



EMPLOYMENT TRIBUNALS

Claimant: Miss J Dennis

Respondent: Lush Retail Ltd

Heard at: Port Talbot Justice Centre

On: 18, 19, 20, 21, 22, 25 and 26 January 2021

Before: Employment Judge S Moore
Mr B Roberts
Ms Y Neves

Representation

Claimant: In Person

Respondent: Mr G Self, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is follows: -

1. The Claimant is not a disabled person in accordance with Section 6 of the Equality Act 2010 ("EA2010") in relation to the following impairments, obsessive compulsive disorder, borderline personality disorder and post-traumatic stress disorder.
2. The Claimant's claim for direct discrimination because of disability contrary to Section 13 of the Equality Act 2010 fails and dismissed.
3. The Claimant's claim for discrimination arising from disability contrary to Section 15 of the Equality Act 2010 fails and is dismissed.
4. The Claimant's claim for failure to make reasonable adjustments contrary to Sections 20 and 21 of the Equality Act 2010 fails and is dismissed.
5. The Claimant's claim for harassment related to disability contrary to Section 26 of the Equality Act 2010 fails and is dismissed.

REASONS

Background and Introduction

1. The ET1 was presented on 7 October 2018. The Claimant brought claims of disability discrimination and has at all times been a litigant in person. The claims were clarified at a Preliminary Hearing with the assistance of an ELIPS representative in November 2019 and it was clarified that the claims being brought were Section 13 direct discrimination, Section 15 discrimination arising from disability, Section 20/21 failure to make reasonable adjustments and Section 26 harassment relating to disability.
2. The claim was heard at Port Talbot Justice Centre as a hybrid hearing with the Claimant and the Respondent's representatives attending in person and the majority of witnesses attending by CVP. There was an agreed bundle split into 5 sections (A) to (E) which changed throughout the course of the proceedings due to additional documents being added by both the Claimant and Respondent.
3. The Tribunal heard evidence from the following witnesses; the Claimant (in person), Ms Ramirez Marinello (in person), Mr T Mattock (in person), Ms L Jones (by CVP), Ms R Gauntlett (by CVP), Ms V Gourlay (by CVP), Ms C Llewellyn (by CVP), Mr D Rice (by CVP), Ms R Jacob (by CVP), Ms C Bluer (by CVP), Mr J Baxter (by CVP), Mr C Reardon-Davies (by CVP), Ms J Harding (by CVP) and for the Respondent Mrs S Hooper (in person) and Ms C Mosey (in person).

Reasonable adjustments

4. The following reasonable adjustments for the Claimant were in place throughout the hearing: regular and frequent breaks, extra time provided, attendance in person of the Claimant's therapist, assistance with wording of questions when cross-examination was taking place, adjourned for 1 day to enable the Claimant to consider new documents disclosed by the Respondent totalling 55 pages, offered different seating arrangements and arrangement of transfer of hearing in person from Cardiff to Port Talbot Justice Centre.
5. The Claimant was also permitted to bring a notebook and a pen into the witness stand and also had a pain clicker.
6. On the first day of the Tribunal the Respondent conceded actual and constructive knowledge of the Claimant's conceded disabilities (anxiety and depression and fibromyalgia) from 3 November 2017. The Claimant's other impairments relied upon remained in dispute and for determination by the Tribunal namely hypothyroidism, asthma, obsessive compulsive disorder, borderline personality disorder and post-traumatic stress disorder.

Issues and Claims for determination

7. The claims before the Tribunal were agreed to be as set out in the List of Issues contained in the Case Management Order of 19 November 2019. These were as follows:

8. Time limit / limitation issues

- a. Were the Claimant's complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA")?
- b. Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred.
- c. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 11 June 2018 is potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it.

9. Disability

- a) The Respondent conceded that the Claimant had the following impairments, fibromyalgia, anxiety and depression at the relevant time. The following conditions remained in dispute: hypothyroidism, obsessive compulsive disorder, borderline personality disorder, post-traumatic stress disorder, asthma.
- b) Do those impairments that remain in dispute have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- c) If so, is that effect long term? In particular, when did it start and has the impairment lasted for at least 12 months?
- d) is or was the impairment likely to last at least 12 months or the rest of the Claimant's life, if less than 12 months?
- e) Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

10. EqA, section 13: direct discrimination because of disability.

- a) Did the Respondent treat the Claimant as follows:
 - i) C Mosey sent the Claimant home on at least 7 occasions after Christmas 2017 for not portraying the required image / have enough energy to fulfil her duties;
 - ii. C Mosey followed the Claimant closely when she was with customers, listening in and then criticising the Claimant;
 - iii. C Mosey criticised the Claimant for not portraying a professional image (telling her to "stand up straight") and referred to her as lazy and clumsy;
 - iv. (the above are put as direct discrimination claims as it is alleged that Ms C Mosey's alleged conduct was because she did not like employees with disabilities) and;
 - v. Dismissed the Claimant.

b) Was that treatment "less favourable treatment", i.e. did the Respondent treat the Claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

c) The Claimant relies on hypothetical comparators.

d) If so, was this because of the Claimant's disability and/or because of the protected characteristic of disability more generally?

11. EQA, section 15: discrimination arising from disability

a) Did the Respondent treat the Claimant unfavourably as follows (no comparator is needed):

i. Placed her on a PAP;

ii. Forced her to take sick leave;

iii. Reprimanded her for how she interacted and presented to customers and staff (criticised for failing to maintain eye contact, standing in certain positions that looked unprofessional and was clumsy);

iv. Gave rapid and conflicting management instructions (arrangement of pots)

v. Dismissed the Claimant;

b) Did the following thing(s) arise in consequence of the Claimant's disability:

i. Disability related behaviour resulted in a PAP being triggered;

ii. Disability related behaviour resulted in the Claimant failing the PAP;

iii. Inability to meet standards at 11 (a) (iii) and (iv) due to disability related behaviour (anxiety and depression and fibromyalgia)

c) Did the Respondent treat the Claimant unfavourably because of any of those things?

d) If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

e) Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

12. EQA, sections 20 & 21: reasonable adjustments (for disability)

a. Did the Respondent know or could it reasonably have been expected to know the Claimant was a person with a disability?

b. A "PCP" is a "provision, criterion or practice". Did the Respondent have / or apply the following PCP's:

i. a physical feature of the premises namely the kitchen on the second floor and the staff room on the third floor up steep stairs?

ii. A performance management procedure;

- iii. A policy that sickness absence would affect whether an employee passed their probationary period;
- iv. A requirement to attend training out of hours or on days off;
- v. A requirement for the Claimant to work with Ms Mosey as a “Buddy Manager” (noting that the Claimant accepts this was supposed to be Ms Jones but asserts that it was in reality Ms Mosey)

c. Did any put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: she was unable to climb steep stairs, was more likely to fail to achieve required standards within a probationary period, was more likely to have sickness absence, was unable to attend training outside of working hours and having to work with Ms Mosey caused the Claimant significant stress and affected her ability to pass her PAP?

d. If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

e. If so, were there steps that were not taken that could have been taken by the Respondent to avoid the disadvantage? The burden of proof does not lie on the Claimant, however it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:

- i. Adjusted the ground floor area / kitchen area to provide a suitable area for the Claimant to take her break and leave her possessions;
- ii. Adjusted the performance management procedure;
- iii. Adjust / remove the disability related absences when considering the Claimant’s probationary period;
- iv. Conduct training during the Claimant’s working hours;
- v. Provided an alternative “buddy” to Ms Mosey.

f. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

13. EQA, section 26: harassment related to disability

a. Did the Respondent engage in conduct as follows:

- i. Ms Mosey sent the Claimant home on at least 7 occasions after Christmas 2017 for not portraying the required image / have enough energy to fulfil her duties;
- ii. C Mosey followed the Claimant closely when she was with customers, listening in and then criticising the Claimant;
- iii. C Mosey criticised the Claimant for not portraying a professional image (telling her to “stand up straight”) and referred to her as lazy and clumsy?

b. If so, was that conduct unwanted?

c. If so, did it relate to the protected characteristic of disability?

d. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

e. Did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? (Whether conduct has this effect involves taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.)

Applications during the Hearing:

14. The Tribunal also heard and determined the following applications:
15. An application by the Claimant to admit a new witness statement from Mr Joseph Baxter, this was not objected to by the Respondents and permission was given for Mr Baxter to give evidence.
16. The Respondent's application to exclude 3 witness statements of Ms Llewellyn, Ms Bluer and Ms Marinello. In respect of all 3 witnesses none had worked with the Claimant or been employed at the same time as the Claimant. The statements contained a degree of collateral evidence relating to the alleged behaviour of Ms Mosey who was the Claimant's supervisor and against much of whom the allegations were based. The objection to Ms Llewellyn's statement was that it was wholly collateral and did not contain any evidence at all about Ms Mosey's alleged behaviour. The Tribunal after consideration decided to admit the statements with a caveat that whilst the evidence within them was potentially collateral evidence that the Tribunal would consider the relevance and what weight to attach to that evidence when they were reaching their deliberations.
17. On 20 January 2021, part way through the Claimant's cross-examination Mr Self made an application to admit new evidence in respect of documents that had come to his attention as a result of discussing the evidence with the witnesses. Mr Self explained that these documents were feedback logs which had been referenced in the Respondents' witness statements. It had come to light during his discussions with the Respondent's witnesses on 19 January 2021 that they had been sent from the Swansea store to the Respondents HR department at some point in 2018 but they had not then been sent on from the HR department to the Respondents' instructed solicitors. In addition there were several other documents namely some emails. This resulted in an adjournment for the entire day of the hearing as the Claimant needed additional time to review these documents and address the Tribunal on whether she objected to their admission. As a result, the hearing was adjourned until the morning of 21 January 2021. On the morning of 21 January 2021, the Claimant confirmed that she did not object to the admission of the new documents. Furthermore, the Tribunal had reviewed the documents and considered them to be of significant relevance to the issues in dispute in the case and therefore the documents were admitted.

Findings of Fact

18. We have made the following findings of fact on the balance of probabilities.

19. The Claimant commenced employment with the Respondent on 27 September 2017 as a Temporary Sales Assistant (in the lead up the Christmas) in the Swansea store. The Respondent is a major retailer that sells handmade cosmetics for the face, hair and body. Prior to the Claimant starting employment, the Respondent had moved their retail outlet in Swansea to the premises on Oxford Street which was a much bigger store and necessitated employing many more staff.
20. The premises on Oxford Street had three floors. On the ground floor was the retail store and a small area at the rear also containing a disabled toilet. On the first floor was a kitchen and the staff room and training area was located on the top floor. The Claimant was permitted to keep her things on the ground floor and get ready for her shift. There was no space set aside in the downstairs area for staff to take breaks or for a rest area. The Claimant would either climb the stairs for breaks or sit on the stairs. There was a chair available for her to use but it had to be moved from the shop floor. There was no evidence she was prevented from doing this if required.
21. The Claimant's start and finish times were adjusted to accommodate her fibromyalgia and bus times as she travelled from Neath and public transport was limited.

Disability

22. The Respondent had conceded that the Claimant was disabled in relation to the impairments of anxiety and depression and fibromyalgia. The impairments of hypothyroidism, obsessive compulsive disorder ("OCD"), borderline personality disorder ("BPD" also referred to as "EUPD"), post-traumatic stress disorder ("PTSD") and asthma continued to be disputed by the Respondent. The conditions of asthma and hypothyroidism were not relevant to the issues in this claim and therefore we have not made any determination or findings in respect of those two impairments. In relation to the other impairments, we make the following findings.
23. The bundle contained the Claimant's GP notes from the beginning of 2017 until April 2018. It should be noted that there is no entry in relation to OCD, BPD or PTSD over that period.
24. The referrals to consultants between 2009 – 2013 do not mention OCD, BPD or PTSD.
25. The only evidence before the Tribunal in respect of OCD and EUPD was as follows. The Tribunal had sight of a letter dated 26 September 2017 from a Consultant Psychiatrist to the Claimant's GP. There was a summary box at the top of the letter which recorded as follows after the words "Diagnosis":

"Emotionally unstable personality disorder traits, social anxiety/OCD?"
26. Dr Khan went on to set out the following in that letter (relevant parts only quoted):

“She is a 22 year old lady, informed me that she is feeling anxious when she is 'a group. She struggles to cope with people and she believes that they are watching her. She is overweight, no one has passed many comments, but she believes they are looking at her, which makes her less comfortable, anxious and panicky. She is feeling comfortable when she is with close friends. She also informed me she is doing things repeatedly, checking doors, cannot resist.... She also said her mood is fluctuating, hourly based. She said that simple things upset her and she loses her temper, lashes out, slamming doors, no physical aggression.”

27. The only other reference to OCD was in a letter of 29 January 2019 from a different Consultant Psychiatrist in which the Claimant was referred for therapy. The letter stated that the Claimant has a **“diagnosis of EUPD, social anxiety/OCD? and PTSD symptoms”** and had last been seen on 8 November 2018. We found this letter of limited relevance as it fell outside the relevant period for the purpose of determining the Claimant’s disability. This was the first time PTSD was mentioned in the Claimant’s medical notes.
28. The impact statement set out details of the Claimant’s day to day activities the Claimant says are affected by her impairments however, it was not clear, in fact it was not articulated at all as to which impairment affected which activity, for example, the Claimant says that she had frequent confused behaviour, intrusive thoughts, feelings of being controlled or delusions, but it was unclear as to whether that was attributed to anxiety/depression or the other impairments.

Respondent’s customer service standards

29. The Respondent operates a system and focus on what is called “five star” customer service” throughout their stores. This was referred to consistently in documents before the Tribunal and the witnesses acknowledged that this was an important factor and requirement for employment with the Respondent. The Respondent had a prescriptive way of both meeting and greeting customers and the experience that they wanted the customers to have within their stores with the interaction with the sales assistants. It was a required practice that supervisors would record feedback on sales assistants in a feedback log and there were a number of different ways in which feedback would be given. There were different ways of giving feedback in place. One type was “ECC” which stands for explain, change and congratulate. The other type was “RASA” which stood for raise, appreciate, summarise and ask. In addition sales advisers were required to maximise time with customers to take advantage of upselling opportunities. Sales advisers would also be expected to demonstrate products to customers in the store by using slates and bowls to demonstrate the particular product that either the customer had expressed interest in or that the sales assistant could identify could be upsold to the customer.
30. The management structure of the store was as follows. The store manager was Sian Thomas (now Sian Hooper). A number of supervisors reported to Mrs Hooper including Ms Mosey who was newly appointed as a supervisor in late 2017.

Training

¹ (sic)

31. Training was provided in store. This consisted of formal separate sessions and on the job training via feedback from supervisors. The Claimant attended three formal training sessions. These took place in the staff room. They took place outside of normal working hours and were paid. The Claimants evidence was that she had requested more training as had other staff but they had been told the store was over budget for training. The Claimant had to pay for a taxi on one occasion to get home to Neath as the training had finished too late for public transport.

The Claimant's employment – September 2017 – December 2017

32. The Claimant was engaged as a Temporary Sales Assistant to go through the Christmas period as were a significant number of other staff at this time. Within the contract of employment, the Claimant was required to serve a probationary period of 3 months. The probation policy stated as follows:

“During any probation period with Lush your suitability for the role will be assessed. You will receive training and support to reach our expected standards of performance and give you feedback to help you improve. If in the probation period of a new employment with Lush we consider that the role is not working out for reasons of your performance, conduct or other organisational reasons you will be required to attend a probation review where the probation period could be extended or your employment ended based on the information reviewed.”

33. The probation policy provided that an unsuccessful probation review did not include the right to appeal. The probation policy did not specify that sickness absence would be a factor in deciding whether someone had passed the probation period.

34. On 19 October 2017 a member of staff brought to the attention of a Manager, Mr McGabb, that the Claimant is alleged to have used offensive language about Ms Mosey on the shop floor. The Claimant was alleged to have said:

“I'm fucking done with this Chrissy is a cunt” and also the following day “I'm done, thinking of going home, Chrissy is singling me out and has done it 3 times”.

35. The member of staff also told Mr McGabb:

“ever since the new lot [seasonal temporary staff] had been complaining about management they feel like they are being targeted. I offered advice to talk to Gemma, Trainee Manager, or Sian, Store Manager and referred to there being a horrible atmosphere of staff grouping having conversations.”

36. Mr McGabb initiated a fact finding meeting with the Claimant later that day in which he put to her that he had received a complaint that she had said the words noted in paragraph 34 above. The Claimant denied the allegation and said that it was unfair and she was being targeted due to the way that Ms Mosey spoke to her and she was treated differently over her disability. The Claimant was embarrassed as Mr McGabb had pulled the Claimant out of the training session to undertake the fact-finding situation. The Claimant walked out of the meeting mid-way. After the Claimant left the meeting the Claimant requested to speak to Gemma Drodge who was a trainee manager at the time. The Claimant alleged that Ms Mosey was singling her out and Ms Drodge asked for examples. The Claimant said that Ms Mosey had accused her of gossiping whilst serving friends and that Ms Mosey had

told her to hurry up on another occasion and get downstairs when the Claimant had been taking her time due to her fibromyalgia and during a training session everyone was talking and the Claimant had been the only one to be asked to stop talking. She also referred to an occasion on the shop floor where she had been asked to change the bowls by another supervisor called Emily and as she was doing this Ms Mosey snatched the bowl from her and told her it was not her job. This was one of the incidents relied upon as unfavourable treatment for Section 15 claim (see paragraph 11 (a) (iv)). The Claimant agreed Ms Drodge could discuss what had been raised with Ms Hooper and Ms Mosey.

37. We find this was the first time the Claimant had informed anyone within the Respondent that she had fibromyalgia and the first time she raised any issue in respect of Ms Mosey.

38. The member of staff had also told Ms Mosey about what the Claimant had allegedly said about her. Ms Mosey was very upset about the report and asked Mr McGabb to investigate. She reported being unable to sleep the night before and asked for another member of staff to accompany her at a training session the following day as she felt uncomfortable being alone with the Claimant at that training. At this point Ms Mosey had not been aware that the Claimant had fibromyalgia.

39. On 20 October 2017 the Claimant was suspended with full pay pending an investigation into the allegations that had been raised by this member of staff.

40. The Claimant was asked to attend a disciplinary hearing on 2 November 2017. She prepared a four page personal statement for use at that meeting. This four-page letter dealt in the main with the Claimant's complaints against Ms Mosey which had not been raised previously. The Claimant stated she had fibromyalgia and all the staff knew to the best of her knowledge. We quote the following extract as it is relevant to one of the reasonable adjustments claims regarding the stairs: She stated:

“when the session moved on we were told we needed to go downstairs for the candy cane report shop activity outside the store. I fully recall the moment I struggled to stand off the stool in the staffroom as my body seized up and was in agony from forcing my body into an uncomfortable position for so long in fear of drawing more attention to myself. I have fibromyalgia and all the staff are aware of this from the best of my knowledge.”

41. The Claimant went on to deny the allegation and stated she was appalled and offended at the use of language she was accused of saying. The Claimant went on to say as follows:

“I sincerely apologise to Chrissy if she has mistaken my anxieties and nerves around her and they as a result were misread to be negative vibes and emotions. It has profusely upset me to think Chrissy was so upset by this that she felt uncomfortable to do training as normal and to believe I assume this of her. I have looked up to Chrissy before I started at Lush and I was beyond excited to work alongside her which is why it has affected me so much. She is a bright and bubbly person on the shop floor and my anxiety around her does not reflect the way I feel about her.”

42. The Claimant also mentioned the issue with the bowls which is now advanced as unfavourable treatment under her s15 claim. Her letter further stated:

“The only recollection of seeing Chrissy on that shift was after Ellie asked me to change the demo bowls with fresh water. Chrissy hurried over to me halfway through making me jump with the bowls in my hand and said something on the lines of “no no you’re not allowed to be doing this that’s not your place or job” once I explained Ellie had asked me to do it she said “oh ok then” and left it wasn’t a big deal just a lack of communication.... I went home feeling happy and positive about the day like usual.”

43. Following disciplinary hearing on 2 November 2017 the manager concerned decided that there would be no further action on the basis he concluded there was no evidence either side. He recommended a mediated conversation between the Claimant and Ms Mosey. The Claimant was asked how she would like to have feedback from management and if there was a different way it could be done. The Claimant responded that Ms Mosey was straight to the point and acknowledged that she misread it quite a lot and this had caused the tension. She described all the feedback so far as “great” and she said that it was definitely herself that needs to understand the feedback and she knew Ms Mosey was not doing it to upset her or for wrongdoing.

44. The Claimant accepted she had made these comments in cross examination but explained she had only done so due to her various impairments that led her to say the comments but that they were not genuine and had been said to please the manager.

45. A mediated conversation took place between the Claimant and Ms Mosey on 16 November 2017. There were no notes of this meeting.

Health declaration

46. Following this incident, the Store Manager, Mrs Hooper met with the Claimant on 2 November 2017 to complete a health declaration form used by the Respondent to gather information to ensure they were offering the right support. The Claimant described her condition and prognosis as hypothyroid disorder, clinical depression, PTSD, high functioning anxiety, borderline personality disorder, panic/anxiety attacks, asthma, OCD, fibromyalgia, auto-immune disease. Under restrictions and limitations, it was noted that stairs could often cause pain/affect chest and lifting items that are heavy. The allowances and procedures that were recorded were that someone would assist the Claimant in changing the demo bowls, she should communicate with staff or a supervisor if she had shortness of breath and could have a short break or time to take medications and take more time between customers. It was agreed that the Claimant could use her digital pain reliever frequently on shift to prevent her spasms. This form was signed by the Claimant and Mrs Hooper.

Gift given to the Claimant

47. There then followed nothing of any note until what became referenced as the gift incident.

48. At the beginning of January 2018, the Claimant had been provided with a gift from the management team specifically Mrs Hooper and Ms Mosey. The Claimant had posted a picture of the gift on Facebook on 2 January 2018 which included a photograph of the products she had been given and the letter that had been written by Ms Mosey although it was signed from the Lush Management Team. The letter read as follows “**Jodie, here is a gift from your management team to say thank you for all your hard work this Christmas. You have been leading by example on shop floor coming in with a fantastic attitude and always given 5-star customer service. Keep on smiling and don’t let anyone get in the way of your dreams.**”
49. The gift and message were intended to encourage the Claimant to apply for a permanent role as an incident had happened which the management team had been informed meant that the Claimant was considering not applying for a permanent role. The Claimant described the job as her dream role and it was clear to the Tribunal that she had a genuine passion for the job and products.
50. This incident was as follows. The Claimant had become friends with an individual who also worked as a sales assistant called Nic Fitton.² At a party, wholly unrelated to the Respondent, there had been an incident where Nic Fitton had thrown a glass of wine over the Claimant. The Claimant told the Tribunal that Nic Fitton and a number of other individuals who worked at the store had subsequently visited the Claimant at her home on a particular date which was the anniversary of something very distressing to the Claimant and the Claimant believed that this visit had been done deliberately and maliciously to upset the Claimant. As a result of this incident between the Claimant and Nic Fitton it was reported to the management team that the Claimant was considering not applying for a permanent post. Mrs Hooper was extremely upset to hear this and discussed it with Ms Mosey and they wanted to give the Claimant the gift to persuade her to apply for a permanent role.
51. It was the Claimant’s understanding at the time that the intention of the gift was a good one. She posted on her Facebook page that she had kept the photo back until she could find “**some beautiful words to write but was still speechless**”. She described Mrs Hooper and Ms Mosey (in reference to the management team) as “**such a beautiful wonderful bunch of human beings so she had to share.**”
52. Subsequently, although it is not clear when, but in the course of these proceedings, the Claimant was informed by Ms Gourlay who was a temporary supervisor at the Swansea store in 2017/18, that the reason the gift had been given to the Claimant was not with good intention. The Tribunal heard evidence from Ms Gourlay. Her witness statement was extremely critical of management at the Swansea store although focused in the main about her employment with the Respondent.
53. Specific to the issues in this claim, Ms Gourlay told the Tribunal that, after hearing about the Claimant and Nic Fitton’s friendship ending, Ms Gourlay asked Mrs Hooper and Ms Mosey what the gift was all about and was told that Ms Mosey suggested getting the Claimant something for no longer

² Ms Fitton was due to give evidence for the Claimant and a statement had been exchanged but Ms Fitton did not attend to give her evidence.

associating with the staff member (Nic Fitton) and this resulted in them putting together the gift pack. Ms Gourlay claimed that she was later told by Ms Mosey if they could get the Claimant to share anything she had heard they might have more sway within the workplace from Ms Mosey's side of the argument in relation to Ms Fitton.

54. Mr Self asked Ms Mosey about this in supplementary questions. Ms Mosey completely denied this had been the motivation
55. Attached to Ms Gourlay's witness statement was a series of Facebook Messenger exchanges between Ms Gourlay and another member of staff. It transpired that Ms Gourlay had also applied for the trainee manager role that Ms Mosey had successfully applied for. In the messages Ms Gourlay described how she felt frustrated by this decision as she had felt that she had been groomed for the role and told things would happen, but that she did not feel frustration towards Ms Mosey but towards management in general. In this exchange with this other member of staff Ms Gourlay referred to Ms Mosey as a "knob" and the other member of staff called her a "twat". Ms Gourlay also referred to Ms Mosey as a "psychopath" and stated that "everyone was scared of her" and that Mrs Hooper would not do anything [about Ms Mosey]. Ms Gourlay also referred to another witness in this hearing (Ms Leah Jones) as follows: "**Leah used to lick Chrissy's ass so I'm surprised about that**" in relation to Ms Jones apparently due to be leaving.
56. It further transpired in evidence that in fact Nic Fitton had been given a final written warning by an independent manager following an independent investigation for bullying Ms Mosey. The Claimant accepted that Ms Mosey had never asked her to provide any information about Nic Fitton as a result of that investigation or any other investigation. We therefore had to determine what the motivation and intention was behind the Christmas gift and we find that the reason was as put by the Respondent because the Claimant had been upset about behaviour from work colleagues/friends and had been considering not applying for a permanent position. We do not accept the evidence of Ms Gourlay as we consider that evidence to be implausible and Ms Gourlay had animosity against Ms Mosey. Had Ms Mosey wanted to in some way orchestrate a position where the Claimant would be on her side in an investigation against Ms Fitton it would surely have followed that the Claimant would then have been asked to have given information or be a witness in the investigation particularly given that the managers knew about the behaviour of Nic Fitton' towards the Claimant at the party.
57. In the feedback log up to Christmas there was only one negative piece of feedback recorded from Ms Mosey to the Claimant on 14 October 2017 this was in relation to the occasion where Ms Mosey had felt that the Claimant had spent too long on a consultation with her neighbours (an hour and a half). There was further feedback on 16 November 2017.
58. The Claimant's case was that bullying and harassment continued from Ms Mosey from the time that she started as a Christmas temp all the way through to the end of her employment. There was no evidence to substantiate these allegations indeed the evidence suggested that the Claimant had had a good relationship with Ms Mosey (see findings at

paragraphs 41, 42 and 51 above). We find that this did not happen. The Claimant accepted that she could not give any examples and repeatedly said she had told multiple people that she had made complaints. She referred to the incident involving the “C” word as the first of three attempts by Ms Mosey to get her sacked as she did not like her even though it was accepted the complaint had been made by a third party. Under cross-examination the Claimant’s evidence was that Ms Mosey and the third party who had brought the allegation to the manager, conspired to make this incident up and get the Claimant the sack. There was no evidence to support this. Even after this allegation had been made and the Claimant made allegations against Ms Mosey, Ms Mosey encouraged the Claimant to apply for a permanent position which the Claimant did so and succeeded and was appointed in part by Ms Mosey.

Offer of a permanent role

59. The Claimant’s temporary role as a Christmas Sales Assistant was due to terminate on 31 December 2017. On 4 January 2018 the Claimant was confirmed as having a permanent role as a sales assistant on 18 hours a week commencing on 10 January 2018. The letter to the Claimant informed her that this was a new position on an initial trial probation period of 3 months during which time the suitability of the role would be assessed and the right to reserve the trial probation period was included in order to assess suitability. The letter was from Mrs Hooper and Ms Mosey.

60. The Claimant was asked about this in cross-examination. It was put to her that Ms Mosey would not have kept, or not have wanted to keep the Claimant on or give her the permanent role if she disliked her and the Claimant’s evidence was that she was kept on in the hope that she would provide evidence against Nic Fitton. The Claimant believed this was an ulterior motive. We reject this for the reasons we have outlined above in paragraph 56.

Events from January 2018

61. Around this time the store manager, Mrs Hooper had been also diagnosed with fibromyalgia and was taking a fairly significant amount of time off, this meant that the store was being managed either by interim managers brought in from outside of the region or by the relatively newly appointed trainee managers within the store including Ms Mosey.

62. The next feedback on the feedback log following the Claimant being provided with a permanent contract was on 15 February 2018 where Ms Mosey is recorded as noting that the Claimant had been chatting on the shop floor and had asked her to stay customer focused. It is recorded that Ms Mosey noted an action to speak to Mrs Hooper about concerns as to how the Claimant had feedback on that occasion.

63. On 17 February 2018 the Claimant was sent home early by Ms Jones as she was experiencing a fibromyalgia flare up.

64. On 21 February 2018 the Claimant applied to join a training team which was headed up by Ms Mosey. It was put to the Claimant that if she had such

major issues with Ms Mosey she would not be applying to join her team. The Claimant's explanation was that she was desperate to be friends with Ms Mosey and wanted her to like her and have her approval and therefore if becoming part of the training team would make it better because she loved her job. She was unsuccessful in her application.

65. On 22 February 2018 there is a record in the feedback log by a supervisor called Ellie. She recorded that the Claimant was upset at the back of the store after receiving direction from Ms Mosey and then talking to another member of staff. Ellie records that the Claimant said that Ms Mosey had **"had a go and shouted at her."** Ellie records in the log that Ms Mosey would not have shouted and would not have had a go she was just giving direction and it is recorded the Claimant then agreed that Ms Mosey had not shouted and she had not meant it badly she had just taken it badly because of her anxiety. When the Claimant was asked about this in cross-examination, she explained that the reason that she had agreed with Ellie that Ms Mosey had not shouted and had not meant it badly was that Ms Mosey was gaslighting the Claimant and this was a common practice. The supervisor called Ellie recorded in the notes that she needed to speak to Mrs Hooper about the Claimant not taking direction well from Ms Mosey. The Claimant asserted during cross-examination that Ellie was part of a management clique that supported Ms Mosey in bullying and that management were instructed by Ms Mosey to send the Claimant home. She also asserted that a manager called Liz was part of a bullying group, this was in reference to being asked about an entry in the feedback log on 8 March 2018 where Liz had recorded that the Claimant was hanging around by the tills when customers needed to be approached and that she did not feel she took the feedback from her very well with body language becoming very closed.
66. There is an entry in the feedback log on 13 March 2018 from a manager called Natalie where it is recorded that the Claimant was given a nudge on body language not as feedback as the Claimant had been using an iPad and leaning against the wall, she was asked to stop leaning as it was felt to be bad body language.
67. On 15 March 2018 Natalie conducted a probation check in with the Claimant. The Claimant reported she was feeling anxious around coming to work due to inconsistent feedback. The Claimant was reminded that if she was not actively working towards goals her probation might be extended or brought to an end.
68. There were other examples of other supervisors giving the Claimant feedback where the Claimant did not react well to the feedback, for example there was an entry on 17 March 2018 by Mr Baxter. He records that when the Claimant was asked not to chat to other sales assistants and focus on a social media post she had been given she did not seem to take the feedback well and became visibly unhappy. On the same day Natalie also recorded that when she prompted the Claimant to check in with supervisors when returning to the shop floor she responded negatively and said she was stressed and anxious and was being told different things by different people.
69. On 17 March 2018 a meeting took place between the Claimant and Ms Jones. Ms Jones accepted under cross-examination that what she had written in the feedback log at the time was accurate. The feedback log

records that she asked the Claimant to join her in a coaching meeting so that goals could be set in regard to the Claimant not accepting feedback from other supervisors. The Claimant became very upset and was crying and went to the bathroom and had an anxiety attack. The Claimant informed Ms Jones that she had become very upset as the information in the feedback was a lie and that she did take feedback well. She reported to Ms Jones that she was unhappy with Ms Mosey's feedback, felt targeted, the feedback was mean and makes others feel the same way. The Claimant informed Ms Jones that she had a meeting with Mrs Hooper and that she was aware of what was happening. This was not in fact the case, there had been no approach to Mrs Hooper and no request for a meeting. The Claimant also went on to say that she had informed Liz, Joe, and Ellie of what was going on and that herself and others were considering contacting HR to put in a complaint and she had already reported Ms Mosey. This also was not the case, there had been no report to HR about Ms Mosey by the Claimant at this stage and there was no evidence that the other staff cited by the Claimant had made any complaint against Ms Mosey. Ms Jones sent the Claimant home after this meeting.

70. Ms Jones offered the Claimant the option to have a shift swap so that the coaching meeting that had not ended up taking place could take place. Ms Jones spoke to Mr Baxter and asked him about what the Claimant had said about having discussions about feedback and Mr Baxter told Ms Jones that discussion with the Claimant had not happened in the way the Claimant had claimed.
71. We had sight of the notes of a coaching meeting that took place between Ms Jones and the Claimant on 22 March 2018. The notes ran to 7 pages and it is apparent from the notes that Ms Jones made extensive efforts to engage the Claimant in deciding what her goals would be based on the feedback log and organised a plan of how to get there. Ms Jones asked how the management team could support the Claimant in achieving goals and the Claimant said that she would like to be kept an eye on to make sure she was doing it and also be given feedback. She informed Ms Jones when she was asked if there was any training, she would need that it was "just a me thing" and she needed to just do it. At this point the probation end date was 10 April 2018. One of the outcomes of the discussion was that it would lead to lots of feedback from management. Ms Jones checked with the Claimant that if that was OK and she agreed. Ms Jones reiterated that the feedback would be from all members of management to which the Claimant responded, "yeah it will have to be" and the notes record that she was visibly upset. Ms Jones asked if there was a way that they could give feedback that would help the Claimant and she said there was not and Ms Jones recorded that they would give feedback in ECC. Ms Jones offered to adjust the way that feedback is given but made the point that if the Claimant did not tell them they could not adjust and help to which the Claimant said "**what is the point?**". Ms Jones also discussed RASA feedback method with the Claimant.
72. The same day (22 March) there was also a return to work interview conducted by Ms Jones. Ms Jones checked that the Claimant was aware of the Health Assured Organisation and how to contact them and this was circled as 'yes' on the form.

73. Following this the Claimant was off sick again on 24 March 2018, the return to work log was again completed by Ms Jones, the reason for absence was recorded as “fibromyalgia and the Claimant has had aches all over her body and unable to get out of bed since yesterday”. The appropriate adjustments on the form recorded were to be more patient with the Claimant when giving feedback. On 27 March 2018 a return to work meeting was conducted by Ms Jones. It was recorded in the feedback log that the Claimant informed her that Ms Mosey had “had a go at her.” Ms Jones offered to have a mediated chat with Ms Mosey and the Claimant but the Claimant refused citing one that had happened 6 months previously and stated that nothing had changed and that Ms Mosey hated her. The Claimant informed Ms Jones that she had wanted to put in a complaint with Mrs Hooper a few weeks before but her anxiety had got the better of her and that another member of staff was going to also come in that day and they were going to put a joint complaint in against Ms Mosey. Ms Jones reiterated that the Claimant could contact Health Assured but the Claimant stated she had not done so as she was too anxious. There was no evidence of any complaint being lodged with Mrs Hooper following that exchange.
74. On 3 April 2018 there was a further coaching meeting with Ms Jones recorded in the feedback log. The coaching plan was extended to 24 April 2018 to enable the Claimant to have more time to get feedback and work on the goals as not all goals were currently being met. It was recorded that the Claimant was happy with this. On the same day the Claimant was asked to meet with Mrs Hooper accompanied by Ms Mosey and Ms Gauntlett. Mrs Hooper expressed concern that the Claimant’s performance had deteriorated over the past month. The Claimant requested a conversation about her health and anxiety she was feeling. The Claimant was informed that her probation hearing was coming up and it was expressed that she was not currently at a level where she would pass probation. The Claimant said that she liked the feedback in the ECC format. Mrs Hooper told the Claimant that management needed to give her feedback but sometimes feel reluctant to do so because of her reaction and they were looking to develop her and not upset her. Mrs Hooper offered the possibility of the Claimant dropping her contract to a temporary basis when her health requires it.
75. On 5 April 2018 a probation review meeting took place. Present were Mrs Hooper, the Claimant and a note taker called Natalie Lloyd. We had sight of the notes. The Claimant is recorded as saying in the notes she agreed the feedback log referenced 3 April 2018 was a true representation. The Claimant talked about brain fog³ and her anxiety. Mrs Hooper put together an action plan with the Claimant. There were 5 actions recorded namely working on feedback from all members of management, steps of selling, shop floor awareness, working on reducing absences and participating in check-ins. It was agreed that the Claimant had to work on developmental feedback from all members of management to improve performance and that this would be measured by the feedback recorded logs. It was also confirmed that Mrs Hooper would make a referral to Health Assured. The probation was extended to 10 June 2016 to give the Claimant the opportunity to meet the standards. The Claimant was informed that if she failed to meet the conditions, she could receive 48 hours’ notice to terminate her employment. This was confirmed in a letter of 10 April 2018.

³ The Occupational Health report advises this is a symptom of fibromyalgia

Incident on 7 April 2018

76. On 7 April 2018 there was an incident between the Claimant and Ms Mosey. Ms Mosey was operating a check-in with the Claimant and two other members of staff about different 'traffic light' customers. During the check-in the Claimant was not participating, after which Ms Mosey asked the Claimant if she could give her feedback to which she agreed. Ms Mosey asked the Claimant if she could tailor the focus to make it more engaging. The Claimant was recorded as saying no, that she felt anxious. Ms Mosey asked if she would like to go home and the Claimant said she would not. Later that shift Ms Mosey fed back to the Claimant that she had spent too long on a consultation and missed several other customers which meant they had not received their 5-star process. This took place off the shop floor and Ms Mosey asked Mr Baxter to be present. The Tribunal heard evidence from Mr Baxter. He described Ms Mosey as seeming agitated and displeased with the Claimant's consultation and criticised the Claimant for the amount of time she had spent with the customers. However, Mr Baxter had confused this incident with a later incident on 26 April 2018 which we set out below. It was however common ground that following this interaction the Claimant had a panic attack and was sent home by Ms Mosey. The return to work form of the same day, which was partially completed by Ms Mosey records that Ms Mosey sent her home following an anxiety/panic attack.

77. Ms Mosey had requested the Claimant to go to the office because she was having a panic attack within the vicinity of the shop floor and she felt she had a responsibility for the shop to balance and also to get the Claimant to a safe space while she was having a panic attack rather than on the shop floor in a distressed state.

78. Both Ms Mosey and the Claimant became upset when discussing this incident during the Claimant's cross examination of Ms Mosey. Ms Mosey told the Tribunal she felt bullied by the Claimant and had cried after the incident but had to return to the shop floor as she was the responsible manager. Ms Mosey felt she could not get anything right when it came to dealing with the Claimant and had tried very hard.

79. Following this shift the Claimant wrote to someone in the Respondents HR team called Jen McAllister. The Claimant sent a 21 page email to Ms McAllister and referred to the shift on 7 April 2018 as being one of the most horrific to have happened. In summary the email stated:

- The Claimant was terrified of going back to work and that everything she had achieved in the 6 months at the store had been erased in the last month.
- Words could not express how incredible Sian [Mrs Hooper] is as a human being and how inspired she was by her.
- Part of the reason she had not passed probation was not accepting feedback and although she loved having feedback her anxiety had been getting worse and she felt like she was being bullied.
- The Claimant had given a notebook to Ms Mosey that she had written about her symptoms.

- The Claimant said that she told Ms Mosey she was brain-fogged with her anxiety but was cut-off and told if she was not OK within 15 minutes, she would be sent home. (This contradicted Ms Mosey's record in the log which stated that she had offered to send the Claimant home)
- When Ms Mosey asked the Claimant to go up to the office and the Claimant said she had a panic attack, was hyperventilating and begging Ms Mosey to stop. Ms Mosey sent her on a 15 minute unpaid break.

80. Ms McAllister replied to the Claimant on 11 April 2018 and suggested that her manager or the Lush Support Team could offer support with the situation she was in. Ms McAllister also referred the Claimant to the People Experience Team and provided their email. Ms McAllister also provided her with a telephone number for a counselling line called Employee Assistance Programme. The Claimant replied to Ms McAllister later than day. She informed Ms McAllister that she had been originally hesitant on talking to Mrs Hooper again purely for not wanting to be an "added pain". She stated that she was much more confident on it now and that she would send her an email tomorrow and knowing that People Experience exists was incredibly helpful. Although she had absolute faith in Mrs Hooper she thought sending them an email to keep them informed of the situation would make her feel more relaxed. She stated that she felt a huge weight lifted off her shoulders.

81. On 16 April 2018 Ms Jones recorded an informal chat with the Claimant in the feedback log. It would appear that a meeting had been arranged with Mrs Hooper but as the Claimant had not responded to an email it was not going ahead. The Claimant told Ms Jones she did not know what to do because 'nothing is getting solved and things have been the same for the last 6 months' and nothing had changed. Ms Jones then recorded the following:

"I told Jodie that it's not been for 6 months and everything was fine Christmas time and Chrissy and herself were getting along fine, I then asked if Chrissy was in Jodie's bad fibro box to which she responded yes. Jodie then began telling me about what had happened on Saturday 7 April and that Chrissy was purposely triggering her anxiety and that she wouldn't leave Jodie alone even though Jodie had already told her she didn't have her asthma pump and she couldn't breathe and felt like she was going to die Jodie went on to say how Chrissy was harassing and bullying her and that she doesn't know what to do or if she'll be here after the next 2 months I informed Jodie this was something she needed to speak to Sian about it was out of my depth".

82. Between 16 – 19 April 2018 the feedback log recorded a number of different supervisors giving the Claimant feedback with no resulting issues in the Claimant accepting the feedback.

83. On 19 April 2018 there was a meeting with Mrs Hooper and the Claimant. This had two purposes; to review progress against the performance action plan and to discuss what had happened on 7 April 2018. The Claimant recorded that when she had been sent home, she felt like she wasn't cared or wanted. Mrs Hooper told her that no-one had taken the decision to send her home lightly and it would happen either when someone is not well enough to be working as they have a duty of care to support people and keep them safe or their behaviour and attitude means they are not performing in their role. The Claimant told Mrs Hooper that making people aware of her triggers would help her control her anxiety. Mrs Hooper said

that Ms Mosey had been upset too. The Claimant said that she did not want Ms Mosey to blame herself and that even when someone is trying to be comforting in the middle of a panic attack there is nothing anyone can do. Mrs Hooper told the Claimant she needed to find a way to work with Ms Mosey. It was agreed to put the event behind them and for the Claimant to work on feedback to management and Mrs Hooper agreed to arrange an Occupational Health Report⁴ referral. The Claimant had mentioned to Mrs Hooper that she had a sore ear. She subsequently informed a number of staff that her ear had been injured due to the panic attack caused by Ms Mosey. This did not reflect what the Claimant told her GP. The GP record states that the Claimant had reported a sore ear, raised temperature cold/sore throat which did not corroborate her claims that her ear injury was caused by the panic attack rather the records suggest they were as a result of a cold.

Incident on 26 April 2018

84. On 26 April 2018 a further incident occurred following the Claimant being given feedback by Ms Mosey where the Claimant had rolled her eyes and been described as “deadpan”. After the third piece of feedback, Mr Baxter intervened. He asked the Claimant to come out the back with him and Ms Mosey as the Claimant was not taking feedback effectively or professionally. Mr Baxter recorded that the Claimant had a confrontational reaction and as they moved out the back, she became uncomfortable to deal with, frustrated agitated and walked away while kicking boxes.
85. Mr Baxter accepted that his entries in the feedback log would have been accurate under cross-examination. In regard to the kicking of the boxes he says he was not comfortable he could stand by the log, he said that the Claimant had knocked over boxes in the small space. It was put to him that his log read that the Claimant had kicked the boxes deliberately and he agreed that that was how he had perceived it at the time and agreed that this was unacceptable conduct. Mr Baxter’s evidence to the Tribunal was that the Claimant was not very steady on her feet, especially when stressed, and it was possible to knock things over but he had not witnessed her doing so previously accidentally. Mr Baxter confirmed that Ms Mosey did not force him to send the Claimant home on that occasion (as alleged by the Claimant) and that had been his decision. As set out above in his witness statement he had muddled up this incident with the one on 7 April 2018. This was evident as the trigger event (in terms of the feedback) had been the wrong way around. Mr Baxter’s witness statement differed to his contemporaneous account. It sought to downplay the Claimant’s behaviour over the box kicking. Mr Baxter’s statement stated that the Claimant had “knocked over” the boxes and it was not clear whether this was indeed an intentional act and he could not confirm or deny it to be. He was critical of Ms Mosey for reporting it as an intentional act.
86. Therefore, the contemporaneous log written by Mr Baxter recorded that the Claimant had kicked boxes but his witness statement to the Tribunal recorded that she had knocked over a pile of boxes.

⁴ This was a different referral to Health Assured who could provide counselling

87. Ms Mosey told the Tribunal that she had found the incident very distressing. The Claimant had become quite angry and aggressive and had kicked the boxes intentionally. Ms Mosey believed she had been trying very hard to give the feedback in a way that was acceptable to the Claimant.
88. We find that the Claimant did kick the boxes due to the contemporaneous note of the events recorded it as such. We were also mindful that the Claimant had informed the Consultant Psychiatrist that she was prone to lose her temper, lash out, slam doors. However we do not conclude that it was an intentional act of aggression although we find it could have been seen in that way at the time.
89. Mr Baxter's feedback log from 26 April 2018 records that he had explained to the Claimant how her reaction affected both the shop floor and himself and Ms Mosey. Mr Baxter records that due to the level of distress that the Claimant was showing that he could ethically not let her go back on the shop floor as this would be unfair pressure on her to give 5 star service. The Claimant alleged that Ms Mosey had broken down two sales assistants in 10 minutes and forced them to go home and Mr Baxter records that he informed the Claimant that she had not done so and in fact **Mr Baxter** had made the decision to send both of these people home. Ms Jones also became involved in dealing with the Claimant's behaviour and also recorded a long entry in the feedback log. The Claimant was still insisting Ms Mosey had made two sales assistants cry and forced them to go home even though Mr Baxter had told her this had been his decision. Ms Jones confirmed to the Claimant it had not been Ms Mosey but Mr Baxter. Ms Jones clearly disbelieved the Claimant's allegation repeated to her that Ms Mosey had caused a burst ear drum on 7 April 2018 as she challenged her for not mentioning it on the day. The Claimant referred to Ms Mosey again being in her bad fibro box and agreed that if Ms Jones had directed her in the same way as Ms Mosey she would not have reacted in the same way.
90. Mr Baxter accepted that following the Claimant's dismissal he also experienced distress due to the actions or behaviour of Ms Mosey which resulted in him having to take time off work and attend counselling due to pressure put upon him by Ms Mosey.
91. The Claimant eventually agreed to go home after spending time with Ms Jones.
92. On 28 April 2018 Mrs Hooper met with the Claimant to discuss the incident on 26 April 2018. She told the Claimant she had serious concerns about her conduct and attitude towards feedback and informed her she was not in a place where they would be passing her probation. Mrs Hooper discussed with the Claimant placing her on paid leave pending the Occupational health report based on the discussion they had about her health and the Claimant agreed this was the best course of action.
93. The Claimant was assessed by an Occupational Health Advisor on 10 May 2018. The Advisor stated that in her clinical opinion the Claimant was fit to continue in her current role. She reported that her main concern was anxiety and panic attacks due to what she perceives as a difficult relationship with her Line Manager. It was set out in the report that the Claimant perceived the feedback she received was negative and impacted on her anxiety

resulting in panic attacks on occasions which impacted on her fibromyalgia and experiences of flare up. It records that the Claimant enjoyed her role but was aware her performance had been poor and attributed it to the difficult relationship with the member of the team, namely Ms Mosey and despite mediation taking place the relationship remained difficult and she was losing her confidence. The report also outlined struggles on occasion with lifting but that the Claimant manages with assisted lifting from colleagues and that she also has been given short breaks to administer medication. The Advisor recommended a further meeting with the manager to discuss ongoing concerns which were driving the anxiety, there were no other restrictions other than assisted lifting recommended. The advisor went on to note that it was not uncommon for individuals who suffer from mental health conditions to experience reduced psychological resilience and reduced ability to concentrate and would be likely to impact on performance to some degree as would the fibromyalgia. In terms of the time scale the Advisor stated that she would expect with a sympathetic and supportive environment the impact on the performance may reduce.

94. Mrs Hooper had a meeting with the Claimant on 29 May 2018 to discuss the report. She asked the Claimant how she felt about meeting Ms Mosey as per the recommendations and she replied a mixture of dread and happy. It was agreed the meeting would take place on 7 June 2018, and the Claimant would remain on paid leave until then. It was also agreed her probation would be extended to 3 July 2018 and that her current PAP would have a line drawn and Ms Jones would move it forward.
95. The Claimant confirmed in the minutes of the meeting that she had a copy of the report and was happy with it. This contradicted the Claimant's evidence under cross-examination when she was asked about the report in respect of the claim for failure to make reasonable adjustments in relation to the location of the office and staff room. The Claimant asserted in cross-examination that she had raised this with the Occupational Health Advisor and the Advisor had failed to include it in the report. We find that this was not raised with the Occupational Health Advisor for two reasons, firstly that the Occupational Health Advisor appears to have extensively discussed the situation with the Claimant and specifically dealt with restrictions and other than assisted lifting this was not mentioned whereas if this had been mentioned we find it likely to have been recorded in the report. Secondly that the contemporaneous notes of 29 May 2018 record that the Claimant agreed with the report and was happy with it which she would not have done so had she had the report omitted something that she had discussed with the Advisor.
96. Thirdly that when Mrs Hooper asked the Claimant if she found the Occupational Health experience positive and the Claimant replied that she was the sweetest person ever and asked that to be passed on.
97. A mediation meeting took place on 7 June 2018, present were Ms Jones taking the notes, the Claimant accompanied by Ms Gauntlett and Ms Mosey and Mrs Hooper. The Claimant told Ms Mosey that she had had time off to process how she felt and that she feels bullied. Ms Mosey told the Claimant that she also feels victimised because she does what others do and the Claimant does not react in the same way. The Claimant told Ms Mosey she felt under attack by her and did not like coming to work and also that her

disabilities are being ignored. She also felt she was being stalked on the shop floor and stated, "I need you to read the book". Ms Mosey said she wanted the Claimant to pass her probation and wanted to be able to work together. The Claimant reiterated she felt threatened and bullied by Ms Mosey and Ms Mosey reiterated that she needed to be able to give her feedback. Ms Mosey stated that she felt attacked by the Claimant and the Claimant said that she had put in complaints and nothing had happened and that she was protected by the Disability Act and she knew her rights and no-one was listening to her.

98. At the mediation meeting the Claimant took great offence to a comment that Ms Mosey made that other people have disabilities too. Her and the person accompanying her stood up and walked out of the room. Having now heard about Ms Mosey's personal circumstances we find this comment was made in light of Ms Mosey's own personal circumstances rather than anything relating to the Claimant's disabilities.
99. Ms Mosey told the Tribunal that she absolutely did not hold adverse views against disabled persons. Her husband is a disabled person and she had moved away from her friends and family in Yorkshire to help look after a disabled member of the family and support a severe disability.
100. It was agreed moving forward after extensive discussion about how feedback should be given, after the Claimant commented that she had a relationship with everyone other than Ms Mosey. Mrs Hooper suggested that they should look to work together on a project. Ms Mosey agreed to that suggestion but the Claimant stated that she just wants to keep her head down. Mrs Hooper informed the Claimant that Ms Jones would be taking over her performance review.
101. On 11 June 2018 Ms Jones met with the Claimant to devise a new performance action plan. There was a dispute between the parties about this action plan ("PAP"). All of the contemporaneous documents suggested that the PAP dated 11 June 2018 had been devised by Ms Jones and this was supported by the evidence that we heard from Mrs Hooper and Ms Mosey. The actions changed from the previous plan; the new actions were as follows: Working positively towards building relationship with Chrissy. Specifically, the Claimant was required to 'leave the past in the past and work on the future of building up a relationship between yourself and Chrissie. Take feedback in a positive way, respect Chrissie as an individual and abide by management decisions. The other actions were to work on feedback to improve customer experience and productivity, consultation and product recommendations are on brand for all customers, consistently use steps of selling and open questions, and no personal conversations on the shop floor. Next to the entry working positively towards building a relationship with Chrissy the persons responsible were recorded as the Claimant and Ms Mosey to work on with the Claimant to put into practice. All had a completion date of 2 July 2018. The main difference was rather than work on developmental feedback from all management it focused on improving the relationship with Ms Mosey. Ms Jones informed the Claimant there would be a new "buddy" system and it was agreed that the Claimant would be in a team with Ms Jones and Ms Mosey. The Claimant agreed she would like this as it would give her the opportunity to build a relationship with Ms Mosey.

102. When Mrs Hooper gave her evidence, she stated that she believed she had created the 11 June 2018 PAP with Ms Jones after the mediation meeting and that Ms Jones did not raise any concerns with her about the contents of the PAP. Mrs Hooper's evidence was that it was fair to ask the Claimant to build on a good relationship with Ms Mosey and cited the example that she believed Ms Mosey was willing to change as she had stated she would work on a project with the Claimant but the Claimant had been very unwilling.

103. Mrs Hooper's evidence on the way that the Claimant wished to receive feedback was as follows: Mrs Hooper said the Claimant changed her mind frequently about the type of feedback that she wished to receive and also the arrangements with the feedback. She gave the example that first of all she did not want another person present when she was receiving feedback as she found it intimidating and then she wanted someone else to be present. Mrs Hooper said management had tried to be flexible but the Claimant kept changing her mind which she remarked was OK. Mrs Hooper did not recall the Claimant saying she wanted to make a formal complaint. She agrees that the Claimant definitely raised concerns about her relationship with Ms Mosey and had also raised with her the incident with Nic Fitton and Mrs Hooper offered to deal with it even though it had taken place outside work, but the Claimant was insistent she did not want it taken further. Mrs Hooper said that from the feedback she could see that the same feedback was being given from multiple supervisors about the Claimant and not just Ms Mosey and that she put Ms Jones in place to support the Claimant as they had a good relationship, but still did not see the improvement

104. Looking at other contemporaneous documents around the creation of the second PAP we had sight of the feedback log and an entry made by Ms Jones on the 11 June 2018. This recorded that Ms Jones had conducted a PAP meeting with the Claimant on this date and Ms Jones states as follows:

"today I set up Jodie's new PAP, I signposted that currently Jodie is failing her probation due to her not meeting her job role Jodie agreed."

105. We heard evidence from Ms Jones. Ms Jones confirmed that her witness statement before the Tribunal had been written in May 2019 some 2 years after the events in question. Ms Jones evidence conflicted with that of Mrs Hooper, Ms Mosey and Ms Jones' own entries in the feedback log. Ms Jones told the Tribunal that in relation to the PAP she arrived at work to find that Ms Mosey had already created the PAP and that Ms Jones argued against this as she believed they were not supposed to create a PAP previous to a meeting. She was informed by Ms Mosey that this was OK and something they were allowed to do. She went on to say she proceeded with the PAP going through all the points that Ms Mosey had made and this seemed like an impossible PAP given Ms Mosey and the Claimant's relationship. Ms Jones insisted that this was not an appropriate PAP she would have created but did so as she was told to do so by her manager.

106. We have carefully considered the conflicting evidence between Ms Jones and Ms Mosey and Mrs Hooper and we have concluded that we prefer the evidence of the Respondent in relation to the creation of the PAP

document. The reasons we preferred the evidence of the Respondent are that it matches or is corroborated by the contemporaneous document at the time, specifically the feedback log which Ms Jones accepted under cross-examination was an accurate contemporaneous record where Ms Jones recorded that she had set up the Claimant's new PAP. As well as the minutes of the meeting that we have referred to above where the PAP was discussed between Ms Jones and the Claimant we find that the language used in this discussion does not in any way support the contention that Ms Jones was not the person who had created and driven the areas for improvement with the Claimant.

Events after 11 June 2018

107. Thereafter on 11 June 2018 we saw a significant number of feedback entries by different supervisors but not importantly Ms Mosey and these all seem to be accepted in their reasonable way by the Claimant. A number of different supervisors felt the Claimant had missed opportunities to demonstrate products using slates and upsell the spa.

108. However, on 13 June 2018 the feedback log records the first feedback given by Ms Mosey since the new targets were agreed in the PAP on 11 June 2018, this concerned the Claimant's initial reluctance to approach a customer as he was known to her and she was not sure about whether this was appropriate. Ms Mosey records that the Claimant gave a response with attitude and following Ms Mosey asking to give her feedback using the RASA technique the Claimant rolled her eyes and was recorded as dismissive and starting to get aggressive. Ms Mosey asked the Claimant if she would like a 15 minute break and the Claimant refused and is recorded as becoming angry and argumentative in her response to the extent Ms Mosey insisted that she took a break. After the break there is then a very long log as to what happened next which reflected the management time in dealing with the fallout from Ms Mosey's feedback to the Claimant. The Claimant was visibly upset and insisted that she was ok to stay on the shop floor despite crying and shaking. The Claimant accused Ms Mosey of lying by saying that she had accused her of refusing to serve a customer. This entry in the log was typed by another supervisor called Ellie. Ellie recorded as follows:

"I stepped in and explained that the feedback in my eyes had been justified and that Jodie had asked in previous meetings to have the opportunity to repeat feedback for clarity. We had descended into arguing about the feedback. Once I started talking J [the Claimant] had more positive body language was looking at me and giving me eye contact. I pointed this out to J and she agreed Jodie kept saying she wasn't OK with the lying that this is like before with Chrissy saying she kicked a box out the back.... With the first piece of feedback direction of Ms Mosey that we had had to have a 15 minute break and we were having a long check-in out the back that resulted in arguing. Jodie said that my feedback and everyone else's had been fine and she was happy with it."

109. It is evident from the feedback log that this conversation continued for some time and that the Claimant became very upset and it was suggested that she took an early lunch break and have a longer break to see if she could recommence her shift.

110. There was then some further feedback on 13 June 2018 where Ms Mosey was accompanied by another supervisor called Sarah. It was

recorded in the log that the Claimant accepted this feedback. There were 9 further entries in relation to feedback where the supervisors recorded that they considered the Claimant in summary the supervisors felt that the Claimant was not utilising all of the up-selling opportunities from the customers that she served.

111. On 16 June 2018 Ms Mosey recorded that she attempted to give the Claimant feedback and was unaccompanied when she did so. The feedback involved Ms Mosey considering that the Claimant could have introduced that a product contained Bergamot oil. The Claimant was insistent in the feedback log and indeed in her witness statement that she had told the customer about Bergamot oil. Ms Mosey is recorded explaining she had not heard her say so. The Claimant cut her off, rolled her eyes and told her in an aggressive manner that she had done so and Ms Mosey decided that the Claimant needed to go on a break. The Claimant refused to go on a break and stood in the corridor with her arms crossed.
112. The Claimant went to see the other supervisor on duty called Ellie and requested whether she could go on a lunch break and was looking upset. Both Ellie and Ms Mosey had encouraged the Claimant to go upstairs to take time for herself. This was not an instruction more of a direction as Ellie believed this would be best for the Claimant as there were comfier seats upstairs. There does not appear to have been any acknowledgment or recognition that the stairs were an issue for the Claimant nor was this recorded that the Claimant raised this problem in the feedback log.
113. It was at this point there is again a significant departure in the evidence between Mrs Hooper on this occasion and Ms Jones. According to the feedback log Ms Jones informed the Claimant upon her arrival back from a break that she was giving her notice of 48 hours probation and explained what it was and the Claimant started crying and asked to talk to her. The Claimant was invited into the office by Ms Jones and informed Ms Jones she felt it was unfair she was being sent home. Ms Jones says that she talked the reasons through why she was being sent home and she seemed to understand and calm down. The Claimant then said she would no longer wish to receive feedback from Ms Mosey on her own as Ms Mosey was only nice to her when other people were around and that in the mediated meeting with Ms Mosey she felt that Ms Mosey was purposely triggering things. Ms Jones informed the Claimant these would be discussed in her review and sent her home.
114. Ms Jones's witness statement did not deal with how on 16 April 2018 she came to inform the Claimant that she had 48 hours' notice of a probation review meeting. Mrs Hooper's evidence was that Ms Jones telephoned Mrs Hooper at home on 16 April 2018 after the incident with Ms Mosey and told her things had happened in the store that she needed to tell her about. Ms Jones had told her that the Claimant had shouted at Ms Mosey and been disruptive and her behaviour had deteriorated. They had spoken about her performance and the incident with the Claimant shouting at Ms Mosey and they decided together that there needed to be a probation review meeting and that this had to be brought forward as it had initially been set to be reviewed on 3 July 2018. Mrs Hooper said from this point Ms Jones was in charge of the hearing. Mrs Hooper insisted she had no input on the decision making but her expectation was that the Claimant was not going to be

successful in completing her probation and she had complete confidence that Ms Jones could deal with the situation and furthermore that Ms Jones did have the option to continue with the PAP if there was sufficient evidence she should do so.

115. The Tribunal had sight of a letter in the bundle dated 16 June 2018. The letter was written by Ms Jones and it was accepted by Ms Jones that she had prepared and sent this letter to the Claimant inviting her to attend a probation review meeting on 18 June 2018. The Claimant was notified that if the performance had not met the expected standards the outcome may be that the probation would continue and would be reviewed again before the last date of the probation period or the probation period would be unsuccessful which would mean termination of her employment with one weeks' notice.
116. The 13 and 16 June 2018 incidents were put to Ms Jones in cross-examination. Initially she said she did not recall them and then she said from what I recall I was in the office Chrissy told me what to do. It was put to Ms Jones that she had contacted Mrs Hooper and said it could not go on and that she had instigated bringing forward the probation review. Ms Jones denied that this had been the case. Ms Jones agreed that the situation between the Claimant and Ms Mosey was taking an enormous amount of staff time and effort. When she was asked if this meant things were not getting done on the shop floor, she did not think this was an issue as one of the supervisors could spend time dealing with the Claimant and the other could run the shop floor. This was a theme we observed with a number of the Claimant's witnesses whereby the witness sought to justify a situation with the Claimant that was not a reasonable position to take.
117. Ms Jones also accepted that there was no prospect of the Claimant and Ms Mosey ever coming to a reasonable working relationship. Ms Jones accepted that she had dismissed the Claimant at the meeting on 18 June 2018. It was put to Ms Jones that she could have made her views clear if she did not agree with what she was being instructed to do and Ms Jones claims that she did and she spoke to Ms Mosey but again insisted Ms Mosey told her what had to be done. She did accept that the Claimant had not achieved the PAP. Ms Jones evidence was that feedback is supposed to be helpful but Ms Mosey's feedback was not helpful or proactive and Ms Mosey had acted inappropriately by glaring and shouting across the room at staff. She described Ms Mosey as going from zero to 100 and screaming at another member of staff in front of the whole shop. This had not been contained in her original witness statement.
118. Ms Mosey's evidence was that the only involvement she had had in the probation review was that Ms Jones asked her how to access or find a particular letter on the company computer folders and that she assisted Ms Jones in finding this particular document but that was the extent of her involvement.
119. We had sight of the probation review notes on 18 June 2018. Ms Jones clearly drove the meeting. She carefully discussed the action plan. She put to the Claimant that in relation to the requirement to work on the relationship with Ms Mosey this did not really show in her feedback. She cited that on

two occasions she had been asked to take a break she had refused and not respected management decisions. The Claimant raised why her probation had been brought forward as she thought she had longer also that 3 shifts were not enough to enable her to change her relationship with someone. Ms Jones explained that due to the feedback “we felt it needed to be brought forward”. The Claimant had failed on 4 elements of the probation. The Claimant’s last recorded comment was that 3 days had not been enough; she had been bullied by Ms Mosey and because of Ms Mosey she is coming in terrified. The Claimant’s dismissal was confirmed in a letter dated 18 June 2018. It was not signed but stated it was from Ms Jones. She was paid one week in lieu of notice.

120. We have preferred the evidence of the Respondents witnesses in this dispute of fact between the parties. The reasons are as follows. Ms Jones’s witness statement did not deal with this evidence at all or this particular situation at all in terms of the actual decision to bring the probation forward. The contemporaneous documentation, namely the feedback log and the letter from Ms Jones, corroborates that it was Ms Jones who had decided to instigate that process and we also find that we prefer the evidence of Mrs Hooper in this regard. The evidence of Ms Jones was at all stages, even when presented with sensible and plausible scenarios, tried to deflect, and excuse the behaviour of the Claimant which we found to reflect the general behaviour of the witnesses that were called on behalf of the Claimant.
121. We turn now lastly to comment and make findings of fact in respect of the witness evidence that we heard on behalf of the Claimant. We start by saying that we recognise that it is highly unusual to have heard from the number of witnesses that we heard from in a case of this nature, namely ex-employees and that there was a consistent theme from all of the witness statements that Ms Mosey’s management style, certainly in respect of giving feedback, was deeply unpopular amongst the witnesses that we heard from. However, we have concluded that the witness evidence that we heard needed to be treated with a degree of caution.
122. Firstly, the Claimant told the Tribunal about a WhatsApp group operating amongst all of the witnesses. This was plainly in operation both at the time of the events (albeit some of the witnesses joined the group later) and during the hearing and was referenced several times by the Claimant particularly when Ms Mosey was giving her evidence. Mrs Hooper and Ms Mosey had also been aware of the WhatsApp group during the Claimant’s employment and this had contributed to Ms Mosey believing she was in fact being bullied by the Claimant and the other members of staff active within this group.
123. Secondly, some of the witness evidence was of some relevance insofar as the witnesses could give evidence on events that were in dispute. However, in a number of cases, namely with Ms Jones and Mr Baxter, their evidence contradicted the contemporaneous records that they themselves had completed during the relevant period.
124. Some witnesses had not even been employed at the same time as the Claimant but were prepared to give evidence in the main, complaining about Ms Mosey’s behaviour.

125. Ms Ramirez Marinello was not employed to work at the Respondents store in Swansea at the same time as the Claimant, she started working on 17 June 2019 and worked until 10 March 2020. She told the Tribunal she had learned of what had happened to the Claimant during a conversation with a person in Debenhams although she could not recall this person's name. This person told Ms Marinello all about what had happened to the Claimant and Ms Marinello became interested to know the Claimant and they got in contact through Facebook. Ms Marinello's statement complained about Ms Mosey's behaviour specifically that she gave her feedback which she found to be manipulative and that she had been bullied by Ms Mosey. Ms Marinello raised a complaint with People Experience in January 2020 and was offered a meeting to have a discussion regarding raising a complaint and was sent the Grievance Policy but accepted she never pursued this. Ms Marinello said that after she decided to discuss first with Mrs Hooper. Ms Marinello also called Ms Mosey a 'gas lighter' which was a word that was used in the Claimant's witness statement. Ms Marinello is not person with disabilities.

126. Mr Mattock worked for the Respondent at the same time as the Claimant for a short period between September 2017 and 31 December 2017. He was employed as a Christmas temp and had been promoted to the role of Stock Supervisor. Mr Mattock was initially friends with Ms Mosey and they shared the occasional lift to and from work. There was allegedly an inappropriate incident in the car following which Ms Mosey decided to no longer give Mr Mattock a lift to or from work. Mr Mattock denied any knowledge of any such inappropriate incident. The relevant evidence that Mr Mattock gave was that on a morning in November 2017 he was in the office ordering stock and Ms Mosey and other members of the supervisor team came in who Mr Mattock called "An Inner Circle" to Ms Mosey who were inseparable. Ms Mosey was then alleged to have raised her voice almost to a shout as if to drill it into everyone present and say the following:

"I fucking hate her, I hate her Jodie is a fucking useless, I hate the bitch".

127. He also alleged that Ms Mosey went on to say she did not care about the Claimant's disabilities as she believed she was using it as an advantage not to work and other disabled members of staff shouldn't be there because she believed they were using their disabilities as an excuse.

128. This entire account was refuted by Ms Mosey. This had to be dealt with as supplementary evidence as prior to witness exchange there had been no indication that this allegation was going to be raised. Ms Mosey described an incident in the car with Mr Mattock and after that she would not give him a lift home again. She was unable to say when it happened. The Tribunal were not told about what the incident was but we observed that Ms Mosey became visibly distressed when she was relaying this incident. She vehemently denied Mr Mattock's allegations that we have set out above. She said that she did not do anything about the incident and she kept her head down and she never spoke to Mr Mattock about it again. Ms Mosey said that Mr Mattock was not even a Stock Supervisor on the November day that he is alleged to have heard the comment and therefore would not even have been in the office when it happened. She was asked whether she holds adverse views about people with disabilities and was absolute in her denial (see paragraph 99 above).

129. Ms Mosey explained that when she joined the shop she had worked as a supervisor in the Leeds store which was a training store. Leeds had very high “candy shop”⁵ report with lots of very positive feedback and training on the shop floor. It was a busy store and turned over a lot of money. She was used to very high standards of work and lots and lots of feedback being given. When she started work in Swansea it was a much smaller store with a very different atmosphere with not much feedback at all being given with lots of friendly chatting amongst both staff and towards customers but Ms Mosey’s view was they were not making the most of the chances for customers to have a different more positive experience. She accepted that when they moved to the bigger store that things were going to change and that some staff were looking forward to it and some were very unhappy at the feedback and that they were no longer permitted to chat amongst themselves and just simply put out stock and there would be more customer focus.
130. We have decided that we prefer the evidence of Ms Mosey and she did not make the comments as alleged by Mr Mattock on the balance of probabilities. Mr Mattock’s statement suggested that he had not left the Respondent on favourable terms. He accepted that he had been regularly missing shifts or leaving early. Although he may have had a reasonable excuse for this, he describes that he was not offered a permanent role after the Christmas period and was devastated as he loved and still loves the company and certain members of staff there. Accordingly, this struck the Tribunal as implausible that if his work situation had been made so difficult by Ms Mosey that he would have sought to continue to want to work there and seek permanent employment.
131. Turning now to the statement of Miss Gauntlett. Ms Gauntlett’s statement was employed at the same time as the events involving this claim. Ms Gauntlett’s statement opened with a paragraph describing how the store changed with a dramatic change in management style an easy going, fun loving atmosphere replaced with subdued, anxious, energy stemming from the culture of feedback within the store environment. Ms Gauntlett described the feedback as being “soul crushing” and whilst she accepted that it was for the benefit of the shop and the needs of the shop it undermined the sales assistants and made them feel belittled. She described how she had been told she was wasting company time and should go and be productive and that Ms Mosey’s feedback often left staff feeling upset. Ms Gauntlett complained that after £185 sale Ms Mosey had said the work ‘cool’ and felt that if this large sale had come from a different member of staff the response would have been different. Ms Gauntlett was not a person with disabilities. Ms Gauntlett’s evidence was that she believed the breakdown in the relationship between the Claimant and Ms Mosey stemmed from, in her opinion, a false allegation where a member of staff had reported the Claimant for insulting Ms Mosey. Ms Gauntlett was present with the Claimant on the mediated sessions.
132. Carys Llewellyn. We placed no weight on Ms Llewellyn’s witness statement which was entirely collateral (it did not mention Ms Mosey at all) and complained about her treatment by the Respondent as a person with a

⁵ Akin to mystery customers

disability of sight impairment. We heard that Ms Llewellyn failed her probation and was not offered permanent employment at the store. Ms Llewellyn complained in her statement that she had not been offered extra shifts over the busy Christmas period but agreed in cross examination that she had informed Mrs Hooper that she felt very disorientated when the shop was busy. She also agreed that there had been a discussion and an agreement with the Respondent that the reason she would not be offered the extra shifts was due to safety concerns that she had flagged. Ms Llewellyn accepted under cross-examination she had been offered the Access to Work Scheme but she had refused it as she knew what she needed and she did not need an assessment.

133. Mr Rice was employed at the same time as the Claimant between October 2017 and January 2018. He also had applied for a permanent contract but had not succeeded. He alleged in his statement that he saw Ms Mosey singling the Claimant out on several occasions, once when Ms Mosey said “good morning” just to him and not to the Claimant when they were standing together. On another occasion another supervisor called Sarah told the Claimant off for helping Mr Rice on the shop floor which apparently deeply upset the Claimant. Mr Rice considered this was unprofessional as it took place off the shop floor even though the shop was not open. Mr Rice considered that these incidents pointed to discrimination or victimisation as the Claimant was treated differently to him within the space of 5 minutes. However, this was contradicted by his evidence that he also did not like the feedback that had been given to him by a supervisor called Sarah and that had upset him and made him feel like a victim.
134. We had further statements from Nic Fitton and an anonymous statement but as we did not hear from these witnesses, we did not attach any weight to them.
135. Mr Cameron Reardon-Davies did not work at the same time as the Claimant. He told the Tribunal he had a negative experience with Ms Mosey’s behaviour towards him. This arose from an occasion where some of the sales staff had gone out on a night out and the next day some had been reported as unwell and hungover and unable to attend work. Mr Reardon-Davies had attended work and told the Tribunal he had only drunk one bottle of beer but nonetheless was accused by Ms Mosey of appearing to be too hungover to be working there. Mr Reardon-Davies described this as bullying and on one occasion Ms Mosey had rolled her eyes at Mr Reardon-Davies when he had asked her what to put on an empty display said, “put what you want I don’t care”. He described Ms Mosey as behaving negatively towards lot of different colleagues. There was no evidence that Mr Reardon-Davies had any disabilities.
136. Mr Reardon-Davies had included in his witness statement a screen shot of Ms Mosey’s social media account where she had posted a photograph of her and Mrs Hooper having a miniature gin and tonic just before the first national lockdown in March 2020 and compared this to the rebuke he had received from Ms Mosey in 2017 for being hungover and he felt that this was an incredibly unprofessional act and breach of company policy.
137. Ms Mosey told the Tribunal she found it very disturbing is that Mr Reardon-Davies had taken a screen shot her social medial profile within 24

seconds of it being posted and found it sinister and conclusive of the fact that the WhatsApp group of the witnesses were still in 2020 watching her on social media.

138. Simone Smith worked at the store between October – December 2017. She also complained of two or three times when she had received negative feedback. Also, on one occasion she was rebuked by Ms Mosey after a customer entered a staff area in the shop and began to demonstrate how to make bubbles. Ms Mosey was concerned this had breached health and safety rules.
139. Carrie Bluer worked at the store between November 2011 and October 2017. She worked with the Claimant on one or two occasions. She had previously been a staff trainer. Ms Bluer told the Tribunal she does not identify as a disabled person. Ms Bluer had applied for two roles and been unsuccessful and was placed on garden leave before she left. Ms Bluer was very critical of Ms Mosey's style of feedback describing it as not constructive and alleged she had been bullied by Ms Mosey.
140. Rhiannon Jacobs worked at the store between October 201 and December. She also complained she felt bullied and singled out by Ms Mosey and given negative feedback and was marked down an unauthorised absence for having time off for counselling. Ms Jacobs told the Tribunal she does not consider herself as a person with disabilities.
141. Jayne Harding was employed between October 2016 and June 2018. Ms Harding had a mediated meeting with Mrs Hooper and Ms Mosey. Ms Harding also had issues with the way Ms Mosey gave feedback and alleged that there was a negative stream that amounted to bullying. Ms Harding had then raised a grievance and was placed on a PAP. Ms Harding reported she had been sent home on occasions when she had become upset after receiving feedback.
142. What this demonstrated to the Tribunal was that Ms Mosey's style of feedback was the same regardless of whether the member of staff was disabled.

The Law

Disability

143. The steps that the Tribunal are required to examine in such matters are whether the Claimant has a physical or mental impairment that has a substantial adverse effect and a long-term adverse effect on the Claimant's ability to carry out day to day activities.
144. The substantial adverse effect is one that is more than minor or trivial and a long-term effect is one that has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to last for the rest of the life of the person. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities it is treated as having continued to have that effect if the effect is likely to recur.
145. Section 6 of the Equality Act provides:

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

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

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

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

146. In determining whether a Claimant is disabled the Tribunal must take into account of the statutory guidance on the meaning of disability as it thinks relevant (2011 Guidance on Meaning of Disability).

Direct Discrimination

147. Section 13(1) of the Equality Act 2010 provides that direct discrimination takes place where a person treats the Claimant less favourably because of disability (the relevant protected characteristic) than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

148. **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** held that the Tribunal must consider the reason why the less favourable treatment has occurred. Or, in every case of direct discrimination the crucial question is why the Claimant received less favourable treatment.

149. The key to identifying the appropriate comparator is establishing the relevant "circumstances". In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** this was expressed as follows by Lord Scott of Foscote:

"...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

150. On the burden of proof Section 136 EA 2010 provides:

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

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

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

151. In **Igen v Wong [2005] IRLR 258 (CA)** the guidance issued by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd** was

approved in amended form. The Tribunal must approach the question of burden of proof in two stages.

“The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the Respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the Respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld.” (paragraph 17, per Gibson LJ)

152. **Hewage v Grampian Heath Board [2012] IRLR 870 (SC)** endorsed the guidelines in **Madarassy v Nomura International [2007] IRLR 246 (CA)** concerning what evidence is required to shift the burden of proof. Facts of a difference in treatment in status and treatment are not sufficient material from which a Tribunal could conclude that on the balance of probabilities there has been unlawful discrimination; there must be other evidence.

S15 – Disability Arising from Discrimination

153. Section 15 provides:

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

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

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

154. **Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14** provides the Tribunal should identify two separate causative steps in Section 15 claims (per Langstaff J, then the President of the EAT):

"The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

155. **Pnaiser v NHS England & anor [2016] IRLT 170** sets out the approach to be followed in Section 15 claims (paragraph 31):

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

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15

case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links.

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

(g) The statutory language of section 15(2) makes clear that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

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

156. In respect of S15 (1) (b), the Tribunal must objectively balance whether the conduct in question is both an appropriate and reasonably necessary means of achieving the legitimate aim. In **Birtenshaw v Oldfield [2019] IRLR 946**, the EAT held that the Tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly.

S20/21 – Failure to make reasonable adjustments

157. Sections 20 and 21 of the Equality Act 2010 set out the duty to make reasonable adjustments. In this case, it is the duty arising under S20 (3) EQA 2010. The Tribunal must consider first of all the PCP applied by the employer, secondly the identity of non-disabled comparators (where appropriate) and thirdly the nature and extent of the substantial disadvantage suffered by the Claimant. (**Environment Agency v Rowan 2008 ICR 218, EAT**).

S 26 EQA 2010 – Harassment

Section 26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

- (3) A also harasses B if—
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

158. It is a question of fact for the Tribunal as to whether the conduct complained of occurred. If so, the Tribunal must determine if it had the purpose or effect as set out in S26 (1) (b). The test has subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser has on the Claimant. The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

Conclusions

Was the Claimant a disabled person in respect of the impairments on OCD, BPD and PTSD?

159. The burden of proof rests with the Claimant to show she has the disabilities. We are mindful that there does not necessarily need to be a diagnosis but, in this claim, we have balanced this with the lack of evidence generally in respect of these impairments.

160. The only medical evidence in respect of the impairments of OCD and BPD was a mention of the conditions in the subject matter of the letters from the Consultant Psychiatrists in September 2017 and February 2019. These references were inconclusive as they were referred to with a question mark and the body of the letter did not conclude any such diagnosis had been reached.

161. In relation to the impairment of PTSD there was even less evidence with only one mention in the later letter which was two years after the relevant period.

162. The Claimant's impact statement contained evidence from the Claimant attributing certain impacts of her day to day activities to these impairments but in the absence of any medical evidence to back these assertions we have concluded that the Claimant has failed to discharge the burden of proof in respect of these impairments. The Tribunal are not medical experts. In some cases, we may be in a position to reach conclusions about an impairment from the Claimant's evidence alone, however in cases such as these where a number of complex mental health impairments are relied upon, we do not consider this to be such a case.

EQA, section 13: direct discrimination because of disability.

Did the Respondent send the Claimant home on at least 7 occasions after Christmas 2017 for not portraying the required image / have enough energy to fulfil her duties

163. The Claimant was sent home on five occasions in 2018, 17 February, 17 March, 7 April, 26 April and 16 June. The first time she was sent home was due to a fibromyalgia flare up according to the return to work form later completed with the Claimant and Ms Jones. It was accepted the Claimant had been sent home by management as she was in a lot of pain. On the other occasions she was sent home either by Ms Mosey (once on 26 April), Ms Jones or Mr Baxter. The reason she was sent home on these occasions was that she had experienced panic attacks following feedback and was visibly upset and unwell. There was no evidence the reason was not having the energy to fulfil her duty.

164. We do not find that this amounted to less favourable treatment because of the Claimant's disability. There was no evidence that a non disabled comparator who was also displaying the same behaviour as the Claimant or who appeared visibly upset and unwell would not have also been sent home. Other staff were sent home on occasions – Jayne Harding and Mr Baxter also sent two other members of staff home.

165. It was not less favourable treatment to send an employee home who was unwell and / or visibly upset. We do not find that being sent home was used as a punishment moreover it was actions that a reasonable employer would have taken in line with their duty of care to the employee and for health and safety reasons.

Did Ms Mosely follow the Claimant closely when she was with customers, listening in and then criticising the Claimant?

166. We find that Ms Mosey did behave in the manner described. However, the reason she behaved in this way was not because of the Claimant's disability but because she was a supervisor who was responsible for maintaining the customer service standards expected by her employer. There was extensive evidence that Ms Mosey treated many other staff without disabilities in the same way. Therefore, the treatment was not because the Claimant's disability.

Did Ms Mosely criticised the Claimant for not portraying a professional image (telling her to "stand up straight") and referred to her as lazy and clumsy?

167. There was no evidence that Ms Mosey behaved in this way. There were occasions where the Claimant was given feedback regarding her stance whilst on the shop floor but this was not by Ms Mosey.

The Claimant's dismissal

168. We have concluded that the reason for the Claimant's dismissal was not because of her disabilities but because she failed to meet the performance standards required of her specifically in respect of the actions set in her PAP's. Ms Mosey did not dismiss the Claimant. We reject that there was any discriminatory motive or reason for dismissing the Claimant. We found above that the decision to dismiss the Claimant was taken by Ms Jones. We also reject the contention that Ms Mosey treated the

Claimant in this way as she did not like people with disabilities. We accepted Ms Mosey's evidence as set out in paragraph 99 above that she had no such motive. This was in our judgment corroborated by Ms Mosey's involvement in encouraging the Claimant to apply for a permanent role. Had Ms Mosey has an animosity to the Claimant because of her disabilities we find it implausible that she would have sent her the gift and encouraged her to apply for a permanent role as well as being involved in the decision to offer her that permanent role.

Section 15 – Disability Arising from Discrimination

169. Did the Respondent treat the Claimant unfavourably as follows (no comparator is needed):

a) Placed her on a PAP

170. One of the potential outcomes of a performance action plan was dismissal. Whilst it is also true to say that a potential outcome could have been improved performance and no dismissal, if standards had been achieved, we have concluded that the potential for dismissal amounted to a disadvantage and as such could amount to unfavourable treatment.

171. The Claimant was placed on a PAP in April 2018. We have gone on to consider whether the unfavourable treatment arose because of something arising in consequence of the Claimant's disability of fibromyalgia, anxiety, and depression. It was submitted that the 'something arising' was the Claimant's disability related behaviour and this triggered the PAP. This was corroborated to a degree by the OH report which advised that a reduced psychological resilience and reduced ability to concentrate could impact performance. However the report states the main work related concern was the difficult relationship with the line manager. It was not clear from the report whether the medical advice was that a reduced psychological resilience might lead to difficulties with working relationships but nonetheless the OH report stated that the Claimant's concerns regarding her relationship with Ms Mosey were driving her anxiety and impacting on her conditions and self confidence. The PAP also included an action to work on reducing absences and we know these absences were connected to the Claimant's disabilities. For these reasons we have determined that there was a connection between the Claimant's disability and her placement on a PAP was a consequence of her disabilities.

172. We have gone on to consider whether this treatment was a proportionate means of achieving a legitimate aim. The legitimate aims relied on by the Respondent were managing performance standards of its workforce and the operational need to ensure the efficient running of its shop.

173. We find these were legitimate aims. The Respondent is a retailer focused on customer service and have standards in respect of the 5 star customer service requirements. It is legitimate to require their staff to perform to a required level to deliver those standards. We also find that an operational need to ensure the efficient running of the shop was a legitimate business aim.

174. We also conclude that placing the Claimant on a PAP was a proportionate means of achieving those aims. In particular we have considered the steps that were taken by the Respondent prior to and during the process of the PAP including facilitating referrals to the counselling line, arranging mediation, adjusting feedback and extensive coaching and training. Despite these steps the Claimant's performance had not improved and was in fact deteriorating particularly in respect of her interactions with Ms Mosey. Placement on the PAP was the next step available to enabling the Claimant to achieve the performance standards and was wholly proportionate in the circumstances. For these reasons, this claim fails.

b) Forced her to take sick leave

175. It was unclear whether this referenced the periods where the Claimant was sent home relied on for the direct discrimination claim (see para 10 (a) (i)), or the period in between being referred to Occupational Health and the receipt of the report. This was discussed with the Claimant at the beginning of the hearing as a preliminary issue however it remained unclear to the Tribunal which was relied on. We have therefore addressed both in our deliberations.

176. The Claimant was compelled (on some occasions she had refused) to go home after panic attacks, displaying behaviour or levels of anxiety and pain at work. We do not consider this to amount to unfavourable treatment. We can understand that the Claimant did not want to go home on these occasions and may therefore view it as unfavourable treatment however in our judgment there was no disadvantage or detriment to the Claimant in these actions. Indeed, having regard to the evidence surrounding the occasions when the Claimant was required to go home these were actions that any responsible employer would have undertaken considering the health and well being of their employees. To allow an employee to continue to work when exhibiting such levels of stress panic attacks and pain as the Claimant would not be the behaviour of a responsible employer.

177. As to the period between the Occupational Health report referral and receipt of the report, we did not find that the Claimant was forced to take sick leave. Firstly, she was on paid leave and not recorded as sick. Secondly the Claimant readily agreed to this at the time (see paragraph 92) which cannot therefore amount to being forced to take the leave. Accordingly, this is not factually made out but even if it were, we would not have concluded this amounted to unfavourable treatment. There was no consequence to the Claimant we heard of to her detriment. She did not miss out on any pay or training. The only detriment the Claimant could point to was being asked to remain out of the workplace yet she had agreed to the suggested course of action. We do not consider there was a detriment to have a period of paid leave whilst the employer takes professional advice on the employee's health issues and adjustments to put in place to assist them.

c) Reprimanded her for how she interacted and presented to customers and staff (criticised for failing to maintain eye contact, standing in certain positions that looked unprofessional and was clumsy)

178. We heard no evidence from the Claimant on this other than the feedback she received for her stance which we have dealt with in paragraph 66 above. This did not amount to unfavourable treatment arising in consequence of her disability. It did not form part of the PAP or lead to any detriment.

179. Whilst the Claimant's fibromyalgia may have caused her problems with standings for period of time there was no evidence as to why being asked to stop leaning on one occasion would amount to unfavourable treatment. The Claimant did not raise any issue about it at the time. Further there was no evidence that the supervisor knew or should have known that the Claimant was leaning as a consequence of her disabilities.

d) Gave rapid and conflicting management instructions (arrangement of pots)

180. This was referred to above in our findings of fact at paragraphs 36 and 42. When considering whether this had been unfavourable treatment we have considered the Claimant's own description of the event where she described it as "no big deal" and that she went home feeling happy after the incident. Taken at its highest this appears to have been a misunderstanding between two supervisors. We do not find this amounted to unfavourable treatment. Even if we had, the incident did not arise in consequence of the Claimant's disability but to a misunderstanding between two supervisors.

e) Dismissed the Claimant

181. Dismissal amounted to unfavourable treatment. The issue to consider therefore was whether the dismissal arose in consequence of the Claimant's disabilities.

182. The Claimant was dismissed as she was unable to meet the Respondent's performance standards. No admissions were made by the Respondent as to whether the lack of capability arose the Claimant's disabilities. We found above that placing the Claimant on a PAP was unfavourable treatment arising in consequence of her disability. The issues with the Claimant's performance that resulted in her being placed on the PAP were essentially the same issues that led to her dismissal (save for the inclusion of reducing absences which was removed from the second PAP). We are satisfied that the Claimant's inability to meet the performance standards was as a consequence of her disability for the same reasons as set out in paragraph 171 above.

183. The Respondent relied the same legitimate aims as set out above in respect of the placement on the PAP namely managing performance standards of its workforce and the operational need to ensure the sufficient running of its shop as the legitimate aim.

184. The Respondent had agreed to 'draw a line in the sand' and set a new PAP on 11 June 2018. The action plans changed but not significantly. The key action that the Claimant had to meet was to improve her relationship with Ms Mosey. This changed from the previous requirement which specified the wider management team but this was unsurprising given the very significant difficulties in their working relationship. The Claimant agreed to these actions at her review meeting with Ms Jones on 11 June 2018. After these actions were set, on the very first occasion the Claimant received feedback from Ms Mosey on 13 June 2018 there was an altercation and the situation deteriorated rapidly. The Claimant refused to take a 15 minute break and Ms Mosey had to insist. The Claimant then accused Ms Mosey of lying both on that occasions and brought up a previous occasion where she maintained Ms Mosey had lied. Another supervisor had to intervene (who supported that Ms Mosey's feedback had been reasonable). The Claimant was distressed and had to take an early lunch break and longer break.
185. On the second occasion they worked together, on 16 June 2018, similar events unfolded when Ms Mosey gave the Claimant feedback which resulted in another stand off about a break with the Claimant refusing to go. These events prompted Ms Jones to contact Mrs Hooper and ask to bring forward the PAP review which was not due to take place until 3 July 2018. At the review meeting on 18 June 2018 Ms Jones put to the Claimant that the feedback showed she had clashed with Ms Mosey and this action was not working.
186. The dismissal letter stated that the Claimant had failed on 4 points of the action plan. In addition to the requirement to improve her working relationship with Ms Mosey, the other actions were to work on feedback to improve customer experience and productivity, consultation and product recommendations are on brand for all customers, consistently use steps of selling and open questions. Although there was some evidence the other actions had been not been met, these actions were in our judgment peripheral and not the reason the Claimant failed the PAP.
187. The reason the Claimant failed to PAP and was dismissed was her inability to accept feedback from Ms Mosey and her subsequent reactions to that feedback. The Claimant was unable to accept feedback from Ms Mosey that she would have accepted from anyone else. The Claimant held a deep rooted animosity towards Ms Mosey. This may have been due to the way Ms Mosey delivered feedback in terms of the direct and blunt style but we do not consider that any of the feedback was inappropriate or other than in keeping with the Respondent's requirements for customer service and performance standards. Further, Ms Mosey delivered the feedback in the same way to all staff she supervised.
188. The Claimant articulated herself at the probation review meeting (whilst not using legalistic terms) why she says the Respondent had not used proportionate means of achieving their aim when she objected to the dismissal only three shifts after her return from sick leave and the new PAP being put in place. This aspect of the Respondents case was very carefully considered by the Tribunal. On one hand, it could be argued it this dismissal cannot have been proportionate as it reneged on an

extension of the probation made only one week earlier to extend the PAP to 2 July 2018.

189. The Respondent addressed this point in their submissions. It was submitted that there had already been an extended probation period and substantial input into trying to find solutions to get the Claimant to an acceptable level. Further that the level was not achieved as the Claimant did not want to work to improve her relationship with Ms Mosey. Accordingly, the dismissal was a proportionate means of the legitimate aims.
190. In respect of the legitimate aims we have already concluded they were legitimate. We have balanced the discriminatory effect of the dismissal against the Respondent's legitimate aims and have concluded that the dismissal was a proportionate means of achieving the legitimate aims. Firstly, addressing performance standards. The Claimant had shown she was able to meet these standards when she first commenced her employment. She had performed well and was clearly passionate and enthusiastic about her role. She had successfully obtained a permanent position after Christmas and there were seemingly no real incidents of any note until late February 2018 when her performance began to deteriorate. Initially there was evidence that the Claimant struggled to accept feedback from all supervisors not just Ms Mosey, but for reasons we have not been able to clearly identify, the inability to accept feedback progressed to solely focus on Ms Mosey. Ms Mosey was, in the words of the Claimant, in her "bad fibro box".
191. Ultimately, the Claimant could not meet the required standards for the role. The Respondent engaged in a series of proportionate steps such as extensive coaching and training as well as an extended probationary period, extended PAP and paid time off. The Respondent had sought professional medical advice on how to support the Claimant and whether there were any recommended reasonable adjustments. The recommendations were acted on; there was a meeting as suggested by the advisor and steps were taken to continue ensuring there was a supportive working environment by asking Ms Jones to coach and manage the Claimant. The Claimant did not want to engage in working on a project with Ms Mosey and stated at the meeting she just wanted to "keep her head down". But this did not happen as can be seen from events on 13 and 16 June 2018.
192. Secondly in respect of the other legitimate aim relied upon namely the operational need to ensure the sufficient running of the shop. The degree of disruption caused to the operational running of the shop in managing the Claimant's performance issues was significant. This level of disruption to the running of the store would have continued to be affected as it had been on each occasion since April 2018 where Ms Mosey was supervising the Claimant and it was not proportionate to expect the Respondent to accept that level of disruption to the operation of the business. It was very unlikely that the Claimant would ever be able to accept supervision and management instruction from Ms Mosey and there were no further steps that could have been taken to overcome this and avoid the dismissal. For these reasons this claim fails.

EQA, sections 20 & 21: reasonable adjustments (for disability)

193. The Respondent had or applied the following PCP's:

Physical features of the premises namely the kitchen on the second floor and the staff room on the third floor and these were accessed by climbing stairs.

194. This was not dealt with at all in the Occupational Health Report and no adjustments were recommended. The Claimant never raised it as an issue other than what we would describe as in passing. It was not at any time a pressing matter. The only time it was mentioned was on the Health Declaration form where it was recorded that stairs could cause pain and on a number of occasions the Claimant referred to not wanting to climb the stairs. It was common ground that the Claimant was permitted to use the limited space on the ground floor to store her belongings and get ready for her shift. We find that the Claimant would on occasions have been disadvantaged from the physical features as accessing the staff facilities caused her pain but we are not persuaded that the disadvantage was substantial as we did not hear any evidence that would corroborate the Claimant found it so.

195. We did not hear any evidence from the Respondent the reasonableness or otherwise of steps that could have been taken to avoid the disadvantage. The Claimant identified that the Respondent should have adjusted the ground floor area / kitchen area to provide a suitable area for the Claimant to take her break and leave her possessions. It was common ground that this adjustment had been made to a degree (the Claimant was permitted to take her break on the ground floor and leave her possessions) however the space had not been adjusted in any way and it was unclear to us what adjustments should or could have been made having heard no evidence on this point from either party.

A performance management procedure

196. It was accepted that this amounted to a PCP and it was applied to the Claimant albeit we find the PCP was not the policy itself but a requirement on the Claimant to perform to a certain standard at work in order not to be at risk of dismissal. The substantial disadvantage was said to be that the Claimant was more likely to fail to achieve the required standards within a probationary period and having to work with Ms Mosey caused significant stress and affected the Claimant's ability to pass the PAP.

197. In this case we consider the identity of the comparators to be non disabled employees who would be able to perform work at a certain standard.

198. Turning now to what was the substantial disadvantage. The Occupational Health Advisor advised the Claimant herself attributed her poor performance to a difficult relationship with a member of the team. She further reported that it was not uncommon for individuals who suffer from mental health conditions to experience reduced psychological resilience and reduced ability to concentrate and that this would be likely to impact on performance to some degree as would the fibromyalgia. With this in mind

we have concluded that the Claimant was at a substantial disadvantage as a consequence of the PCP.

199. We go on to consider whether the Respondent took such steps as were reasonable to have taken to avoid the disadvantage. The Respondent relied on the following steps; the PAP was extended a number of times; the actions were agreed with full input from the Claimant and the probation period was extended and suspended during the paid leave whilst the OH report was obtained. There is a great degree of overlap here with the S15 dismissal claim.
200. The Claimant's second PAP was agreed on 11 June 2018 and due to run until 2 July 2018. Despite this, it was brought forward on 16 June 2018 after only three shifts. The adjustments that had been recommended by the Occupational Health advisor was a meeting between the Claimant and Ms Mosey, which had taken place, and the provision of a sympathetic and supportive environment which may have led to a reduction in the impact on her performance.
201. We have therefore considered the recommended adjustments in the context of the previous steps taken by the Respondent as well as whether it was a reasonable step to have cut the extended probation short after only three shifts. We have also considered this issue under the S15 claim in respect of the dismissal.
202. We find that the Respondent had taken reasonable steps to avoid the disadvantage. The Claimant's performance had started to deteriorate from February 2018 in terms of not accepting feedback from supervisors. After the Claimant was unsuccessful with her application to join the training team (headed by Ms Mosey), the Claimant's performance deteriorated significantly whenever Ms Mosey was involved. Ms Jones offered a mediated chat with Ms Mosey, this was refused. Ms Jones was involved in additional coaching. The Claimant was provided with the Respondent's Health Assured provider and the Claimant did not take this any further. She was permitted to take leave at short notice. Upon returns to work following sick leave the Respondent always completed the appropriate paperwork and checked if any adjustments were needed. Her start and finish times were adjusted. When the issues escalated in April 2018 the Claimant was given a number of weeks paid leave pending an OH referral. The Respondent had adjusted back and forth the type of feedback given to the Claimant. Neither proved to be acceptable when delivered by Ms Mosey. They adjusted how feedback was given – off the shop floor, accompanied and then unaccompanied. They discussed how much feedback should be given.
203. In our judgment, for the above reasons the Respondent had provided a sympathetic and supportive environment. We have balanced what we heard about Ms Mosey's style of feedback. It is clear that a number of employees did not like the style of feedback and it was direct and not always delivered in the most positive way. However, having balanced all of the evidence we reject that it was inappropriately delivered or in a bullying manner. Unfortunately, there had been a complete breakdown in the working relationship between the Claimant and Ms Mosey. This can be seen by the Claimant's behaviour at the time whenever she was given feedback

by Ms Mosey and her ready acceptance particularly towards the end of her employment that it was only Ms Mosey who was in the wrong even when Ms Mosey did the same as other supervisors.

204. The Claimant alleged that the PAP should have been adjusted and her disability related absences removed. No disability related absences had been taken into account in the later 11 June 2018 PAP and this did not play any part in the Claimant's failure of the PAP.

205. The PAP was adjusted and extended. It was not clear what was said to be the adjustment that would have alleviated the disadvantage of being placed on the PAP which led to the Claimant's dismissal. We had some concerns that the Respondent brought the PAP to a premature conclusion but these were outweighed by the overall reasonableness of the steps previously taken by the Respondent. We also had to consider whether the suggested adjustments would have alleviated the disadvantage. Issues arose on Claimant and Ms Mosey's the first shift together after the 11 June 2018. The Claimant had been provided with a different buddy manager who was Ms Jones. This made no difference to what ensued. Even if the PAP had run its course until 3 July 2018, there was no reasonable prospect that any adjustment would have alleviated the disadvantage because there was no prospect that any adjustment or steps could have been taken by the Respondent to enable the Claimant to accept feedback or management by Ms Mosey. The only thing in our judgment that would have alleviated the disadvantage would have been for Ms Mosey and the Claimant to never work together again such was the level of distrust on the part of the Claimant and this was not in our view a reasonable step the Respondent had to take.

206. For these reasons we find this claim fails.

A requirement to attend training out of hours or on days off

207. The Respondent accepted this was PCP applied to all staff. The Claimant's evidence on this is set out at paragraph 31 above. The only disadvantage we were taken to was that on one occasion this resulted in the Claimant having to take a taxi home as all public transport to Neath had finished. The identity of the comparator group would be the non-disabled staff attending the training. However, they would also be subject to this disadvantage if they lived in Neath as public transport would also not be available to the comparator group. For these reasons this claim fails.

A policy that sickness absence would affect whether an employee passed their probationary period.

208. The Respondent's probation policy did not include any such policy however the Claimant's first PAP did include a requirement to reduce absence as one of 5 action plans. Accordingly, there had been such a PCP applied by the Respondent.

209. There was no disadvantage as it was not applied to the Claimant. It was removed from the PAP that led to her dismissal. Therefore, this claim fails.

A requirement for the Claimant to work with Ms Mosey as a “Buddy Manager” (noting that the Claimant accepts this was supposed to be Ms Jones but asserts that it was in reality Ms Mosey)

210. We do not find that this was a PCP nor that it was applied to the Claimant. There was a mention of a buddy system by Ms Jones on 11 June 2018 but this specified that the Claimant would be in a team with Ms Jones and Ms Mosey. In reality Ms Jones led all of the discussions with the Claimant, completing her coaching plan and probation reviews as well as most of the return to work interviews. Factually this claim is not made out and fails.

EQA, section 26: harassment related to disability

211. The acts relied upon were the same as the direct discrimination claim. For the same reasons set out above under our conclusions for the direct discrimination claim, we have concluded that the conduct either did not happen in the manner described nor did it relate to the protected characteristic of disability. Further it did not have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

212. We accept that the conduct complained of had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We have no doubt that the Claimant genuinely believed that Ms Mosey was harassing her on the grounds of her disability. However, it does not follow that the conduct had the effect taking into account the other circumstances of the case and whether it was reasonable for the conduct to have that effect. The Claimant had a genuine perception that any actions taken by Ms Mosey were targeting the Claimant whereas in reality, standing back objectively and weighing up the evidence on the balance of probabilities, they were not. This was corroborated a number of times by the Claimant's own acceptance that if another supervisor had behaved in the same way it would not have been an issue.

213. In our judgment it was not reasonable for the conduct of Ms Mosey to have had the effect. During this Tribunal, the Claimant asserted there was a wide conspiracy amongst the supervisors to support Ms Mosey to bully and gas light the Claimant. There was no evidence to support this and if anything, there was a concerted organised effort to rally against Ms Mosey (albeit we do not find this was by the Claimant). The reality of the situation in our judgment was that the Claimant and Ms Mosey felt bullied by each other and Ms Mosey was also being bullied by other staff. There was an absence of strong management and leadership within the store at the time with Mrs Hooper being frequently absent due to her own health issues. The store was being effectively managed either by interim managers or newly appointed supervisors. This combined with inexperienced temporary staff, a change in focus on feedback and driving sales (the atmosphere previously being described as “easy going and fun loving”) led to a toxic environment at the store. This was exacerbated by the What's app group we heard about. We also agree with Mr Self's submissions that this campaign extended beyond the employment of the Claimant and that the witness statements

needed to be considered in light of this as was evidenced by Mr Reardon Davies screen shot of Ms Mosey's Instagram post within 24 seconds of it being posted. Ms Mosey has been referred to in some extremely unpleasant terms. Whilst these references were not in any way connected to the Claimant, the Claimant has sought to rely on persons associated with these social media discussions about Ms Mosey as witnesses to her claims.

214. The harassment claim therefore fails.

Time Points

215. These were not pursued by the Respondent and as such we have not dealt with them in our conclusions. Further, the findings of fact mean it is not necessary to consider this issue.

216. In light of the above, the Claimant's claims are dismissed.

Employment Judge **S Moore**

Date: 26 March 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 30 March 2021

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FOR EMPLOYMENT TRIBUNALS