elements which are not protected.

175. The relevant dates of these two protected acts are as follows: 8 March 2019 (FWR) and 14 June 2019 (the Grievance).

176. The detriments relied upon are (a) the change to the employment contract and (b) stopping CSP. The letter of change in respect of the contract is dated 12 June 2019. Therefore, the Grievance cannot be the cause of this alleged detriment. This leaves only the FWR.

177. Whilst the parties are not entirely agreed on how many discussions were had with who and when, it is a known fact that the disagreements over the claimant's working pattern were occurring before the FWR being made. The contractual position is a consequence of that ongoing disagreement. It is not 'because of' the FWR.

178. In respect of CSP it is necessary to highlight that the payment of CSP is discretionary. Whilst that is not an immunity from a discrimination claim, it is a relevant factor in understanding causation in this matter. Ms Stewart believed that she was acting in accordance with company policy. That belief is relevant, because it is a strong counterweight to the decision being 'because of' the FWR or the grievance.

Detriment on the ground of making a FWR – section 47E of the ERA

179. The points made in relation to victimisation above were repeated in respect of the amended flexible working claim.

Indirect sex discrimination – section 19 of the EqA

PCP

180. It is denied that the PCP identified by the claimant in the list of issues was in place. There were ongoing processes, through those processes, different proposals were made. The PCP matters, because that inevitably impacts each of the questions that are then asked.

181. Relatively early on in the process, the respondent was offering the claimant the possibility of only doing one late night every two weeks. This matters because it is a less harsh PCP than the PCP that is relied upon by the claimant. By 2020, the situation develops further in that the claimant is also being offered the opportunity to finish at 8pm.

182. The claimant has approached this case on the basis of the population as a whole. This is not a recruitment case. Such a pool is too wide. Beyond that incorrect pool, it is not possible to know the relevant position on a more specific pool necessary to test the allegation. The claimant is unable to discharge her burden of proof in this respect.

Claimant at a Disadvantage

183. The claimant has failed to adduce sufficient evidence in this respect. The claimant's mother receives Attendance Allowance. There has not been a recent assessment in respect of free personal care. This is in respect of a) any deterioration in the medical position or b) in respect of any change in the work position, bearing in mind that the claimant's evidence was that a factor in a historic refusal was her availability.

Justification

184. The justification stage has not been reached. If the Tribunal does not agree the relevant point is that the claimant's case seeks to go too far in placing an unreasonable burden on the respondent. It seeks to hold the respondent to too high a standard when the focus should be on the proportionality of the PCP.

185. Further, this is not a reasonable adjustments case. Again, the Tribunal is concerned with the proportionality of the PCP.

186. In looking at the justification balancing exercise that must be carried out, it is clear that the more serious the disparate impact then the greater the level of cogency that is required in the justification defence. It is at this stage of the justification defence that it is necessary for the Tribunal again to look at the disparate impact. The Tribunal will only have reached this stage having determined the correct pool. It is submitted that even taking the claimant's case at its highest, using the 58/42 stats, that these are not statistics lending themselves to the language of 'serious' disparate impact.

187. The claimant's case has not been consistent as to whether or not it is an accepted fact that it is necessary for there to be a coordinator and a manager assigned to the top floor between 5pm and 9pm.

188. In terms of the facts generally, the Tribunal is asked to have regard to the fact that the respondent understands its business and it is for the respondent to set the standards that it wants in order to achieve the best commercial outcome. At times, the claimant's case has strayed from scrutinising the position of the respondent to essentially second-guessing their commercial view.

189. Finally, in terms of the legitimate aim relied upon is ensuring sufficient staffing cover. This is a deliberately broad point and is capable of encompassing many sub points relating to commercial success, fairness amongst staff, the efficient running of the business. There can be no doubt that the aim in and of itself is legitimate.

Time Bar

190. Any act relied upon before 19 April 2019 is out of time. In respect of the direct case, this means that the declining of the FWR on 5 April 2019 is out of time. This is not a continuing act. It was a distinct decision and is in the list of issues as a distinct decision.

Remedy

191. It is difficult to address the Tribunal in respect of injury to feelings without knowing the relevant findings. However, adopting a straightforward approach as possible, it is submitted that the Schedule of Loss is excessive in this respect.

192. This is most likely a lower band case. For example, the sick pay point is a one-off act.

193. It is important to bear in mind that some of the acts relied upon by the claimant in her evidence in chief as contributing to her injury to feelings are not pleaded acts of discrimination. For example, the reference to potential misconduct proceedings is distinct from the contractual change. This is relevant in two respects, firstly the Tribunal should not take into account those matters which are said to cause injury to feelings but are not discriminatory and secondly, if the claimant is taking these matters into account when placing where her award should fall, it would follow that this is a factor reducing that sum.

194. In respect of the indirect case, section 124(6) EqA references section 119 of the Act in respect of the approach to be taken to compensation. Section 119, which is the power of the Sheriff Court in this respect includes section 119(5) of the EqA. On the basis of this provision, the Tribunal is asked to make no injury to feelings award. The alleged discrimination was not intended.

195. In respect of the damages claimed, it is submitted that it would be wrong in principle for the claimant to recover damages during any period in which she is in education whilst on sick leave. The claimant did not seek the permission

of the respondent before undertaking this course whilst off sick. Indeed, it could be said that the respondent's reaction to the claimant's actions in this regard has been generous. The claimant's evidence was that she started this course in August/September 2019.

196. The respondent referred the Tribunal to the following cases: Ministry of Defence v DeBique [2010] IRLR 471; Essop v Home Office [2017] ICR 64; Hardy & Hansons PLC v Lax [2005] IRLR 726 ; Barry v Midland Bank [1999] ICR 859).

Discussion and deliberation

Direct discrimination – section 13 of the EqA

197. For this claim to succeed the claimant must satisfy the Tribunal that because of associated disability she was treated less favourably than the respondent treats or would treat others.

198. The Tribunal asked whether the claimant was treated less favourably because of her mother's disability within the meaning of section 13 of the EqA?

199. In relation to the First Act the claimant relied on an actual comparator Ms Laird. The claimant said that her FWR was refused but Ms Laird was moved to a permanent day shift.

200. The Tribunal considered whether there were no material differences between the claimant and Ms Laird. The claimant, a section coordinator in Kidswear had difficulty working a regular weekly late shift because of her mother's disability. She made the FWR which was refused. Ms Laird, a section coordinator in Womenswear was asked to change her shift from late shift to day shift.

201. The Tribunal did not consider that the claimant and Ms Laird were in the same position in all material respects. There was no evidence before the Tribunal of Ms Laird's caring responsibilities (if any). Ms Laird did not ask the respondent either informally or formally to change her shift. It was a

request made by the respondent to her. A more appropriate comparator would have been a hypothetical comparator who was a section coordinator at Braehead who had to care for a close family relative who was not disabled and had made a flexible working request.

202. The Tribunal applied the reason why test to Ms Stewart's refusal to grant the FWR.

203. The claimant had previously worked weekly late-night shifts when reporting to another section manager. From November 2018, the claimant expressed difficulty in doing so on a regular weekly basis. She was Ms Stewart's only direct report. Ms Stewart was the only section manager on the top floor whose direct report was not picking up a weekday late shift. Ms Stewart asked PPS in January 2019 about the Carer's Passport, forcing the changing on the claimant or demoting her because she said that she could not work a weekday late night. Ms Stewart was advised of the risk. Ms Stewart dealt with the matter informally and told the claimant to do her rostered shifts or she would formally change her shift patterns. The claimant then made a FWR. Despite having already considered the matter informally Ms Stewart dealt with the FWR. Ms Stewart was fixated on being consistent across section coordinators and the claimant's explanation for not doing her share of weekly late nights appeared of little significance to Ms Stewart.

204. The Tribunal considered that if the hypothetical comparator had made a FWR that involved Ms Stewart proposing to the other section managers that her direct report was treated differently to the other section coordinators the hypothetical comparator would have been treated the same as the claimant. The Tribunal therefore concluded that the First Act of less favourable treatment was not because of the associated disability.

205. The Tribunal then considered the Second Act of less favourable treatment: the changing of the claimant's contract of employment. The claimant relied upon a hypothetical comparator: a section coordinator who was required to work one late shift per week but did not have caring responsibilities owing to a disabled parent.

206. The Tribunal again applied the reason why test and referred to its conclusion about the reasons for the First Act. The Tribunal considered that Ms Stewart wanted the claimant to do as she was instructed and if the claimant did not do so voluntarily Ms Stewart was prepared to make her do so contractually. The Tribunal considered that for Ms Stewart the explanation why the claimant was unable to work a weekly late shift was of little significance. The reason why Ms Stewart changed the claimant's contract was because she would not do voluntarily what was being asked of all the section coordinators on the top floor despite the claimant being instructed to do so by Ms Stewart. The Tribunal therefore concluded that the hypothetical comparator would have been treated in the same way.

207. The Tribunal then considered the Third Act of less favourable treatment: the option of stepping down to a customer assistant role. The claimant relied upon a hypothetical comparator: a section coordinator who was required to work one late shift per week but did not have caring responsibilities owing to a disabled parent.

208. The Tribunal noted that the claimant previously decided to step down from another role because she was not able to commit. Against that background the Tribunal did not consider that it was unreasonable to explore that option with the claimant. On being informed that the claimant was not interested the subject was not pursued. The Tribunal considered that such an option would have been explored with a section coordinator who was not able to commit to a late night shift but did not have caring responsibilities owing to a disabled parent.

209. The Tribunal concluded that the claimant was not directly discriminated on the grounds of associated disability.

Victimisation – section 27 of the EqA

210. The Tribunal next turned to the victimisation claim. To establish that she has been victimised the clamant must show that she has been subject to a detriment and that she was subject to that detriment because of a protected act.

211. The protected acts relied upon by the claimant are the making of the FWR and the raising of the Grievance. The respondent accepted that part of the Grievance is a protected act but said that the FWR does not fall within the definition of a protected act under section 27(2).

212. The Tribunal referred to section 27(2) and first asked whether the claimant carried out a protected act and/or did the respondent believe the claimant had done or may do a protected act under section 27 of the EqA.

213. The Tribunal considered that FWR was made against the background of the claimant having the Carer's Passport; having made an informal FWR and referring to the claimant's caring responsibilities for her mother and the harassment being asked to undertake late shifts which she could not do because of the caring responsibilities for her disabled mother. The Grievance makes an allegation of discrimination under the EqA. The Tribunal considered that the FWR and the making of the Grievance were protected acts.

214. The claimant asserted that the changing of her employment contract and stopping her CSP were detriments. The Tribunal considered if the respondent subjected the claimant to a detriment. Although "detriment" is not defined in the legislation the Tribunal considered that these were detriments as they were to the claimant's disadvantage as she could not have worked her changed contractual hours because of her caring responsibilities for her disabled mother and she remains absent on sick leave. The Tribunal did not understand the respondent to dispute this but rather take issue that the detriments were because of the protected acts.

215. The Tribunal then considered the reason why the claimant's contract of employment was changed.

216. The claimant had previously worked weekly late shifts when reporting to another section manager. From November 2018, the claimant expressed to Ms Stewart her difficulty in doing so on a regular weekly basis. She was Ms Stewart's only direct report. Ms Stewart was the only section manager on the top floor whose direct report was not picking up a weekday late shift. Ms

Stewart asked PPS in January 2019 about the Carer's Passport forcing the changing on the claimant or demoting her because she said that she could not work a weekday late night. Ms Stewart was advised of the risk.

217. The Tribunal noted that in February 2019 when the matter was being discussed informally Ms Stewart did not impose any contractual change but told the claimant to do her rostered shifts or she would formally change her shift patterns. The claimant then made the FWR. Ms Stewart was upset about this but considered and rejected it. The claimant then appealed that decision.

218. The reason why Ms Stewart changed the claimant's contract was because the claimant would not do voluntarily what was being asked of all the section coordinators on the top floor despite being instructed to do so by Ms Stewart. Ms Stewart had threatened to change the claimant's contract and having challenged Ms Stewart's decision by making the FWR Ms Stewart carried out her threat.

219. The Tribunal then considered the reason why Ms Stewart stopped the claimant's CSP. By August 2019 the claimant had carried out another protected act: raising the Grievance. The claimant attended work during the FWR process. Her sick absence before the grievance hearing was for work related stress. She was medically certified as unfit to work and only weeks into her CSP when Ms Stewart decided to stop it without notice that she was considering doing so and it taking effect. Ms Stewart raised the issue of the FWR and the Grievance and did not consult PPS despite saying that she would. Even when the claimant's absence continued Ms Stewart did nor reconsider the situation despite being informed that she could so do.

220. The Tribunal concluded that the respondent subjected the claimant to a detriment because she had made a protected act and her victimisation claim succeeds.

Detriment on the ground of making a FWR – section 47E of the ERA

221. The Tribunal understood that the claim under section 48 of the ERA that the claimant had been subjected to a detriment in contravention of section 47E of the ERA was in the alternative to the victimisation claim.

222. If the Tribunal was wrong in its conclusion that the FWR made on 8 March 2019 was a protected act under section 27(2) of the EqA the claimant made an application under section 80F of the ERA.

223. The claimant said that she suffered the detriments to which she referred in her victimisation claim. The Tribunal considered if the respondent subjected the claimant to a detriment. "Detriment" is not defined in the legislation. The Tribunal considered that changing her contractual hours and stopping CSP were detriments as they were to the claimant's disadvantage as she could not worked her changed contractual hours because of her caring responsibilities for her disabled mother and she remains absent on sick leave. The Tribunal did not understand the respondent to dispute this but rather took issue that the detriments were because the claimant made the FWR.

224. The Tribunal then referred to the conclusions that it had reached above about why the claimant's contract of employment was varied and why the claimant's CSP was stopped.

225. The claimant had challenged Ms Stewart's decision taken informally under the FWP by making the FWR so Ms Stewart carried out her threat to change the claimant's contract. The claimant raised the Grievance and was then medically certified unfit to work. Ms Stewart raised the issue of the FWR and the Grievance with the claimant at the ill health meeting. Ms Stewart did not consult PPS despite saying that she would. Ms Stewart decided to stop the claimant's CSP without notice that she was considering doing so and it taking effect. Even when the claimant's absence continued Ms Stewart did nor reconsider the situation despite being informed that she could so do.

226. The Tribunal considered that the making of the FWR materially influenced Ms Stewart's decisions when subjecting the claimant to the detriments.

Indirect discrimination – section 19 of the EqA

227. The Tribunal then considered the indirect discrimination claim. It asked whether a provision criterion or practice (PCP) applied to the claimant? The Tribunal referred to the list of issues which identified that the claimant relied on a requirement for section coordinators to work a late/night shift. The respondent did not accept that this was in place as there were ongoing processes through which different proposals were made. In her submissions the claimant argued that the PCP was one or more of: the requirement to work late shift; the requirement for section coordinators to work late shift (whether across the full store and/or the top floor); and/or the requirement for section coordinators to work at least one late shift per week.

228. The Tribunal referred to the outcome letter of the FWR dated 5 April 2019 which stated that the section coordinator role within the top floor of Braehead is such that each coordinator is required to work one late shift per week. The outcome letter of the appeal against refusal of the FWR dated 8 May 2019 stated that the claimant's options were: a set late night each week; working 5pm to 9pm late shift spreading the remaining two hours over the four other shifts going from 9am to 3.30pm to 9am to 4pm. While the Tribunal noted that Ms Moran asked if the claimant had the ability to work a late night every second week to support where possible this was not offered as an option. The letter dated 12 June 2019 confirming the variation to the claimant's contract of employment from 7 July 2019 said that the claimant "required to work one late night currently finishing at 9pm each week".

229. During the claimant's absence she has attended several ill health meetings during which phased return to work was discussed. From 17 September 2019 the Tribunal noted that the proposed phased returns required either a set weekly late night; a late night from 5pm to 9pm with the hours spread; or a late night every second week. Following the ill health meeting on 13 February 2020 the options were: one late night every two weeks (two per

month) instead of one every week; a set late night of her choosing rather instead of a rotational basis; a phased return to two late nights per month; an 8pm finish on the late night rather than 9pm; a 5pm to 9pm shift on the late night smoothing the remaining two hours into the claimant's shift.

230. The Tribunal considered that when the claimant attended work up to July 2019 the requirement was to work a weekly weekday late shift. From September 2019 the claimant was required to work a weekday late night every second week. The Tribunal considered that the PCP imposed by the respondent was the requirement for section co-ordinators on the top floor to work a regular weekday late shift.

231. The Tribunal then asked if the PCP was or would be applied to those with whom the claimant did not share the claimant's protected characteristic (sex). The Tribunal was satisfied from Ms Stewart's evidence that although the section coordinators on the top floor were all women the respondent would employ males into these positions and the PCP would also be applied to them. The PCP would be applied to male section coordinators working on the top floor at Braehead.

232. Next the Tribunal considered whether the PCP put the claimant and those who share her protected characteristic (women) at a particular disadvantage when compared to men. The claimant claims that women are more likely than men to be the primary carer for disabled and/or elderly parents (and mothers) and therefore find it harder to comply with the PCP.

233. The Tribunal's view was that its own industrial knowledge and experience was that women are more likely than men to be carers for elderly disabled parents and more particularly mothers.

234. If the Tribunal is wrong about this then it agreed with the claimant's submission that as the respondent is such a large employer employing people from the public at large including for section coordinator roles and including men to whom the PCP is or would be applied a pool of the staff at Braehead or the staff working on the top floor of Braehead is too narrow. In any event there was no evidence to suggest that the respondent's

employees at Braehead were any different from the general public from where they were employed. There is no requirement that the PCP puts every member of the group sharing the claimant's protected characteristic at a disadvantage. Working a late shift would create a disadvantage for carers for elderly disabled parents as this is when they particularly require personal care. The Tribunal was satisfied that women were more likely to be carers than men. The respondent did not produce contrary evidence and the examples of carers in their policies were consistent with this view. There was no contrary evidence to suggest that women were not more likely to be disadvantaged by needing to work late shifts. The Tribunal considered that the PCP did put women at a particular disadvantage.

235. The Tribunal then asked if the PCP put or would put the claimant at that disadvantage. The Tribunal was satisfied that the evidence demonstrated that the PCP put the claimant at a disadvantage. She was the primary carer for her disabled mother, and she found it harder to comply with the PCP than her male colleagues who were less likely to care for disabled and/or elderly parents.

236. The Tribunal then turned to consider whether the PCP was a proportionate means of achieving a legitimate aim. The Tribunal had to weigh the respondent's reasonable needs against the discriminatory effects of its measure and make an assessment of whether the former outweighed the latter.

237. Dealing first with the legitimate aim; this is not defined but it must correspond to a real need and the means used must be appropriate with a view to achieving that objective and be necessary to that end.

238. The respondent relied upon the legitimate aim "of ensuring staffing cover". The Tribunal accepted that ensuring staff cover was a legitimate aim. The Tribunal appreciated that the respondent understands and sets standards for its business to achieve its commercial outcome.

239. The Tribunal considered that given the respondent's trading hours managerial cover was required on the top floor during the late shift. The

Tribunal was unconvinced on the evidence before it that there was a change in customer demand on the top floor (except for Christmas peak) during the late shift leading to a review in January 2019 demonstrating a real need for a section coordinator and a section manager to be assigned to the top floor between 5pm and 9pm on weekdays.

240. The Tribunal felt that having section coordinator and a section manager on the late shift was helpful to cover the manager's break; cashing up and for supervision but was not essential as there were occasions when the respondent pulled late shift section coordinators to work on other shifts; the respondent did not consider it necessary to find maternity cover for Gillian who worked two late nights per week preferring to leave the other top floor section coordinators to volunteer to cover these additional shifts; and the claimant's role in her absence has been covered by a customer assistant albeit Gillian returned from maternity leave in July/August 2019. The Tribunal thought that had there been a real need the respondent would have considered the shift patterns in the contracts of employment of all the section coordinators rather than relying on them covering the weekly late shifts on a makeshift basis.

241. In any event the Tribunal considered that the respondent's manner and approach to achieve its alleged legitimate aim was disproportionate.

242. The respondent appeared to be capable of flexibility, staff progression and staff empowerment when it chose to do so and at other times appeared to operate in silos where the lower and top floors and different departments were incapable of working together as a team to meet customer needs and experience.

243. While Ms Stewart said that she approached other top floor section managers about other top floor section coordinators doing more weekday late shifts that was on an informal basis and the Tribunal was less than convinced that Ms Stewart explained with any conviction why such a request was being made. The approach was not made to any section manager on the first floor.

244. Since 2016 the claimant volunteered to work late shifts when she was able. This arrangement had worked. At times she had been working on average two late shifts per month. While the claimant had difficulty with a blanket requirement to work a regular late shift work there was no suggestion that the claimant would not offer to work a weekday late shift when she was able to do so. There was no consideration given about Gillian's return to work following maternity leave or looking to train other employees to cover a weekly or fortnightly four-hour shift. While the respondent alluded to having no budget, the Tribunal did not form the impression that the cost of obtaining cover for the shift was ever considered or investigated.

245. By contrast the Tribunal noted that the claimant's position moved from being able to offer work a weekly late shift when she could manage to get assistance to care for her mother to being unable to commit to a permanent regular change in her contracted hours. The impact on the claimant was significant. She was unable to work her contracted hours and her health and financial position suffered as a consequence.

246. The respondent wanted the claimant to cover four hours 5pm to 9pm per week/ fortnightly. Given its size and resource the impact to the respondent in the claimant not covering a late shift was small particularly when alternative viable solutions could have been explored and implemented. The impact on the claimant has been substantial. The Tribunal concluded that any legitimate aim as may have existed had not been proportionately pursued.

Time Bar

247. Given the Tribunal's decision in relation to the direct discrimination claim it was not necessary to consider any issues of time bar.

Remedy

248. The Tribunal moved onto consider the question of remedy. The Tribunal referred to section 124 of the EqA and section 49 of the ERA. The claimant seeks declarations; compensation; and a recommendation.

249. The Tribunal upheld the complaints of discrimination under sections 19 and 27 of the EqA and of having suffered a detriment under section 48 of the ERA. The Tribunal considered that it was appropriate in its judgment to make declarations to that effect.

250. The Tribunal then considered whether it was appropriate to make a recommendation. The claimant is still employed by respondent and she seeks a declaration that she should be allowed to continue day shifts as per the arrangements in place from 2016. The Tribunal was sympathetic to the request. It acknowledged that the respondent had taken steps in February 2020 to offer an alternative post which had minimal late shift working. However, given the effects of the COVID19 pandemic and the unknown consequences on the claimant and the respondent's business the Tribunal felt that it was inappropriate to do so. Nonetheless it hoped that the respondent will monitor how its policies and practices impact on various groups and consider what may be modified to removing that impact while meeting its staffing needs.

251. The Tribunal then considered compensation. The respondent referred to the Tribunal to section 124(6) of the EqA and submitted that in respect of the indirect discrimination case the Tribunal should make no injury to feeling award as the discrimination was not intended. While the Tribunal noted this provision, it had first considered a declaration and recommendation and therefore did not consider that it was barred from considering compensation particularly as there was another type of discrimination.

252. The Tribunal referred to the claimant's schedule of loss and supporting payslips and wage documentation. The Tribunal did not understand there to be any dispute as to the figures used. Despite having done so successfully since 2016, the claimant has been unable to maintain work and her caring needs since July 2019. There was more than one act and type of discrimination. The claimant also succeeded with her detriment claim for making a flexible working request. The claimant remained absent from work at the time of the hearing.

253. In relation to the claimant's loss of earnings up to the date of hearing the Tribunal considered the respondent's submission that it would be wrong for the claimant to recover damages during any period in which she was in education whilst on sick leave.

254. In the Tribunal's view throughout the claimant's position has been that she was able to work her contracted hours and fulfil her caring responsibilities for her mother. The problem was the imposition of the requirement to work a regular weekday late shift. Despite knowing this and being aware of the impact on the claimant's health the respondent continued to insist on the claimant working a regular weekday late shift. The Tribunal appreciated that being constantly at home with her mother was very testing for the claimant and ran the risk of her mother becoming more dependent on her making any return to work challenging. While the claimant did not ask for the respondent's permission to undertake the college course, she did not conceal it and it was she who informed the respondent. The claimant was not being paid by the respondent while in education; she continued to engage at ill health meetings and considered all the options that were proposed which until the end of February 2020 require her to work a regular weekday late shift. The Tribunal felt that the claimant's mental health and self-confidence benefited from her being in education during what was a difficult time for her. The Tribunal considered that from a financial and mental health perspective the claimant wanted to return to work but was unable to do so.

255. The respondent's discriminatory treatment of the claimant caused her to be signed off work with work related stress. The respondent stopped her CSP in August 2019. The claimant was still signed off work at the date of the hearing. She had been offered a role in late February 2020 which she did not accept. The Tribunal's impression was that had the respondent been able to accommodate her college course up to May 2020 the claimant might have accepted this post. While the Tribunal felt this was regrettable it decided that it was appropriate to restrict the claimant's financial loss to the end of March 2020 being £7,154.47.

256. Turning to an award for injury to feelings these are compensatory. They should be just to both parties. They should compensate fully without punishing the wrongdoer. Feelings of indignation at the wrongdoer's conduct should not be allowed to inflate the award.

257. The Tribunal reminded itself that an award of injury to feelings is to compensate for "subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression." (see *Vento v Chief Constable of West Yorkshire* Police (No. 2) [2002] EWCA Civ 1871 [2003] IRLR 102*).*

258. In *Vento*, the Court of Appeal observed there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

259. For claims presented after 6 April 2019, the *Vento* bands are now a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,000 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

260. The claimant sought an injury to feeling award in the upper quartile of the middle band of Vento of £22,000. The respondent said that this is more likely a lower band case and that some of the claimant's evidence contributing to her injury to feeling was not plead as acts of discrimination.

261. In the Tribunal's judgment this is a case that appropriately falls into the lower quartile of the middle band of the *Vento* guidelines. There were different types of discrimination and it was not a one-off act. The subjective feelings

described by the claimant in her evidence at the final hearing were entirely plausible and credible. The claimant had financial difficulties, she had feelings of worthlessness for being unable to provide for her family; her face came out in hives and she had panic attacks. Those dealing with the matter for the respondent exhibited closed minds contrary to sound decision making and proper application of natural justice. On one hand the respondent had not embarked on a lengthy campaign of discriminatory treatment to merit an award at the top band. On the other hand, the respondent's failings were so significant that they can not be properly categorised as a less serious case falling in the lower band. This placed the case in the Tribunal's judgment in the middle band of Vento.

262. The Tribunal found the claimant's account of the impact of the respondent changing her contract of employment and withdrawing her CSP credible and reliable. The subjective feeling described by the claimant in her evidence at the hearing were plausible and credible that the claimant would feel hurt feelings during sick absence by being repeatedly asked by her line manager who was well aware of the background why the claimant could not work a regular weekday late shift. The claimant is a long serving employee who had previously successfully combined her work and caring responsibilities; remained willing to work late shift when she could (as she had demonstrated in the past); and she had exhausted all other avenues to resolve the situation.

263. Applying a broad brush, the Tribunal assess the amount payable to the claimant for injury to feelings as £11,000 and that is the amount the Tribunal ordered the respondent to pay to the claimant.

264. The Tribunal turned to the question of interest. It is empowered to make an award of interest upon any sums awarded pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The rate of interest prescribed by regulation 3(2) is the rate fixed for the time being, currently an amount of eight per cent per annum in Scotland.

265. Under regulation 6(1)(a) for an award of injury to feelings the period of the award of interest starts on the date of the act of discrimination complained of and ending on the day on which the Tribunal calculates the amount of interest. In the case of other sums of damages or compensation and arrears of remuneration, interest shall be for the period beginning on the mid-point date and ending on the calculation. The mid-point date is the date halfway through the period beginning on the date of the act of unlawful of discrimination and ending on the date of calculation. For the purposes of both awards the date of calculation is 18 June 2020 being the date of this Judgement.

266. Where the Tribunal considers that a serious injustice would be caused, if interest were to be awarded for the periods in regulation 6(1) and (2), it may, under regulation 6(3), calculate interest for a different period, as it considers appropriate. The Tribunal received no submission to that effect from either party, and it did not consider it appropriate to do so. The Tribunal cannot alter the interest rate of eight per cent per annum, as that is prescribed by law, and it is a matter in respect of which it has no judicial discretion to vary the interest rate, only the period to which that rate refers.

267. Accordingly, the appropriate rate of interest is eight per cent. The mid-point is 28 December 2019. The Tribunal orders the respondent to pay the clamant the additional sum of **£272.96** representing interest on the claimant's total loss of earnings of £7,154.47, calculated by reference to the mid-point between 7 July 2029 (change to the claimant's contract of employment) and 18 June 2020 a period of 347 days. The mid-point is 174 days. **The Tribunal's calculation is £7,157.47 x 0.08 x 174/365 days = £272.96**.

268. Further the Tribunal orders that the respondent shall pay to the claimant the additional sum of interest upon the injury to feelings award of £11,000 calculated at the appropriate rate of interest of eight percent for the period between 7 July 2019, the date the claimant's contract of employment was changed and 18 June 2020 being the date of this Judgment, a period of 347 days. **The Tribunal's calculation to is £11,000 x 0.08 x 347/365 days =**

£836.60. Adding the two interest amounts together the total interest payable is **£1,109.56**.

Employment Judge: S MacLean
Date of Judgment: 18 June 2020
Entered in register: 1 July 2020
And copied to parties