Case No. 1401247/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms Victoria Schulberg	AND	Marks and Spencer Plc

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 11, 12, 13 and 14 October 2021 (14 October 2021 in Chambers)

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms R Hewitt-Gray, Mr G Jones

Representation

For the Claimant: In person
For the Respondent: Mr James Green of Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are dismissed.

REASONS

1. In this case the claimant Ms Victoria Schulberg, who was dismissed by reason of gross misconduct, claims that she has been unfairly dismissed, and that she was discriminated against because of a protected characteristic, namely her disability. The claim is for an alleged failure to make reasonable adjustments, and for harassment. The respondent concedes that the claimant is disabled, but it contends that the reason for the dismissal was gross misconduct, that the dismissal was fair, that there was no discrimination, and in any event that the claimant's claims for discrimination have been presented out of time.
2. We have heard from the claimant. For the respondent we have heard from Ms Kath Hamber; Mr Nelson Middleton; Mr Jon Peters; Mr Sean Pearce and Mr Ben Hall.

3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. The respondent has made representations as to the reliability of the claimant's evidence.
4. In the first place, under the respondent's procedures those present at internal meetings were invited to sign minutes of those meetings as being accurate at the time. Employees therefore have the opportunity to read minutes and then sign them to agree them as accurate, or to request amendments or additions which are then made before they sign. We have seen several pages of notes of meetings held with the claimant and she signed each page to confirm their accuracy. On one occasion she requested additional comments, which were included, and which she then accepted. Despite this, during this hearing the claimant suggested that these minutes were inaccurate in a number of ways. The respondent's view of this is that this was an attempt by the claimant to embellish her claim and to avoid the evidential impact of unhelpful contemporaneous documents.
5. The claimant faced further difficulties with regard to the contemporaneous documents. In the first place her allegations of harassment on the grounds of disability were wholly unsupported by the contemporaneous documents, and the claimant failed to raise any concerns or complaints, either formal or informal, until she faced unrelated allegations of gross misconduct. In addition, on occasions the claimant refused to accept matters put to her in cross examination which appeared plain from the face of the contemporaneous documents.
6. As a result of these concerns, and where there was a conflict of evidence between the claimant and the respondent, we preferred the evidence of the respondent's witnesses. In addition, the weight of evidence was against the claimant. Bearing all of this in mind, we found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
7. <u>The Facts:</u>
8. The respondent is the well-known national retailer. The claimant Ms Victoria Shulberg was employed by the respondent as a Customer Assistant in the respondent's Plymouth store. She worked two days per week, with a full shift on each day. Her duties predominantly involved standing and to carry out her duties efficiently she was routinely required to undertake prolonged standing. The respondent also has a food store in Crownhill in Plymouth. The claimant commenced employment on 21 November 2004 and she was dismissed summarily by reason of gross misconduct on 10 December 2018.
9. The claimant suffered from ill-health and she was diagnosed as having rheumatoid arthritis in 2015. She had also undergone a foot operation arising from this condition. This impairment had a substantial adverse effect on her normal day-to-day activities, particularly mobility, in the sense that the effects were more than minor or trivial.
10. As might be expected the respondent has a number of policies and procedures in place. There is a written Disciplinary Policy which provides that gross misconduct might well result in dismissal, and it includes a list of examples of gross misconduct which is expressed to be non-exhaustive. This list includes dishonest behaviour; fraudulent acts with the intention of obtaining money, assets or services; and serious breach of M&S policy, procedures guidelines or regulations.
11. Under the respondent's procedures those present at internal meetings were invited to sign minutes of those meetings as being accurate at the time. Employees therefore have the opportunity to read minutes and then sign them to agree them as accurate, or to request amendments or additions which are then made before they sign.
12. The respondent also has an M&S Discount Policy which explains that one of the major benefits of working for the respondent is the opportunity for colleagues to receive an exclusive discount on most goods. In general terms this enables employees to benefit from a discount of 20% on purchases from the respondent. The claimant accepted that she used this discount on all purchases from the respondent. This policy has a specific provision to deal with refunding online purchases under the heading Refunding .com

purchases. It provides: “Colleagues who require a refund for purchases bought online or by telephone can return the goods by post or obtain a refund in store. The amount refunded will be the amount paid i.e. the price of the goods less the discount amount and will be refunded back to the original method of payment. The standard returns policy applies.” The Conditions of Use of the policy make it clear that failure to comply with the relevant provisions might result in disciplinary action: “Failure to comply with the conditions of use by either the colleague or nominated user may result in disciplinary action, including withdrawal of the card for the duration of any sanction issued or dismissal … Ignorance of the conditions of use will be no defence for misuse of the card.”

13. The claimant’s duties changed in mid-2017 and she returned to the shop floor at that time. Before this she had been involved in induction of new employees, and coaching and training employees in the Plymouth store which included the respondent’s relevant procedures. After her return to the shop floor part of the role involved processing refunds on the customer service desk. We are satisfied that the claimant was a long-standing member of staff with extensive experience of the respondent’s procedures, including till procedures, refunds, and the respondent’s generous discount benefit.
14. There were two instances when the claimant was investigated for apparent breaches of the respondent’s relevant procedures. In October 2016 the claimant took a pair of glasses from the shop floor and failed to pay for them. She was interviewed by her line manager Ms Kath Hamber, from whom we have heard, on 3 October 2016. The claimant explained that she forgotten her own glasses, used some from the store, but forgot to pay for them because of various pressures at home. Ms Hamber gave her the benefit of the doubt, and decided to take no further action, other than reminding the claimant about the importance of the relevant procedures. The second occasion was in February 2017, when the claimant obtained a refund on a faulty item in store but without a receipt. She was given a full refund and it was not clear whether the claimant had originally used her staff discount for the purchase. The line manager sought advice from the respondent’s HR department (known as People Policy Specialists or PPS). The advice given was that there was an expectation that if an employee had used the staff discount card they must ensure when returning items that they do not receive more money back then they had paid. The claimant was reminded of the correct procedures in the circumstances, but no further action was taken.
15. The claimant commenced a period of sickness absence the end of March 2017 because of the operation on her foot. She was interviewed by Ms Hamber on her return to work on 5 June 2017. The minutes of that meeting record that the claimant had an operation on her foot which had “severely limited her mobility”. Nonetheless the claimant confirmed that there were no limitations on her ability to complete normal tasks. Ms Hamber agreed to meet regularly with the claimant to discuss any problems which she might have going forward.
16. These discussions resulted in the claimant being offered a number of adjustments to address the difficulty which prolonged standing might have on her painful feet. At a return to work meeting on 22 January 2018 the claimant and Ms Hambro agreed that the claimant would be able to sit down after each two hour period, whether for a break or for seated duties. The claimant agreed that this would be fine and would let Ms Hamber know if she was struggling at any time. They also agreed that if the claimant felt she needed to sit or to walk around she would be able to swap departments to lingerie for an hour or the clearing department. The claimant confirmed that she was happy with these adjustments that had been made.
17. The respondent discussed the claimant’s health with her in more detail in April 2018. This led to a referral to the Occupational Health Department. The notes make it clear that the claimant was already wearing trainers with orthotics as an adjustment to address the pain in her feet. The claimant was also offered the adjustment of working in the food department on tills so she could sit down and take her shoes off. The claimant declined this offer because she felt it might aggravate the rheumatoid arthritis in her right hand. The notes also record that it had already been agreed with the

claimant that she could sit down when required and that she could split her day where possible. It was also agreed that after every two hours she would be able to sit whether this was on her break or otherwise. The respondent had agreed to provide a chair while she was sitting on the "shop your way" desk, but not on the customer service desk because the space was too confined and there was insufficient room to have one. The claimant also confirmed at that stage "that she was better walking around so sitting was not so much of an issue" and it was agreed that she could move into the fitting rooms or do repro and move around, but with the agreement that she could have the chair on the shop your way desk as mentioned. And as noted above, the claimant had confirmed that she was happy with the adjustments which were in place.

18. The resulting Occupational Health report was dated 16 May 2018. It advises that the respondent should consider the following workplace adjustments: "(i) having the option to sit down periodically throughout the working day. Would benefit from the provision of a chair/perch stool behind the Customer Service Desk and Ordering Desks; (ii) avoid repetitive crouching; (iii) avoid manual handling of loads greater than 5 kg; (iv) avoid repetitive reaching with the left arm; (v) avoid repetitive gripping with right arm, such as scanning on food tills due to long-term inflammatory condition affecting her right hand; and (vi) would benefit from being able to wear open footwear to release pressure placed on the top of the right foot. It is recommended that management arrange a person specific risk assessment of Mrs Schulberg's work areas to look at whether open footwear is suitable and if there are any risk reduction measures that can be made. It may be a consideration for Miss Schulberg to wear enclosed footwear when performing high-risk tasks such as receiving deliveries and then changing to open footwear for lower risk tasks such as working behind desks whereby the risk of loss or bumps from trolleys would be minimised. Ultimately this is a management decision based upon risk assessment and taking into account advice from the Health and Safety Department"
19. Mr Middleton of the respondent, from whom we have heard, then carried out a risk assessment, as suggested by that Occupational Health report. He advised that installing a chair behind the customer collection till would not be suitable because of a lack of space, and also that a chair behind the Customer Service Desk would not be suitable because of a lack of storage. He also advised that wearing open footwear would be an unacceptable risk in the context of the store.
20. Ms Hambro and the claimant had another meeting on 16 June 2018. At that meeting Ms Hambro explained that the suggested adjustments would not be implemented. More specifically she was told that she could not wear open toed footwear for her own protection because of the need to cover her feet but that management had agreed that she could still wear her trainers. Ms Hamber confirmed that the option of having a chair at the customer service desk was not feasible, but there was a chair at the back of the "shop your way" area for the claimant to sit down when required. The claimant confirmed that "she's fine with this". She also confirmed: "I'm doing more time on the ordering, this has helped, and that I can sit when I need to". Ms Hambro asked: "Is there anything else you think I need to know and also are you quite happy with us arranging after every couple of hours you're able to sit whether that be your breaks … When able to do so?". The claimant confirmed "yes okay".
21. In October 2018 the claimant had taken sick leave at a time when she had been refused an application for annual leave. At a meeting on 15 October 2018 Ms Hamber asked the claimant whether that absence was linked to her request for holiday over the same period which had been rejected. The claimant denied this and became upset. Ms Hambro did not pursue the matter, but she did discuss with the claimant further ways in which the claimant might be supported.
22. The claimant pursues a claim for harassment which is based on the manner in which Ms Hambro dealt with her illness during these various meetings. More specifically the allegations are as follows.
23. First the claimant alleges that Ms Hamber subjected her to excessive or inappropriate questions in the meetings between January and May 2018. In general terms this relates to the enquiries which Ms Hamber made as to the claimant's health. The

claimant asserts that the enquiries were inappropriate given that she had only missed three shifts, but the situation was complicated because the claimant was undergoing medical investigations and changes to her medication. We find it was normal and appropriate for the claimant's line manager Ms Hamber to conduct detailed interviews with a view to ascertaining the true nature of the claimant's ill-health, the reason for any absences and/or any requirement to make adjustments. In addition, it is clear from the minutes of this meeting that the claimant had no objection and no complaint about the manner in which Ms Hamber conducted the meetings. We accept Ms Hamber's evidence that there was nothing offensive or oppressive about her discussions with the claimant during that period.

24. The second allegation concerns Ms Hamber discussing the claimant's health conditions with a colleague namely Ms Rachel Hutchinson in or around January 2018. However, the claimant accepted at this hearing that she herself had discussed her health with Ms Hutchinson and had not asked to keep that conversation confidential. We find that there was a further discussion between Ms Hutchinson and Ms Hamber, which included a discussion of the claimant's health, but the claimant did not raise a complaint at the time and do not appear concerned that this had happened.
25. The third allegation relates to Ms Hamber questioning the claimant's diagnosis in early 2018. The claimant asserts that Ms Hamber told the claimant abruptly that she had not been diagnosed with rheumatoid arthritis. Ms Hamber denies this. We prefer Ms Hamber's evidence in this respect. In any event that position is supported by the previous Return to Work forms which show that Ms Hamber had already accepted the claimant's diagnosis of rheumatoid arthritis as the reason for her absence.
26. Finally, the claimant relies upon the return to work interview in October 2018. The notes record that the claimant was asked if her previous rejected holiday request was relevant to the fact that she had taken sickness absence at the same time. The claimant denied this and became upset, but she was not questioned further by Ms Hamber and there was then a discussion about adjustments and how the claimant could be supported. It is true that the claimant expressed dissatisfaction at being questioned about her holiday, but the matter was not pursued by Ms Hamber, and the claimant was happy with the content and process of the rest of the meeting. The minutes indicate that the claimant was not unhappy about that meeting to the extent that it related to her health and disability.
27. In November 2018 there were then two incidents which resulted in the claimant's dismissal. In October 2018 it came to the respondent's attention that on 3 November 2018 the claimant had purchased a pair of boots online with a retail price of £35.00. The breach was subject to a 20% promotional discount, and in addition, the claimant purchased them using her staff discount card, obtaining a further 20% discount on the reduced price. She therefore paid only £22.40 for the boots which was equivalent to a discount of 36% or £12.60. On 3 November 2018 the claimant returned the boots in store and obtained a cash refund for the full price of the boots, with no reduction for the staff discount or the promotional discount.
28. The second incident arose on 13 November 2018 when the claimant attended the respondent's store in Crownhill as a customer and made a purchase of groceries for £39.25. The claimant used her staff discount card to obtain a 20% discount and tried to use the contactless function with her debit card to pay the remaining balance of £31.40. The payment of the balance was not completed successfully because the limit for contactless payments by debit card was £30.00. The claimant left the store with the groceries and without paying for them.
29. Ms Hamber interviewed the claimant on 19 November 2018. The claimant confirmed that she had bought the boots online and had received the full cash refund of £35.00. She did not think she paid the full price for the boots but confirmed that she would have obtained a 20% discount but did not remember receiving the second 20% through the promotional discount. She admitted that she had not queried the fact that she had received a full refund and she knew that the discount policy required staff to disclose

any discount when obtaining a refund. She also accepted that she should have told the person serving her, Sandra Horn, that she had received a discount.

30. With regard to the second transaction, the claimant remembered the transaction when she was shown a receipt and she knew that the debit card contactless payment limit was £30.00. Despite this she claimed that she did not know that the transaction had not gone through.
31. Ms Hamber then continued investigations. She interviewed Sandra Horn. She then met with the claimant again on 26 November 2018 during which meeting they both watched the CCTV footage of both of the transactions. The claimant again accepted that she had not told Sandra about the staff discount or the promotional discount on the boots. As for the Crownhill transaction she said that she had not seen that the purchase was for more than £30.00 and thought that it had been completed. She denied that she would have carried out either transaction on purpose.
32. Ms Hambro then prepared an investigation report which concluded that the claimant had a case to answer in connection with both transactions. Ms Hamber had concluded there was sufficient evidence to believe that the claimant had financially gained on return of the boots and had acted in breach the terms and conditions of the discount policy by converting discount to cash. In addition, with regard to the uncompleted purchase in Crownhill there was sufficient evidence to believe that the claimant had failed to pay for the balance on the purchase and had left the store which had resulted in the theft of groceries.
33. The claimant did not express remorse during either investigation interview, neither did the claimant offer to pay for the goods taken from Crownhill or to return the excess money received from the refund.
34. The claimant was invited to a disciplinary hearing and was provided with a copy of the investigation report. The letter warned that dismissal was a potential outcome and informed the claimant of her right to be accompanied at the hearing. In the event Mr Duncan Hardwick, an experienced manager employed by the respondent, accompanied and assisted the claimant at both the disciplinary and subsequent appeal hearings.
35. The disciplinary hearing took place on 10 December 2018 and was chaired by Mr Jon Peters, from whom we have heard. The claimant and Mr Hardy were informed that they were entitled to have a break when they asked, and there were two breaks during the hearing of up to an hour each whilst Mr Peters discussed the matter with HR/PPS. The claimant raised a number of general points in mitigation. These included her own ill health, the ill health ill health of her husband, and the fact that she was on medication. However, it has never been the claimant’s case that she acted in the way that she did because of the matters raised by way of mitigation.
36. Mr Peters decided to dismiss the claimant summarily for gross misconduct, and he communicated this to the claimant and Mr Hardwick at the end of the disciplinary hearing on 10 December 2018. He confirmed his reasons in a dismissal letter on the following day. His reasons for dismissing the claimant were as follows: (a) there had been a serious breach of trust between the claimant and the respondent as a result of her conduct in relation to both transactions; and (b) the fact that there were two separate allegations within a short period of time suggested dishonesty on the claimant’s part; and (c) he did not believe the claimant has given a credible explanation of her conduct in relation to either transaction. The claimant claimed that she did not think that she had bought the boots at a discount or was not paying attention when she obtained a refund. However, the ability to process refunds is an integral part of the job role for the respondent’s employees such as the claimant who worked on the Customer Service Desk. The claimant was an experienced member of staff and Mr Peters found it difficult to believe that she would not have disclosed her staff discount. He also decided that the claimant must have been aware of the additional 20% promotional discount on this purchase and her explanation was not credible given that she would have had to enter this offer manually online when making the purchase.

37. With regard to the failure to pay for the groceries at Crowhill, Mr Peters found it difficult to believe that the claimant could have forgotten about £30.00 limit for contactless debit card transactions. The claimant had produced a number of bank statements to show that her normal method of purchase was by Apple Pay, which is why she did not know that limit. However, Mr Peters concluded that this explanation was not credible given her experience working on tills. She also claimed that she was not aware that her shopping had exceeded £30.00 on this occasion. Mr Peters found this difficult to believe and decided that the claimant was an experienced member of staff who had a responsibility to ensure that the transaction was completed properly. The claimant suggested that she did not wait for receipt because she never took receipts for food, which Mr Peters found to be improbable.
38. It was only when Mr Peters questioned the claimant about her lack of remorse and failing to offer to pay back the funds that the claimant then offered to apologise and to do so.
39. Mr Peters considered all the matters raised by way of mitigation by the claimant and/or Mr Hardwick, and he also considered the claimant’s clean disciplinary record and her length of service with the respondent. He concluded on the evidence before him, which included the CCTV footage, that the claimant had acted dishonestly, and that her personal circumstances and mitigating factors did not justify her behaviour. He concluded that the claimant had committed gross misconduct and decided to dismiss her summarily.
40. The claimant was offered the right of appeal, and she appealed by way of a standard form on 19 December 2018. The grounds of appeal raised were that Mr Peters had not given sufficient consideration to the matters raised in mitigation; that there was a lack of confidentiality in the investigation because Ms Hamber’s investigation had become common knowledge; the lack of opportunity to address Mr Peters before he made his decision; and that Mr Peters had failed to consider her bank statements concerning the use of Apple Pay in sufficient detail.
41. There was then an appeal meeting on 17 January 2009 which was chaired by Mr Sean Pearce, from whom we have heard. Mr Pearce is a store manager and was independent of the earlier decision and a senior manager with the respondent. Mr Hardwick again accompanied the claimant. Mr Pearce dealt with the matter by way of a rehearing and the claimant was allowed to give a detailed explanation of her actions and points raised in mitigation. Mr Pearce also interviewed Miss Hamber, and Mr Peters. Following this process Mr Pearce concluded that Mr Peters had allowed the claimant ample time to present her case which included mitigating factors in a disciplinary meeting which had lasted nearly six hours. He was satisfied that Mr Peters had considered all the points that were raised. He was also satisfied that Ms Hamber had kept details of the claimant’s suspension sufficiently confidential. He was satisfied that the claimant had been given every opportunity to add any final points before Mr Peters confirmed his final decision. He also concluded that Mr Peters had acted appropriately and reasonably in concluding that the claimant’s bank statements were not relevant but that he had considered the general point about Apple Pay in any event. Finally, the claimant also raised the matter of a lack of rest breaks during the disciplinary hearing and Mr Pearce was satisfied that rest breaks had been offered to the claimant.
42. Mr Pearce was satisfied that Mr Peters’ decision to dismiss the claimant had been fair and reasonable and that a fair process being followed. He therefore decided to reject the claimant’s appeal.
43. Following her dismissal, the claimant raised a grievance which was dated 3 March 2019. Under the respondent’s procedures a post-employment grievance did not require an invitation for the claimant to attend any hearing herself. The grievance was dealt with by Mr Ben Hall, from whom we have heard, who is another store manager with the respondent. Mr Hall conducted an investigation into the grievance which included interviewing Ms Hamber.

44. There were eight grounds for the grievance which were as follows, together with Mr Hall's conclusions: (a) Ms Hamber had been insufficiently supportive of the claimant and her difficulties, but Mr Hall concluded that Ms Hamber was fully aware of the claimant's situation both at work and outside work and had offered help and support wherever possible including various adjustments; (b) the claimant was denied the use of a chair or stool at the customer services desk and the use of orthopaedic shoes to manage the pain and condition, but Mr Hall concluded that the correct process was followed in relation to these potential adjustments and that Mr Middleton's report had advised against the adjustments suggested; (c) that the claimant was not given a copy of the occupational health report, whereas Mr Hall concluded that the claimant had in fact received it by email; (d) the claimant had been subjected to exhausting questioning at the return to work interview in January 2018, but Mr Hall concluded that Ms Hamber had conducted it appropriately in line with the relevant policy; (e) Ms Hamber had discussed the claimant's condition with a colleague, Rachel Hutchinson, without permission, and Mr Hall agreed that whilst the claimant had made the decision to discuss her condition with Ms Hutchinson, this should not have been discussed further between Ms Hutchinson and Ms Hamber; (f) the claimant had been wrongly called in to work from holiday in August 2018, Mr Hall agreed with this criticism but that it resulted from an error in the IT system; (g) the claimant should not have been invited to her return to work meeting on 15 October 2018 while still on sickness absence, and she was unfairly questioned about a holiday request at that hearing, and Mr Hall concluded that the absence meeting was not premature and that the discussion about the holiday request was appropriate and only a small part of that meeting; and (h) Ms Hamber was prejudiced against the claimant and this influenced her decision to refer the claimant to the disciplinary hearing, but Mr Hall concluded that there was no evidence to support that allegation.
45. With the exception of recommending that Ms Hamber should receive further coaching to ensure she was fully aware of all aspects concerning colleague confidentiality, Mr Hall rejected the grievance.
46. The claimant first made contact with ACAS under the Early Conciliation provisions on 12 February 2019 ("Day A"), and ACAS issued the Early Conciliation Certificate on 12 March 2019 ("Day B"). The claimant presented these proceedings on 11 April 2019.
47. Having established the above facts, we now apply the law.
48. The Unfair Dismissal Claim:
49. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
50. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
51. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
52. We have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Wilson v Racher [1974] ICR 428; Neary v Dean of Westminster [1999] IRLR 288; Taylor v OCS Group Ltd [2006] ICR 1602 CA; Adeshina v St George's University Hospitals NHS Foundation Trust and Ors EAT [2015] (0293/14) IDS Brief 1027; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.

53. Applying Iceland Frozen Foods Limited v Jones, the starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair.
54. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. Applying British Home Stores Limited v Burchell, a helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. Applying Sainsbury's Supermarkets Ltd v Hitt, the band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
55. In order to find gross misconduct, the tribunal must be satisfied on the balance of probabilities that there has been wilful conduct by the employee that amounts to a repudiatory breach of the employment contract, permitting the employer to accept that breach and to dismiss the employee summarily, see Wilson v Racher and the decision of Lord Jauncey in Neary v Dean of Westminster.
56. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd. A sufficiently thorough re-hearing on appeal can cure earlier shortcomings, see Adeshina v St George's University Hospitals NHS Foundation Trust and Ors.
57. There was a case management preliminary hearing on 27 November 2009 during which the claimant identified her various claims, and these were recorded in a Case Management Order on that date. This is referred to in this judgment as the Case Management Order.
58. The claimant identified four reasons why she alleges her dismissal was unfair (as set out in the Case Management Order), and we deal with each of these in turn.
59. First and secondly, the claimant asserts that the respondent failed to address evidence which tended to exonerate her as to her intention to steal, and the respondent failed to take properly into account the validity of her explanations. This partly refers to an allegation that Mr Peters did not properly consider the claimant's bank statements which were said to demonstrate a pattern of previous spending in which she used Apple Pay. We reject this criticism. It is clear from the relevant minutes and from Mr Peters' evidence that he fully considered all of the matters raised by the claimant when giving her explanation. He also considered the point about the claimant's pattern of previous spending by Apple Pay but attached little weight to it given the surrounding circumstances. The point is that this is not a case where the claimant presented a defence that the reason she had acted as she had was because of (say) illness, or the effects of her medication. The claimant merely put forward a large number of general points in mitigation in both her statement before the disciplinary hearing, and at the hearing, but at no stage has she argued that these matters caused her to act in the way that she did. We find that Mr Peters was entitled to find that the claimant had acted dishonestly on the evidence before him.

60. Thirdly, the claimant asserts that the respondent failed to take into account the claimant's long service and clean disciplinary record. We reject this criticism. This point was considered by both Mr Peters at the disciplinary hearing, and by Mr Pearce at the appeal hearing. The respondent formed the view that the claimant's long service and clean disciplinary record were outweighed by the seriousness of the allegations and the fact that there were two similar instances of dishonesty in a short period of time.
61. Fourthly, the claimant alleges that the respondent failed to take into account her mental and physical health and her wider mitigation. In the first place, the claimant was given full opportunity in the presence of Mr Hardwick (the senior manager who accompanied her) to present any matter in mitigation which she wished. The evidence of Mr Peters is that he took into account all the matters which were raised before him. He concluded that these matters could not justify the claimant's conduct particularly as (by the claimant's own admission) at the Crownhill store she was not distracted and was "happy as Larry".
62. The claimant also raises two allegations of procedural unfairness. The first is that the respondent failed to conduct the disciplinary hearing "in an humane way" by failing to give breaks and failing to manage the hearing to avoid distress. The claimant admitted at this hearing that she and her companion Mr Hardwick were offered the opportunity to ask for breaks whenever they needed them, and that breaks were taken. She changed her criticism to a complaint that on the two occasions when Mr Peters had adjourned the proceedings for approximately an hour, she and Mr Hardwick were not told how long that break would last. Whereas we accept it might have been more courteous to have informed claimant how long a suspected break was likely to last, we do not agree that any such criticism renders this dismissal procedurally unfair. Finally, the claimant asserts that the case was prejudiced because details of it were disclosed to other staff and had become common knowledge. We reject that criticism as well. In the first place there is no evidence that details of the claimant's case were indeed disclosed to other members of staff. In any event, even if they had been, this would not have affected the procedural safeguards with regard to the hearing which remained in place.
63. In this case it is clear from the evidence of Mr Peters and Mr Pearce, and we so find, that the respondent genuinely believed that the claimant had committed gross misconduct.
64. We find that the respondent's belief in the claimant's gross misconduct was held on reasonable grounds for the following reasons. The facts of the first incident when the claimant returned the boots were never in dispute. The claimant accepted that she was aware that she had not paid the full price, that she was familiar with the relevant policy, and that it was her responsibility to raise the fact that she had used discounts before claiming a full refund. The claimant gave an explanation that she was not paying full attention, and was distracted by a conversation when she obtained the refund. However, the claimant was an experienced employee who was well used to processing refunds within her normal role and, in our judgment, it was reasonable for the respondent to conclude that she had provided insufficient explanation, and that she had acted dishonestly.
65. With regard to the second incident at Crownhill, the claimant has never disputed that she failed to pay for her groceries. The claimant explained that she did not know how much the items had cost, and that she was not aware that payment had not been processed. In our judgment the respondent was entitled to reject that explanation particularly given the claimant's long experience as a member of staff which included working on tills, and the CCTV footage which showed the claimant looking at the checkout screen (which had not been cleared) before leaving with the groceries.
66. In addition, the respondent was entitled to take into account the claimant's lack of remorse. The claimant failed to apologise for her actions, and she failed to offer to repay the incorrect refund, or to pay for the groceries which she had taken. Although the claimant accepted at this hearing that she alone was responsible for her actions, nonetheless during the disciplinary hearing the claimant consistently sought to criticise

others, including the assistant who served her when she exchanged the boots, and the customer assistant who was working at the Crownhill checkout.

67. We also find that there was a full fair and reasonable investigative process. The claimant was informed of the potential allegations against her before being suspended on full pay. There was then an initial investigation and report, before the claimant was called to a disciplinary hearing. The claimant was informed of the allegations against her, provided with the relevant evidence, and told that the circumstances might lead to her dismissal. She was informed of her right to be accompanied, and she attended the disciplinary and appeal hearings accompanied by Mr Hardwick who was a senior manager with the respondent and fully aware of their procedures. The claimant had every opportunity to state her case in response to the allegations. The claimant was afforded the right of appeal and pursued an appeal which was determined by a manager who was independent of any previous involvement and senior to the original decision-maker.
68. In conclusion therefore the respondent genuinely believed that the claimant had committed gross misconduct, and this belief was based on reasonable grounds. It followed a full fair and reasonable investigation. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair.
69. In our judgment dismissal in these circumstances fell within the band of reasonable responses, albeit at the extreme end. Even bearing in mind the size and administrative resources of this employer, we find that the claimant’s dismissal was fair and reasonable in all the circumstances of the case. We therefore dismiss the claimant’s unfair dismissal claim.
70. <u>The Discrimination Claims:</u>
71. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 (“the EqA”). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges a failure by the respondent to comply with its duty to make adjustments, and harassment
72. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P’s ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
73. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
74. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
75. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

76. We have considered the cases of Environment Agency v Rowan [2008] IRLR 20 EAT; Newham Sixth Form College v Sanders EWCA Civ 7 May 2014; Archibald v Fife Council [2004] IRLR 651 HL; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 EAT; Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075 EAT; Project Management Institute v Latif [2007] IRLR 579 EAT; Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v the Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry [2011] EWCA Civ 769; and Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
77. The Claimant's Disability:
78. The claimant was diagnosed with rheumatoid arthritis in 2015 and has suffered from this condition from at least then. This is an impairment which is long-term in the sense that it has lasted for more than 12 months. It is an impairment which has had a substantial adverse effect on the claimant's normal day-to-day activities, including mobility, in the sense of the effects are more than trivial. The respondent concedes that the claimant is a disabled person, and that she was disabled by reason of this impairment at the times material to this claim. We agree with that conclusion and we so find. We also find that the impairment in question caused the claimant substantial disadvantage, and that the respondent knew of the same.
79. Harassment:
80. Turning next to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).
81. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.
82. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned contact to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land

Registry at para 47 “Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.” Similarly, Langstaff P emphasised in Betsi at para 12: “The word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc ...”

83. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: “One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.”
84. The claimant’s claim for harassment related to her disability was identified in the Case Management Order as relying on two aspects of unwanted conduct, namely (i) questioning her diagnosis and disability; and (ii) making it clear that her condition was a nuisance and inconvenient, including by refusing, restricting or reducing adjustments.
85. It became clear during the course of this hearing that the claimant relies on the following four incidents or circumstances involving Ms Hamber, which we deal with in turn. Before doing so however we note that the claimant stated in evidence on a number of occasions that she “didn’t have a problem with” Ms Hamber whom she accepts had tried to assist the claimant when managing her health conditions. We find generally therefore that this is not a case where the alleged unwanted conduct can be said to have been done with the purpose of violating the claimant’s dignity or creating an intimidating or offensive environment. We therefore have to assess what effect the alleged conduct had on the claimant, and if it had the proscribed effect, whether it was reasonable for it to have done so.
86. The claimant further developed her allegations of unwanted conduct during this hearing, and they appear to fall into the following four categories.
87. First the claimant alleges that Ms Hamber subjected her to excessive or inappropriate questions in the meetings between January and May 2018. In general terms this relates to the enquiries which Ms Hamber made as to the claimant’s health. The claimant asserts that the enquiries were inappropriate given that she had only missed three shifts, but the situation was complicated because the claimant was undergoing medical investigations and changes to her medication. We find it was normal and appropriate for the claimant’s line manager Ms Hamber to conduct detailed interviews with a view to ascertaining the true nature of the claimant’s ill-health, the reason for any absences and/or any requirement to make adjustments. These investigations did result in Ms Hamber referring the claimant to Occupational Health for the very purpose of considering potential adjustments. We have seen the contemporaneous minutes of the various meetings and there is nothing to suggest from these that the claimant had any cause to complain. Indeed, she confirmed that she was satisfied with the assistance which was generally on offer. The claimant raised no complaint about these meetings until several months later when she faced her unrelated disciplinary allegations. We reject the allegations that Ms Hamber’s conduct during these meetings had the proscribed effect or alternatively that was reasonable of the claimant to conclude that it had done so.
88. The second allegation concerns Ms Hamber discussing the claimant’s health conditions with a colleague namely Ms Rachel Hutchinson in or around January 2018. However, the claimant accepted at this hearing that she herself had discussed her health with Ms Hutchinson and had not asked to keep that conversation confidential. We find that the fact that there was a further discussion between Ms Hutchinson and Ms Hamber did not have the proscribed effect on the claimant, and in any event that it was not reasonable for her to have concluded that it had done so.
89. The third allegation relates to Ms Hamber questioning the claimant’s diagnosis in early 2018. The claimant asserts that Ms Hamber told the claimant abruptly that she had not

been diagnosed with rheumatoid arthritis. Ms Hamber denies this. We prefer Ms Hamber's evidence in this respect. In any event that position is supported by the previous Return to Work forms which show that Ms Hamber had already accepted the claimant's diagnosis of rheumatoid arthritis as the reason for her absence. We therefore find that this aspect of unwanted conduct relied upon by the claimant did not happen.

90. Finally, the claimant relies upon the return to work interview in October 2018. The notes record that the claimant was asked if her previous rejected holiday request was relevant to the fact that she had taken sickness absence at the same time. The claimant denied this and became upset, but she was not questioned further by Ms Hamber and there was then a discussion about adjustments and how the claimant could be supported. Given that it was standard practice of the respondent to invite an employee with underlying ill-health issues to a meeting even before they had been absent for two weeks we do not accept that the invitation itself amounted to harassment, nor that it was reasonable for the claimant to have concluded that the invitation in itself amounted to the proscribed conduct. Similarly, we find it was appropriate for a line manager to have asked the claimant to confirm the reason for her absence, and where this matter was not pursued and helpful discussions ensued we find that the alleged conduct did not have the proscribed effect on the claimant, and in any event that it was not reasonable for her to have concluded that it had done so.
91. Accordingly, we dismiss the claimant's claim for harassment related to her disability.
92. Reasonable Adjustments.
93. We now turn to the claim that the respondent had failed to make reasonable adjustments. The claimant identified this claim in the Case Management Order as follows. The claim relies upon one PCP, namely that the respondent's requirement for the claimant to discharge the duties of her role efficiently included prolonged standing which was routinely required. This is said to have put the claimant at a substantial disadvantage in comparison with persons who are not disabled because prolonged standing was painful to her. The claimant asserts that the following adjustments were therefore reasonably required: (i) the adjustments set out in the Occupational Health report; (ii) allowing her to remove her shoes, wear open toed shoes or change shoes as necessary to relieve pain; (iii) the ability to sit from time to time; and (iv) the ability to take time away from the shop floor as needed to work sitting down.
94. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in Environment Agency v Rowan. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer; (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.
95. Environment Agency v Rowan has been specifically approved by the Court of Appeal in Newham Sixth Form College v Sanders - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.
96. As per HHJ Richardson at para 37 of General Dynamics Information Technology Ltd v Carranza UKEAT/0107/14 KN: "The general approach to the duty to make adjustments under section 20(3) is now very well-known. The Employment Tribunal should identify (1) the employer's PCP at issue; (2) the identity of the persons who are not disabled with whom comparison is made; and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the Employment Tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the "step".

Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take".

97. In the first place in this case we find that the PCP relied upon by the claimant was in place, namely that the respondent's requirement for the claimant to discharge the duties of her role efficiently included prolonged standing which was routinely required. The respondent does not dispute that this PCP was in play. We also find that the claimant's disability of rheumatoid arthritis which inter-alia gave rise to pain in her feet caused her substantial disadvantage (namely the pain in her feet) when compared to non-disabled comparators without that condition. Again, the respondent does not dispute that the claimant suffered substantial disadvantage in this way, and we find that at all material times the respondent was aware of the same.
98. We therefore find that the statutory duty was engaged, and that the respondent was therefore required to take such steps as it was reasonable to have to take to avoid that disadvantage.
99. The claimant does not dispute that a number of adjustments were put in place. These included the ability to take breaks whenever she wished, the provision of extended rest breaks, the provision of seated work every two hours, and the ability to swap out to the lingerie department to carry out seated work when needed. Although the claimant asserted at this hearing that these adjustments were rarely implemented, this is not supported by the contemporaneous evidence, and is indeed contradicted by the claimant's own comments at the meeting on 16 June 2018. We reject the assertion that these adjustments were either restricted or otherwise not implemented.
100. In addition, there were other adjustments on offer to the claimant which she chose not to accept. This included working the same number of hours but over three days rather than two (in order to decrease the length of the shift), or alternatively moving to the tills on the food hall so that the entire shift would be seated. We make no criticism of the claimant for declining these offers which would have involved three days commuting instead of two, and/or handling cold items, each of which suggestion might have aggravated her condition, but it is worth noting that the respondent was prepared to accommodate these potential moves if the claimant thought they would be of assistance.
101. The claimant asserted at this hearing that it was unreasonable of the respondent to require her to request being swapped out to a different department. However, she accepted that only she would know when this adjustment was required, and it was accommodated when she requested it. In addition, the claimant never suggested at the time that she was unwilling or felt uncomfortable in making that request, and she did not challenge the ad hoc nature of this adjustment as being unreasonable for that reason.
102. In our judgment therefore the respondent had already put in place these adjustments and it had taken reasonable steps which were successful in avoiding the disadvantage which the claimant suffered. For these reasons we find that the respondent had not failed in its duty to make reasonable adjustments.
103. With regard to the specific adjustments referred to by the claimant in the Case Management Order, we now deal with these in turn.
104. First, the claimant refers to the recommendations of the Occupational Health report dated 16 May 2018. The suggestion as to workplace adjustments which are relevant to the PCP of prolonged standing are limited to two suggestions, which are these: the option to sit down periodically throughout the working day, for example with the provision of a chair/perch stall behind the Customer Service Desk and the ordering desk; and being able to wear open toed footwear to release pressure placed on the top of the right foot. There was a recommendation that there should be a specific risk assessment of the claimant's work areas to look at whether open toed footwear was suitable and whether any risk reduction measures could be made. There was a suggestion of wearing enclosed footwear when performing high-risk tasks as compared with open footwear for lower risk tasks such as working behind desks.

105. Secondly, the claimant refers to the freedom to remove her shoes and wear open toed shoes and/or to change shoes as necessary to relieve pain. This seems to us to be a duplication of the Occupational Health recommendation with regard to footwear.

106. Thirdly the claimant refers to the ability to sit from time to time, and fourthly the ability to take time away from the shop floor as needed to work sitting down. As noted above, we have found that these adjustments were already in place in any event.

107. This leaves the two specific adjustments which were requested or proposed, and which were specifically rejected by the respondent on 16 June 2018. These are the ability to wear open toed footwear, and the provision of a specific chair at the Customer Service Desk.

108. With regard to the open toed footwear, the claimant accepted in evidence that there were rails and dollies of stock which were routinely moved around in the area where she worked and that previously her foot had been knocked by another member of staff moving a dolly. As recommended by Occupational Health, the respondent had carried out a risk assessment, and Mr Middleton concluded that there was a risk to the claimant suffering injury to her feet if she wore open toed footwear. We find that the respondent was entitled to conclude that wearing open toed footwear gave rise to a potential risk of injury to the claimant, and for this reason it was not an adjustment which was reasonable. The respondent did not insist on any particular type of footwear, other than footwear which was enclosed to avoid that risk of injury. The claimant was permitted to wear trainers for that reason. We reject the assertion that the respondent had failed to make a reasonable adjustment simply by failing to allow the claimant to wear open toed sandals.

109. Secondly, we deal with the suggestion that a specific chair or perch stool should be provided for the claimant at the customer service desk. Ms Hamber's evidence was that there were space constraints behind the customer service desk and the area was often congested with rails of stock. In his risk assessment Mr Middleton also identified a potential concern regarding storage of the chair on the five days during the week when the claimant was not working. The claimant accepted that it was necessary for employees to be able to pass through that area unimpeded.

110. The question to be addressed is whether this was therefore a step which it was reasonable for the respondent to take to avoid the substantial disadvantage suffered by the claimant. We bear in mind that at that time other reasonable adjustments were already in place for that purpose, and they were effective. This included a chair at the other desk; the ability to take breaks whenever she wished; the ability to take extended rest breaks; and the option of swapping out to the lingerie department. In addition, given the space constraints and the need for the employees to pass unimpeded, and given the other adjustments already in place, we do not find that this was a step which was reasonable for the respondent to have to take to avoid the claimant's disadvantage. For the record, if it were not for the successful adjustments already in place, then we find that it might well have been reasonable for the respondent to have had to take this step.

111. We therefore dismiss the claimant's claims that the respondent has failed to make reasonable adjustments.

112. <u>Claims Presented out of Time:</u>

113. in any event, we would have dismissed the claimant's claims of harassment and for reasonable adjustments for the following reasons.

114. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

115. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.

116. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

117. We have considered the following cases, namely British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23; and Matuszowicz v Kingston upon Hull City Council [2009] 3 All ER 685.

118. In this case the claimant's effective date of termination of employment was 10 December 2018. The normal time limit of three months therefore expired at midnight on 9 March 2019. The claimant first made contact with ACAS under the Early Conciliation provisions on 12 February 2019 ("Day A"), and ACAS issued the Early Conciliation Certificate on 12 March 2019 ("Day B"). This stopped the clock for the limitation provisions which were then extended by one month to 12 April 2019. The claimant presented these proceedings on 11 April 2019. The effect of these provisions is that the claim was therefore presented within time to the extent that it relates to events including the dismissal on 10 December 2018 (including the unfair dismissal claim). However, any events arising on or before 13 November 2018 are potentially out of time.

119. With regard to the harassment claim, the last act relied upon by the claimant is the meeting on 15 October 2018. Even if this were the last act in a continuing course of conduct or state of affairs, the claim was still presented out of time. In any event, given that we have found that there was no harassment at this time, there is no continuing course of conduct to this date, and the earlier allegations raised by the claimant are more significantly out of time.

120. With regard to the claim for reasonable adjustments, the respondent clearly communicated to the claimant on 16 June 2018 that it would not provide a chair at the customer service desk and would not permit open toed footwear. Applying Matuszowicz, the alleged failure to make adjustments is an omission and is not a continuing act, and therefore time started running for the claimant's reasonable adjustments claim on 16 June 2018. This claim was therefore presented five months out of time.

121. Despite the fact that limitation was identified as an issue in the Case Management Order, the claimant has not presented any cogent argument for suggesting that it would be just and equitable to extend the time limit. We accept that the claimant had a number of personal issues and difficulties to face at the relevant times. These included her own illness, the serious illness of her husband, and the upsetting circumstances of being dismissed. However, the claimant has not pursued any argument that she was prevented or precluded from presenting these proceedings because of ill health, and

we have certainly seen no medical evidence to suggest that this was the case. In any event these circumstances were ongoing and still pertained at the time the claimant issued these proceedings, so she was not prevented from presenting these proceedings by those circumstances. There is no suggestion that the claimant failed to understand the need to issue proceedings within the time limit, nor that she was misled by an adviser or by the respondent to the effect that she needed to delay when she should not have done.

122. We have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.

123. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular … "The length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

124. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: "[18] … It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

125. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

126. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

127. Considering the factors in Keeble and the balance of prejudice between the parties, this is not a case in which it can be said that the respondent has been seriously prejudiced by the delay in the sense that it has been unable to defend the claim and/or the cogency of its evidence has been seriously affected by the delay. Nonetheless the burden of proof remains on the claimant to convince us that it would be just and equitable to extend time, and the claimant has failed to discharge that burden.

128. For these reasons the claimant's claims for harassment on the grounds of disability and in respect of the alleged failure to make reasonable adjustments are dismissed in any event as having been presented out of time.

129. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to ; a concise identification of the relevant law is at paragraphs to ; how that law has been applied to those findings in order to decide the issues is at paragraphs to .

Employment Judge N J Roper
Dated: 14 October 2021

Judgment sent to parties: 27 October 2021

FOR THE TRIBUNAL OFFICE