EMPLOYMENT TRIBUNALS

Claimant: **Ms S Jackson**

Respondent: **New Look Retailers Ltd**

Heard at Sheffield (Hybrid) **On:** **27, 28 and 29 October 2021**
1, 2 and 9 November 2021
20 December 2021 (in chambers)

Before: **Employment Judge Brain**
Members: **Mr M Lewis**
Mr L Priestley

Representation

Claimant: **in person**
Respondent: **Miss R Owusu-Agyei, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. Upon the claimant's complaint of constructive unfair dismissal brought under the Employment Rights Act 1996:

   (1) The claimant was constructively dismissed by the respondent.

   (2) The claimant's complaint of constructive unfair dismissal succeeds.

2. The claimant's complaints (at paragraphs 14(vii) (a), (b) and (c) of the reasons below) of harassment related to disability brought under the Equality Act 2010 were brought outside the limitation period in section 123.
3. It is just and equitable to extend time to vest the Tribunal with jurisdiction to consider the harassment complaints referred to in paragraph 2 of the Judgment.
4. The harassment complaints referred to in paragraph 2 of the Judgment fail and stand dismissed.

REASONS

Introduction and preliminaries

1. The Tribunal heard evidence in this case over five days upon 27, 28 and 29 October and 1 and 2 November 2021. Helpful written and oral submissions were then made by each party on 9 November 2021. At the conclusion of the hearing on 9 November 2021, the Tribunal reserved judgment. We now give reasons for the judgment that we have reached following our deliberations in chambers.

2. The respondent is a well-known fashion retailer. The claimant was employed by the respondent between 6 July 1999 and 8 April 2019. Upon the latter day, the claimant resigned from her employment without notice. The claimant worked as a sales advisor at the respondent's store at Crystal Peaks in Sheffield. The claimant worked at the Crystal Peaks store from around September 2003. For the first four years or so of her career with the respondent, she worked as an allocator and assistant merchandiser in Weymouth.

3. The claimant submitted her claim form on 2 July 2019. Before doing so, she went through the mandatory early conciliation process as required by the Employment Tribunals Act 1996. She commenced early conciliation on 11 April 2019 which ended on 11 May 2019.

4. The claimant's claim form pleaded complaints of unfair dismissal pursuant to the 1996 Act, complaints of discrimination and harassment related to disability under the 2010 Act and a complaint of wrongful dismissal.

5. Following receipt of the respondent's grounds of resistance, the Employment Tribunal listed the case for a case management preliminary hearing. This hearing came before Employment Judge Rostant on 8 October 2019. A copy of the minute of the discussion is at pages 31 to 37 of the bundle.

6. Employment Judge Rostant listed the case for a hearing to take place between 5 and 8 May 2020. The hearing was listed to deal with the merits of the claimant's claims and jurisdiction issues arising upon the claimant's claims brought under the 2010 Act. He directed that the hearing would not deal with remedy issues.

7. The Covid-19 pandemic impacted the UK in March 2020. The pandemic has had a significant impact upon these proceedings. Firstly, it led to the postponement of the hearing which had been listed for May 2020. Secondly, it had a dramatic adverse effect upon the respondent's commercial fortunes. This led the respondent to enter a company voluntary arrangement *('CVA')* with their creditors. The CVA is dated 15 September 2020.

8. The respondent took a point that the terms of the CVA had the effect of ousting the Employment Tribunal's jurisdiction to consider the claimant's claims.

9. On 21 September 2021, the Employment Judge promulgated a reserved judgment in which it was held that the Employment Tribunal's jurisdiction to consider the complaint of wrongful dismissal had been ousted by the terms of the CVA. However, it was held that the statutory claims brought under the 1996 Act and the Equality Act 2010 remained within the jurisdiction of the Tribunal.

10. The reserved judgment of 21 September 2021 is in the supplemental bundle at pages 5 to 21. The somewhat complex procedural history of the case is set out in paragraphs 8 to 22 of the reasons which accompanied that judgment. The Tribunal shall not repeat that procedural history here.

11. Employment Judge Rostant, in his minute of the case management hearing of 8 October 2019, set out the issues in the case. The complaint brought by the claimant of unfair dismissal under the 1996 Act is one of constructive unfair dismissal. Employment Judge Rostant recorded the issues as follows upon this claim: (we use the same paragraph numbers as in his record):

    (ii) (a) Was the claimant dismissed, i.e. did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? (b) if so, did the claimant affirm the contract of employment before resigning? (c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be the reason for the resignation)?

    (iii) The conduct the claimant relies on as breaching the trust and confidence term is:

    a. *The conduct of the claimant's line manager [Mrs] K Sherburn as described in paragraph 5 of the claim*
    b. *The bullying of the claimant by [Mrs] Sherburn between August and November 2018,*
    c. *The delay in dealing with the claimant's grievance*
    d. *The handling of the mediation on 18 January 2019 as described in paragraph 10*
    e. *The rejection of the grievance.*
    f. *The rejection of the claimant's appeal against the grievance rejection*
    g. *The underpayment of the claimant in February and March and the failure to provide any explanation for the deduction of all the claimant's pay in February and some £200 in March 2019.*

    (iv) If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

12. Paragraph 5 of the claim (referred to in paragraph (iii)(a)) is at pages 13 and 14 of the bundle. It is headed *"Incidents leading to grievance and resignation – constructive unfair dismissal"* and reads as follows:

    5. In August 2018 an incident occurred in the store at Crystal Peaks that led to my raising a formal grievance against my manager Kirsty Sherburn:

    5.1 At the end of one particular day Kirsty became extremely critical of the time that I had spent serving a customer at a till at close of business. There were in fact problems with the operation of the till although Kirsty took no time to discover

this – she simply berated me about this. On its own this was not something that I got upset about.

5.2 At the same time as telling me off about the till Kirsty also berated me about what she described as inappropriate footwear. New Look has no set or rigid policy with regard to footwear and as Kirsty and New Look were aware I have a condition with my knee – hyperflexion. This is a painful condition and I need shoes that are sufficiently comfortable to ensure that I can stand all day on the shop floor. The footwear in this case was relatively new Nike trainers – I still have these to show what they look like.

5.3 All workers on the shop floor also wear their own footwear (shoes are not issued by New Look) and all are either trainers or other fashion shoes and none are or were better than those I was wearing at the time.

5.4 During the incident Kirsty told me in strident terms that my footwear was inappropriate for work and that she didn't expect to see me in those or the "horrid orange things" again. She was wound up and highly heated during this exchange. I was not.

13. Paragraph 10 of the claim (referred to in paragraph (iii)(d)) is at page 15 of the bundle. It reads as follows:

(10) I was then invited to a 'mediation' meeting on 18 January 2019. This was billed as something positive and an attempt to get all those involved to sort out the issues and move on. In fact my experience was completely different from this. During the meeting the managers present sought to undermine what I was saying and they were abrupt and aggressive defending Kirsty without actually trying to mediate anything and without any obvious knowledge of what had been happening in store three months before. I wrote to New Look to complain about that following the meeting.

14. At the case management preliminary hearing held on 8 October 2019, Employment Judge Rostant identified that the sole complaint brought by the claimant under the 2010 Act was harassment related to disability. He noted the issues arising from this as follows (and using the same paragraph numbers as in his minutes):

(i) Were all of the claimant's complaints of discrimination presented within the time limits set out in sections 123(1)(a) & (b) of the [2010 Act]? 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; etc.

(v) Was the claimant a disabled person in accordance with the [2010 Act] at all relevant times because of her impairment of hyperflexion.

(vi) The respondent does not accept that the claimant meets the definition of disability.

(vii) Did [Mrs] Sherburn engage in conduct as follows:

a. Criticising the claimant's footwear?

b. Preventing her from wearing trainers to work between August and November 2018

c. Continuing with her conduct as above at the mediation on 18 January 2019.

(viii) If so, was that conduct unwanted?

(ix) If so, did it relate to the protected characteristic of disability?

(x) Did the conduct have the purpose or (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) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

15. As we have said, the pandemic necessitated the postponement of the hearing listed for May 2020. The hearing was re-listed for 12 to 15 October 2020. The matter came before Employment Judge Little sitting with Mr Lewis and Mr Priestley. The hearing was again postponed, this time to March 2021. This was because of the unavailability of Mrs Sherburn for medical reasons.

16. Employment Judge Little caused to be sent out a minute of the discussion which had taken place on 12 October 2020. This appears not to be in the hearing bundle. However, he recorded (in paragraph 9.9) that the respondent was not contending there to be a potentially fair reason for the dismissal of the claimant. No potentially fair reason for the constructive dismissal of the claimant was advanced by Miss Owuusu-Agyei in her closing submissions on 9 November 2021. As we have determined (for the reasons set out below) that the claimant was constructively dismissed by the respondent, it follows that the constructive unfair dismissal claim succeeds.

17. An additional couple of points are worth noting upon the claimant's complaints brought under the 2010 Act. At paragraph (4)(vi) of the minute of the hearing held on 8 October 2019, Employment Judge Rostant includes a passage discussing complaints brought by the claimant of indirect disability discrimination and of an alleged failure by the respondent to comply with the duty to make reasonable adjustments. We have omitted this passage from these reasons given that it is now otiose, the claimant having indicated that these claims were not pursued. Further, a complaint which she brought of unfavourable treatment for something arsing in consequence of disability was dismissed pursuant to the reserved judgment of 21 September 2021. The claimant's only complaint brought under the 2010 Act which remains to be decided is of disability related harassment.

18. On 23 June 2020, the respondent sent to the Tribunal and to the claimant an updated position statement upon the question of disability. This is at page 64 of the bundle. The position, where material, reads as follows:

(1) Having considered the further information set out in the claimant's second impact statement and in particular the detail about the progressive nature of her condition, the respondent no longer contests that the claimant was at the material time, a disabled person within the meaning of section 6 of the [2010 Act] because of her physical impairment – (hypermobility or hyperflexion).

(2) The respondent does however continue to resist the claimant's allegations of discrimination and maintains that it did not have the requisite knowledge of disability for the reasons set out in its previous statement on disability, and the revised grounds of resistance.

(3) The respondent notes that the claimant's second impact statement goes into detail about her mental as well as her physical health. We acknowledge that such detail may be relevant for the purposes of her constructive dismissal claim. For the avoidance of doubt, however, the respondent does not concede that the claimant is or was disabled on any basis other than by virtue of her physical condition of hypermobility or hyperflexion. This is in accordance with the issues agreed and recorded in the case management summary by Employment Judge Rostant on 9 October 2019, as follows: "was the claimant a disabled person in accordance with the [2010 Act] at all relevant times because of her impairment of hyperflexion."

19. The salient part of the respondent's revised grounds of resistance (in the bundle at pages 39 to 43) pertaining to the question of knowledge reads as follows (at paragraph 26):

The respondent was aware that the claimant had cause to visit hospital in January 2018 in relation to her knee but was not aware that the claimant suffered with an ongoing condition.

(We have not cited the second sentence of paragraph 26 of the amended grounds of resistance which deals with the question of the impact upon the claimant's stated activities of the hyperflexion or hypermobility, given the respondent's concession upon the question of disability).

20. It follows, therefore, upon the complaint of disability related harassment brought under the 2010 Act, that the following issues arise:

(1) Whether the claim was brought within the limitation period provided for by section 123 of the 2010 Act and if not whether time should be extended to vest the Tribunal with jurisdiction and consider it.

(2) Whether at the material time the respondent had actual knowledge or constructive knowledge of the disability.

(3) Whether Kirsty Sherburn conducted herself in the manner alleged as set out above, whether that conduct was unwanted and whether it related to the claimant's disability. Finally, if so, did that conduct have the purpose or did it reasonably have the effect of violating the claimant's dignity or creating an intimidating etc environment for her within the workplace?

21. During the course of the hearing before us, each party produced late disclosed documents. In the case of the claimant, this was a copy of an appointment card for physiotherapy which she received under the care of the Rotherham Primary Care Trust. The physiotherapy took place between 28 September 2007 and 26 November 2007.

22. The Respondent produced a number of meeting notes connected with the claimant's grievance. Unsurprisingly, the claimant expressed great concern about their late production given that she had been pressing for copies of them for some time. The explanation for their late production given by the respondent (through counsel) was unsatisfactory. They appear to have been produced during the course of the hearing at the behest of one of the respondent's observers from within their human resources department. This doubtless helpful individual was able to track down the documents quickly. It is remarkable that no one within the respondent had been able to produce these documents sooner. No one from the respondent gave evidence about this issue and it was left to

Miss Owusu-Agyei to do her best to proffer an explanation. All this being said, in the final analysis the claimant had no objection to the documents being introduced into the bundle.

23. At the outset of the hearing on 27 October 2021, the respondent presented the Tribunal with a supplemental bundle. There can be no sensible objection to the first part of this which contained the Orders made when the matter came before this Tribunal on 1 March 2021, together with the reserved judgment of September 2021 to which we have already referred. More controversial was the second part of the supplemental bundle. This part of the bundle contained copies of the claimant's and Kirsty Sherburn's rotas. Again, it is surprising that these documents could not have been produced much sooner. The claimant objected to the admission of these documents into the evidence. On balance, while the Tribunal was concerned about the late production of this material we agreed with the respondent's counsel that the documents were relevant to an issue in the case and they had been disclosed in accordance with the respondent's continuing duty of disclosure. The prejudice to the claimant of their admission was capable of being balanced by allowing her to give supplemental evidence upon the documents.

24. The Tribunal heard evidence from the claimant. She also called evidence from Anne Elsey in support. Mrs Elsey is the claimant's aunt.

25. The respondent called evidence from:

    (1) Kirsty Sherburn. As we have said, she was the claimant's line manager at the material time with which we are concerned. Mrs Sherburn is a former employee of the respondent. She worked for the respondent between 2014 and 2019 as store manager of the Crystal Peaks store. She was the claimant's line manager from the time that she (Mrs Sherburn) commenced work at Crystal Peaks until the end of the claimant's employment with the respondent.

    (2) Gail Richardson. She is the manager of the Wakefield store. She has worked for the respondent for 15 years.

    (3) Matthew Kirby. He is a former employee of the respondent. He was employed as a regional business manager for around six years. The region which he managed included the Crystal Peaks store.

    (4) Naomi Swindells. She is employed by the respondent as a payroll advisor.

26. Anne Elsey and the respondent's witnesses gave their evidence by video. The claimant and Miss Owusu-Agyei attended the hearing in person.

27. It will, we think, be helpful at this stage to give a chronology of some of the key events which took place towards the end of the claimant's employment. It is hoped that this gives some chronological structure as some of the matters of which the claimant complains overlap several of the events which took place:

    2 November 2018 – the claimant commenced a period of sick leave. She did not return to work for the respondent at any stage after this date.

    9 November 2018 – the claimant raised a grievance, primarily about the conduct of Kirsty Sherburn.

    28 November 2018 – the claimant attended a grievance meeting with Gail Richardson (who had been asked to hear the claimant's grievance by Mr Kirby).

4 December 2018 – Mrs Richardson sent to the claimant an invitation for her to attend a mediation meeting to be held on 8 December 2018. This was to be conducted by Mrs Richardson with the claimant and Kirsty Sherburn in attendance: *[in the event, this meeting did not take place due to claimant's ill health].*

14 December 2018 – Gail Richardson held a health and well-being meeting with the claimant.

4 January 2019 – Gail Richardson held another health and well-being meeting with the claimant.

9 January 2019 – Gail Richardson held a grievance investigation meeting with Kirsty Sherburn.

14 January 2019 – a mediation meeting was held attended by the claimant, Gail Richardson, Kirsty Sherburn and Melanie Dodsworth (another store manager). On this day, a short time before the mediation meeting commenced, the claimant was informed by Gail Richardson that her grievance had not been upheld.

18 January 2019 – Gail Richardson sent the claimant a letter setting out her reasons for the rejection of her grievance.

24 January 2019 – the claimant appealed against the rejection of her grievance. The grievance appeal was dealt with by Mr Kirby.

12 February 2019 – the claimant's grievance appeal hearing was held, chaired by Mr Kirby.

4 March 2019 – Mr Kirby conducted interviews with Kirsty Sherburn and Katie Frith (a supervisor employed at the material time by the respondent).

8 March 2019 – the claimant received the grievance appeal outcome. Mr Kirby did not uphold her appeal.

8 April 2019 – the claimant resigned with immediate effect.

Findings of fact

28. We now turn to our findings of fact.

29. The claimant fell at work on 27 July 2006. There is a letter from her General Practitioner to a consultant neurologist at Rotherham General Hospital within the bundle at page 115. The letter says that the claimant *"had been sent home from work because her right leg was too weak to support her."* After her fall, the claimant was helped by Emma Taylor who at the time was a deputy at the store. She took the claimant home. As evidenced in her late produced document, the claimant underwent physiotherapy in the autumn of 2007. The claimant was effectively discharged from neurological care on 23 January 2007 (page 121).

30. On 25 January 2018 the claimant suffered from a dislocation of her right knee. She visited hospital (pages 122 to 131). It appears from the document at page 130 (being a letter to her GP from the Rotherham Hospital) that she was diagnosed with an *"injury of knee."*

31. The claimant was seen by Rotherham Hospital again on 1 February 2018. The relevant document is at pages 139 and 140. It was noted by the relevant clinician

that the claimant *"has had problems with her right knee for many years, especially going up and down stairs which was managed with physiotherapy some 14 years ago. A week ago she was coming down the stairs when she got sudden pain in the right knee and felt the knee become unstable."* The clinician goes on to say, *"I've explained to Mrs Jackson that structurally she has got a sound knee but anterior knee pain is due to quads wasting. I have explained that she needs to desensitise her patella femoral joint and shown her some exercises today. I have referred her to physiotherapy for quads, core and gluteal strengthening. I have emphasised that she does need to do the exercises to rebuild her muscle strength and co-ordination and I don't have a surgical solution for her pain. I have therefore discharged her from my care."*

32. The claimant returned to work on 31 January 2018. A medical risk assessment was carried out by her supervisor Katie Frith. This is at pages 132 to 138. Katie Frith noted that the claimant's knee condition was a potential hazard owing to her medical condition. She noted several times that the claimant's *"knee might pop out if she was walking for a long time, walking on uneven surfaces and may struggle with use of stairs."*

33. The claimant accepted, in evidence given under cross-examination, that there was no medical intervention in relation to her knees between the treatment in 2006/2007 and January 2018. The claimant added that "*it's all down to self-control".* What she meant by this was that she was managing her own condition. As was the case in 2007, she underwent physiotherapy in the early part of 2018 following her fall at college on 23 January 2018.

34. The self-help included the wearing of trainers and a knee support. The claimant's role involved long periods of standing. She said in evidence (in paragraph 10 of her witness statement) that *"only sports trainers seemed to relieve the symptoms to any degree".* Her evidence is that her reliance upon trainers increased after 2016. The Tribunal accepts this evidence. Within the bundle at pages 177 and 178 are receipts dated 12 and 13 July 2017 for the purchase of her of three pairs of Nike sports trainers. It is unlikely that the claimant would buy so many pairs of trainers of not inexpensive trainers at around the same time unless she had real need for them.

35. The physiotherapy which the claimant underwent after the fall in January 2018 appears to have been successful. There is a letter within the bundle at page 141 dated 6 April 2018 from her physiotherapist addressed to her GP. This says that the claimant's *"knee pain and functional ability is much improved following tailored rehab for her anterior knee pain. She has a continuous exercise plan to maintain her general lower limb strength and functional alignment."*

36. Mrs Sherburn says, about the claimant's knee problems (in paragraphs 15 and 16 of her witness statement) that, *"I wasn't aware that Sam had any condition although I remember that Sam had problems with her knee in January 2018 and had to go to hospital. She was on crutches for a short time afterwards. On 30 January 2018 my colleague Katie Frith messaged Sam to find out if she was okay and fit to return to work. I would usually have done this but I think I was on holiday at the time. Sam informed Katie that she was not able to walk far but she was happy to work on either the fitting room or tills. Katie asked Sam if she was on crutches and Sam confirmed she was uses one for walking. Katie let Sam know that she had reached out to me to confirm if I was okay for Sam to attend work on crutches as this may be a health and safety issue and we didn't want*

Sam to hurt herself further. Katie informed Sam that she might be able to attend work if she was working on delivery but Katie would confirm. A copy of these messages can be found on page 229 of the bundle."

37. Mrs Sherburn goes on to say in paragraph 18 of her witness statement that, *"Sam stopped using her knee support and crutch a couple of weeks later as I remember. Then I never heard another word about her knees."* Mrs Sherburn says that the claimant wore the knee support over her clothing. Mrs Sherburn says that the claimant only wore the knee support for a short time in the early part of 2018. During her cross-examination of Mrs Sherburn, the claimant suggested that she was discreet about the knee support and wore it under her clothing. At all events, there is no issue that Mrs Sherburn knew of the need for the claimant to wear knee supports.

38. The claimant's daughter was born on 31 December 2002. When her daughter was six years of age, the claimant made a flexible working request. This is at page 187 and is dated 11 September 2009. She noted that she was working 20 hours a week at Crystal Peaks. Her working hours were 10am to 2pm Monday to Friday. The claimant's wish was to have *"these hours as my fixed hours of work."* On 24 November 2009 the claimant's working shift pattern, as from 24 December 2009, was to work Monday to Friday between the hours of 10am and 2pm. There was a requirement for her to work one Saturday or Sunday each month. Where she did so, she would not have to work one of her weekday shifts. This was noted to be a permanent change to her terms and conditions of employment.

39. In paragraph 12 of her witness statement, the claimant says that she was motivated to make the flexible working request because *"The store could not support a higher contract (20 plus hours a week) that I would need when my daughter reached 18 (December 31 2020), therefore, I took it upon myself to re-educate and re-train in order to possibly be able to supplement or change my career in the future."*

40. The claimant returned to education in 2017. She started a BA Fine and Applied Arts degree which she completed in June 2020.

41. She made a second flexible working request on 26 August 2017 (pages 207 and 208). She suggested a change in the working pattern to fit in with her college timetable. By this stage, Kirsty Sherburn was her line manager. On 7 September 2017, the claimant was notified that her flexible working request had been agreed. She remained upon a contract working 20 hours a week which would be worked flexibly between stipulated hours over five days excluding Monday and Tuesday of each week.

42. In paragraph 15 of her witness statement, the claimant says that she detected animosity from Kirsty Sherburn. The claimant attributes this to her taking proactive steps to secure her future and to commercial pressures upon Mrs Sherburn. The Tribunal finds there to be no animosity towards the claimant from Mrs Sherburn at this stage. Firstly, had there been, we may have expected to see the claimant avail herself of the grievance procedure. It is a feature of this case that the claimant, to her credit, is not afraid to exercise her rights and stand up for herself. Therefore, we have little doubt that had the claimant experienced animosity from Kirsty Sherburn between 2017 and 2018 she would have done something about it. Secondly, Mrs Sherburn having responded positively to the

claimant's flexible working request of August 2017 to help the claimant with her studies is at odds with hostility or animosity towards her about them.

43. The claimant then made a third flexible working request in August 2018. This was necessitated by a change in her university timetable. The flexible working request form dated 29 August 2018 is in the bundle at page 236. In essence, the claimant was no longer available to work on Wednesdays. She remained unable to work on Monday and Tuesdays. She therefore wished to work her 20 hours between Thursday and Sunday. As the claimant said in the first paragraph of her grievance letter dated 9 November 2018, the flexible working request was submitted on 30 August 2018.

44. The claimant's evidence, in paragraph 18 of her witness statement, is that the flexible working request was rejected by Mrs Sherburn upon the basis that it was within 12 months of the operation of the flexible arrangements following upon the second request made on 26 August 2017 (at page 207). The claimant's account is that she was told by Mrs Sherburn that the working arrangements agreed following the second flexible working request had not run for 12 months and therefore the third request dated 29 August 2018 was premature and would be stored in her file for safekeeping.

45. Mrs Sherburn, for her part, says in paragraph 23 of her witness statement that she had taken advice from the respondent's employee relations team (known as *'ER'*) and had been told that because the claimant was still within a year of her second request being implemented on 24 September 2017, the third request could not be actioned. Mrs Sherburn scheduled a meeting to discuss the third flexible working request on 18 September 2018.

46. The claimant was unhappy about the stance adopted by Mrs Sherburn. She says that she discussed the matter with Anne Elsey and Acas. Mrs Elsey has experience of retail management. Mrs Sherburn was prevailed upon to bring the meeting forward by several days to 14 September 2018. However, she informed the claimant that any change to her working hours could only take effect after 24 September 2018 (that is to say, one year from the date of the second request being implemented on 24 September 2017).

47. There is no complaint brought by the claimant of a failure by the respondent to comply with their statutory obligation to consider her third flexible working request. We consider the claimant's interpretation to be correct. By section 80F(4) an employee may not make a further flexible working application to the same employer before the end of the period of 12 months beginning with the date on which the previous application was made (as opposed to the date of its implementation or decision made upon the application). The previous (second) flexible working application was made on 26 August 2017. Therefore, the claimant was entitled to make a further request on or after 26 August 2018.

48. At all events, the respondent made arrangements to meet with the claimant to discuss her third request a little over two weeks from the date upon which it was made. The respondent was also prepared to bring forward the date of the meeting by several days.

49. Mrs Sherburn's handling of the third flexible working request is relied upon by the claimant as evidence of increased hostility towards her. In our judgment, the respondent's handling of the third flexible working request provides little basis for the claimant's complaint of hostility or animosity. There is no basis for a

suggestion that the respondent was wilfully misinterpreting the flexible working provisions within the 1996 legislation. Mrs Sherburn was simply acting upon what she had (mistakenly) been told by ER and conveying to the claimant ER's mistaken interpretation of the provisions. The claimant's wishes were largely accommodated which is at odds with hostility towards her. The respondent acted reasonably quickly when dealing with her request.

50. We now turn to the incident referred to in paragraph 5 of the claimant's grounds of complaint (cited in paragraph 12 of these reasons). This became known, during the course of the hearing, as the *"till and trainers' incident".* Where convenient, we shall refer to it in those terms.

51. There is some uncertainty about the date of the till and trainers' incident. In her grievance letter of 9 November 2018 (pages 251 to 253) the claimant refers to handing in her third flexible application on 30 August 2019 and that this was then followed *"within a few days"* by the till and trainers' incident. The claimant said in evidence before us that the incident took place between 30 August and the date of the flexible working meeting held on 14 September 2018.

52. The claimant's account in her witness statement is set out in paragraphs 23 to 26. She describes having difficulties processing a transaction at the till. She prevailed upon another member of staff, Billie Webster, for assistance but to no avail.

53. The claimant describes that the customer left the till point after she had eventually processed the transaction. She says, *"I was sent to the opposite side of the store by Michelle Parkin one of the supervisors, where Kirsty was waiting for me, and had been for some time. I was made to feel incompetent and treated like a naughty child. Kirsty made me feel inadequate and a failure, yet this was no failure that was my fault but was due to a till communication problem which other members of staff had also experienced and with no similar reprisals. At this point she chastised me for my actions, offered me training as if it was my fault and told me to get on with the clear rail as I had failed to do this whilst serving the customer."* She says, "*This incident was not dealt with away from the shop floor, or away from other customers, or at a point where Kirsty had given thought to the event and had been able to think about her actions. She was hasty to act, and did not consider how this would affect me, or would look to the other customers who were shopping."*

54. In paragraph 24, the claimant goes on to say, "*As I turned to walk away Kirsty said, "and by the way you are not to wear those trainers again to work". They were in her opinion unsightly and not appropriate for work, sports running trainers were not to be worn and if I felt the need to wear similar footwear they would need to be Converse or Vans etc that are more fashionable. None of these brands of footwear provide the same level of cushioning as the Nike trainers I have been recommended to wear."*

55. The claimant says that Mrs Sherburn said the claimant was not to wear trainers in future and referred to those that she was wearing as, *"those orange things."* The claimant says, *"there was no mention of my footwear being dirty or in any way needing cleaning before wearing them to work."* Her account was that Mrs Sherburn took exception only to their colour.

56. In paragraph 26 of her witness statement, the claimant says that she had been wearing her trainers for a period of almost 18 months at this point.

57. Kirsty Sherburn's version of events may be found in paragraphs 19 to 21 of her witness statement. She says that she noted that the claimant had spent around 45 minutes on dealing with one item for a customer. This had resulted in a long queue building up. She says that she spoke to the claimant who told her (Mrs Sherburn) that *"the till screen kept flickering."* Mrs Sherburn formed the view that this explanation did not make much sense. She therefore asked the claimant, *"Are your sure you're okay with it? Do you need some refresher training"* to which the claimant replied that she did not. Mrs Sherburn says that, *"This wasn't a heated conversation and I didn't think it was significant."*

58. She then goes on to say that, *"I noticed Sam's trainers were really mucky. I told her something like, "you can't wear those Sam, they're too dirty." I'm not bothered about staff wearing branded shoes (which some managers mind) but hers were just too mucky. She would have been okay wearing them in delivery, but not on the shop floor where staff need to be presentable. They were scruffy and looked like they needed a wash. Sam didn't respond in any particular way that I remember. She didn't state there were any reason she needed to wear those particular shoes."* She then goes on in paragraph 21 to explain that the respondent does not have a policy on footwear and that, *"staff can wear what they want, but not obvious branding that promotes another brand."*

59. Miss Owusu-Agyei sought to impugn the claimant's credibility upon this issue by reference to some of the material within the bundle. It was suggested that the claimant made no mention of the till and trainers' incident in the grievance meeting with Gail Richardson held on 28 November 2018. The notes of that meeting are at pages 258 to 272. They were signed by Mrs Richardson and by the claimant. The claimant explained that Mrs Richardson had not asked about the till and trainers' incident even though it was in her grievance letter.

60. Mrs Richardson for her part says that the issue of the need for the claimant to wear trainers had cropped up during the course of the grievance meeting. In paragraph 10 she says that the claimant's complaint *"was that Kirsty had told her she couldn't wear these trainers."* She went on to say, *"I remember asking Samantha if Kirsty knew about the particular reason she wore these shoes to which Samantha replied "no"".* It follows that upon the respondents' evidence, the matter was discussed.

61. At the mediation meeting held on 14 January 2019, the till and trainers' incident was raised. The notes (at pages 305 to 319) record (at page 310) that the claimant said that she was made to feel *"incompetent"* upon the day of the incident. The claimant made reference to experiencing *"fear about the trainers' situation"* at the very end of the mediation meeting (page 319).

62. At the grievance appeal hearing before Mr Kirby, the claimant said that *"Kirsty pulled me up, asked if I needed further training. Said I wasn't capable".* (The grievance appeal minutes are pages 339 to 361. The salient passage is at page 344). The claimant also told Mr Kirby that she could not "*exactly"* remember what was said to her by Kirsty Sherburn.

63. Miss Owusu-Agyei submitted that *"The claimant's account becomes even elaborate"* than is portrayed in the contemporaneous documents when she describes matter in her witness as set out in paragraphs 54 and 55 of these reasons. Counsel maintained that Kirsty Sherburn *"has been consistent in her evidence that both the till and trainer incidents were brief, seconds long interactions where Mrs Sherburn did not berate the claimant …"*

64. As we have already said, the record of the meeting of 9 January 2019 between Gail Richardson and Kirsty Sherburn was only produced for the benefit of the Tribunal and the parties during the hearing. Upon the third last page of the minutes, Mrs Sherburn recounts speaking to the claimant after she had taken 45 minutes to serve a customer. Mrs Sherburn then said that she went to watch CCTV footage of the matter before going down to question the claimant again.

65. There is no mention within her witness statement of Mrs Sherburn taking time out to go and view CCTV and of speaking to the claimant twice about the difficulties with the till. This is a surprising omission and is at odds with the respondent's case that the till and trainers' incident was a brief, seconds long interaction.

66. In her meeting with Mrs Richardson, it is recorded that Mrs Sherburn says that she did speak to the claimant upon the same day about wearing what she contends were dirty orange trainers. We refer to the third page of the notes of the meeting of 9 January 2019.

67. Under questioning from the Employment Judge, Mrs Sherburn accepted that there was a conversation with the claimant about her ability to operate the till upon the shop floor and that Mrs Sherburn had asked the claimant whether she considered that she needed further training. Mrs Sherburn said that she was sure that there was only her and the claimant upon the shop floor at the time. (There was no evidence in chief given by her to this effect in her witness statement).

68. The claimant (rather imaginatively, we think) produced weather data for Rotherham from August and September 2018 in support of her case that the weather was fine and dry at the material time. She did this in support of her case that the trainers were not liable to get dirty from rain or mud. However, the Tribunal cannot set great store by this meteorological evidence given that she had by that point owned the trainers for around 14 months. It is therefore credible that they may have appeared dirty notwithstanding the fine spell of weather being enjoyed in the area September 2018.

69. This being said, we prefer the claimant's account upon the till and trainers' incident. Kirsty Sherburn's credibility is significantly tainted by the omission to make any reference in her witness statement to her removing herself from the busy shop floor in order to spend time watching CCTV footage, speaking to the claimant twice about the problems with the till and ensuring that no one else was around when she spoke to her on the shop floor.

70. We do not consider the claimant to have given such inconsistent accounts as to significantly impair her credibility. We think there is much in the claimant's point that her complaint in her account of matters that Mrs Sherburn made her to feel inadequate, incompetent and incapable are consistent and synonymous sentiments. The relevant passages in her witness statement are consistent with the grievance and the contemporaneous minutes. In the final analysis, there is no dispute between Mrs Sherburn and the claimant that the claimant was spoken to by Mrs Sherburn about the length of time which she took over the transaction and about the condition of her trainers.

71. We think there is much in the claimant's point that at the grievance hearing the onus is upon the investigating manager to ask the questions of the complainant. Mrs Richardson did not ask the claimant to explain or expand upon the till and trainers' incident. As far as the claimant was concerned, the matter was clearly

set out in her grievance letter. As far as she was concerned, she was there to answer the investigating officer's questions and that is what she did.

72. The reference in paragraph 10 of Gail Richardson's witness statement to Mrs Sherburn's knowledge (or otherwise) of the need for the claimant to wear trainers does not appear in the grievance hearing notes commencing at page 251 (or at any rate, the Tribunal was not taken to the relevant passage). This is a significant inconsistency which impacts upon Mrs Richardson's credibility.

73. In our judgment, it was inappropriate for Mrs Sherburn to have spoken to the claimant (twice as it transpires) upon the shop floor. We accept that Mrs Sherburn satisfied herself that no one else was in the vicinity. However, in our judgment it is sub-optimal management practice for a manager to speak to a junior employee upon the shop floor and not in private even after taking the precaution of ensuring that no one else is around. There is always the possibility of another member of staff or a member of the public coming upon the conversation unexpectedly.

74. On any view, there was a failure by Mrs Sherburn to give the Tribunal a full account of the till and trainers' incident in her evidence in chief.

75. For the reasons in paragraphs 59 to 74, on balance, we find that the claimant's training shoes worn that day were not dirty. We accept the claimant's account that they were not. Further, the respondent had not had cause to rebuke the claimant about her appearance at any stage in her long career with them (save for one occasion when she had worn an inappropriate blouse). There was no evidence that there was a history of the claimant turning up for work in dirty footwear or inappropriate clothing. Had she done so, we are confident that this would have been picked up (as was the case with the claimant's blouse). We therefore accept the claimant's account that Mrs Sherburn upbraided her for the state of her footwear without good cause that day.

76. However, we do not accept the claimant's account that Mrs Sherburn barred the claimant from wearing trainers after the till and trainers' incident. Firstly, the respondent had tolerated the claimant wearing sports trainers for many months. Indeed, the claimant's own case is that she had worn them consistently for at least 18 months prior to the till and trainers' incident. Secondly, it appeared to be common ground between the parties that members of staff were allowed to wear trainers and indeed any other kind of footwear so long as they were not branded.

77. The claimant told Gail Richardson at the grievance investigation meeting of 9 November 2018 that she had gone to work one day straight from university wearing trainers, had exited her car and then had to return to it in order to change her footwear before entering the store. The relevant passage is at page 266. We do not accept the claimant's account. In our judgment, it is against the probabilities that Kirsty Sherburn would have imposed a ban upon the claimant from wearing trainers for the reasons in paragraph 76. Again, we are confident that had the claimant been prevented from wearing comfortable footwear and had to endure wearing less comfortable shoes then given her character and disposition she would have complained and availed herself of the grievance process sooner than she did.

78. We accept that Mrs Sherburn unreasonably upbraided the claimant upon the day of the till and trainers' incident about the state of her footwear and find that she did so in a fit of pique or temper. This is because she was displeased with the

claimant about the length of time taken to process the transaction and the disruption that this caused to her busy day.

79. In conclusion, therefore, we find:

(1) Kirsty Sherburn rebuked the claimant upon the shop floor arising out of the till and trainers' incident.

(2) She asked the claimant upon the shop floor whether she considered that she needed training.

(3) The location chosen by Mrs Sherburn was inappropriate.

(4) The claimant's footwear was not dirty or unkempt.

(5) Mrs Sherburn acted unreasonably in speaking to the claimant as she did about her footwear.

(6) The respondent did not bar the claimant from wearing trainers after the till and trainers' incident.

80. As we saw from the list of issues prepared by Employment Judge Rostant, the claimant complains of the bullying of her by Mrs Sherburn between August and November 2018. We must therefore now turn to matters other than the till and trainers' incident.

81. The third flexible working request resulted in the shift pattern set out in the letter from Mrs Sherburn to the claimant of 18 September 2018 (at page 243). This recorded that she was unavailable between Monday and Wednesday inclusive, was available after 2pm on Thursday and Friday and was available throughout Saturday and Sunday. The claimant complains in paragraph 21 of her witness statement that she, "*would continuously be given shifts where at times I was not available, and I would be repeatedly be given shifts that meant I was working near to the end of a Saturday and yet had already worked late Thursday and Friday, the previous two evenings."* She says that the respondent did this in order to interfere with her home life.

82. The Tribunal cannot improve upon Miss Owusu-Agyei's submission upon this issue where she says (in paragraph 51(c)(ii)) that, "*Of the 10 Saturdays between 30 August 2018 and 27 October 2018, the claimant worked three (pages 105 to 110; 22-23 of the supplemental bundle). Of those three, one appears to be a 12 to 4pm shift (page 110), one appears to be a 12 to 6pm shift (page 22 supplemental bundle) and one appears to be a 1 to 6pm shift (page 22 supplemental bundle). This reflects the fact that the claimant wanted to work 20 hours per week, but was unavailable on Mondays, Tuesdays and Thursday mornings in her 2017-18 flexible working request (page 220) and was unavailable on Mondays, Tuesdays, Wednesdays and Thursday and Friday mornings in her 2018-19 flexible working request (page 243). Therefore, the allegation that the claimant was repeatedly given shifts that meant she was working at the end of a Saturday is not made out on the evidence."* In evidence given under cross-examination upon this issue, the claimant conceded that her reference to being continuously given unsuitable shifts *"may be a little strong"*. In our judgment, the claimant has not made out her case that the claimant was being singled out for unreasonable treatment in connection with the shift patterns and rotas.

83. In her witness statement, the claimant refers to one other incident of alleged bullying at the hands of Kirsty Sherburn. This was in connection with a request made by the claimant for annual leave to be taken on 17 November 2018. The

claimant was in fact on annual leave during week commencing 27 October 2018 and made her request during her leave for additional annual leave to be taken upon 17 November 2018: (in fact the request was made on 29 October). Unfortunately, the claimant was given the wrong day as annual leave. Katie Frith, who organised the rotas, put the claimant down as being on annual leave on 24 November instead of 17 November.

84. The claimant maintained that she spoke to Katie Frith who said that she had noted the correct date. She (the claimant) had not spoken to Kirsty Sherburn about the question of taking annual leave in November 2018. It seems to be the claimant's case that Kirsty Sherburn had contrived to note the wrong day of annual leave (presumably, in order to inconvenience the claimant).

85. The Tribunal has no record of it being put to Kirsty Sherburn that she had illegitimately interfered in the claimant's holiday leave arrangements. We therefore agree with the respondent's submission that this was simply an error and nothing more.

86. The claimant raises two other incidents in her grievance letter (commencing at page 251). The first of these concerns an allegation that she was belittled by Kirsty Sherburn in front of a customer upon a working day towards the end of October 2018. The claimant says that she wished to go to retrieve her inhaler but before being able to ask Mrs Sherburn if she could leave the shop floor so to do, she was unjustifiably rebuked such that she felt intimidated from asking. There is no reference to this matter in the claimant's impressive 38 pages' witness statement. Accordingly, no evidence having been led by the claimant upon this issue, the Tribunal is unable to make any findings in her favour upon it.

87. A similar conclusion must be reached in connection with a complaint raised by the claimant in her grievance upon the issue of clocking in. Her complaint appears to be that she was rebuked either for clocking in too early or too late such that she felt that no matter when she clocked in, she was wrong. This is mentioned in the claimant's grievance letter but again not in her witness statement. It follows therefore that the claimant having led no evidence upon it the Tribunal is unable to conclude in her favour that the incident occurred.

88. Following her annual leave taken during week commencing 27 October 2018, the claimant was signed off by her GP as unfit to work with effect from 2 November 2018 because of stress at work. The relevant sick note covering the period from 2 to 16 November 2018 is at page 255. The claimant continued to receive sick notes from her GP certifying her as unfit for work for the same reason until the end of her employment. The relevant pages within the bundle are 256, 257, 288, 289, 335, 336 and 375. The claimant never returned to work.

89. A week after commencing her sickness absence, the claimant raised her grievance. As we have seen, this is at pages 251 to 253 and is dated 9 November 2018.

90. It is worth pausing here to consider the respondent's grievance and mediation policy. This is at pages 434 to 443.

91. Three processes are described within the policy. The first of these is the informal process. Where an employee does not consider that an informal process would result in a satisfactory resolution then it is recommended that they look to follow the formal process.

92. The policy also contemplates mediation. The salient parts of the policy read:

"Where there is a minor breakdown in a working relationship, you should think about mediation to see whether this can help you to rebuild the working relationship between those involved before considering a formal process. Mediation involves a facilitated conversation with a neutral third party manager to discuss any issues and seek to agree a resolution. Mediation can be used as part of the informal stage of the grievance procedure, or as an outcome of a formal grievance meeting. Mediation is voluntary and can only go ahead when everybody agrees to it. We do encourage you to consider this as it helps to [resolve conflict, rebuild relationships and address a range of issues]."

93. The mediation policy goes on to say that a manager who has not previously been involved will hold the mediation meeting where this is agreed. The aim is to work together to problem solve and focus on going forward and rebuilding working relationships. The policy goes on to say that, *"As this is an informal process, there is no need for a company notetaker to be present. Instead, the manager facilitating the meeting will capture the key concerns, objectives and outcomes agreed".* The policy then goes on to describe the formal process.

94. The formal process prescribes the procedure to be followed by the employee in making a complaint and then the holding of a grievance meeting. The policy then goes on to say that after completing the investigation, the manager will write to tell the employee of their findings without unreasonable delay. It goes on to say that, *"Where the manager finds evidence to support all or some of your concerns, especially where the grievance is in relation to bullying and harassment, a relationship break down, unfair treatment etc they will consider mediation."* An employee dissatisfied with the outcome has a right of appeal. The relevant procedure to follow when raising an appeal is then described.

95. One of the issues noted by Employment Judge Rostant is the claimant's complaint that there was a delay by the respondent in the handling of her grievance. It is worth, therefore, noting the relevant timeline:

(1) 9 November 2018 – the claimant writes her grievance (pages 251 to 253).

(2) 12 November 2018 – the claimant delivers the grievance to the respondent (see the email at page 246).

(3) 20 November 2018 – Kirsten Self, employee relations advisor, acknowledges the claimant's grievance and invites her to attend the grievance meeting on 28 November 2018 (page 254).

(4) 28 November 2018 – the grievance meeting takes place attended by the claimant, Leigh Woodhead, sales manager, and the claimant. The claimant agreed to Gail Richardson's suggestion of mediation (page 270).

(5) 4 December 2018 – Kirsten Self writes to the claimant to invite her to attend a mediation session on 8 December 2018.

(6) 5 December 2018 – the claimant cancels the mediation (page 415).

(7) 14 December 2018 – Gail Richardson meets with the claimant. This was a health and well-being meeting to discuss the claimant's continued absence from work. The notes are at pages 277 to 284. The claimant expressed reservations about going through the mediation process as she said that it made her feel like she was responsible for being bullied. Mrs Richardson said that the mediation was the outcome of the grievance. *(This was an odd*

conclusion for her to reach as the grievance outcome was not yet known). The matter was held over until the next health and well-being meeting.

(8) 4 January 2019 – a second health and well-being meeting was held attended by the claimant, Gail Richardson and Mel Dodsworth, the manager of the Meadowhall store. The claimant consents to mediation. The relevant notes of this meeting are at pages 291 to 295.

(9) 8 January 2019 – Mrs Richardson wrote to the claimant to say that following the health and well-being meeting on 4 January 2019, a mediation meeting had been set with a provisional date of 14 January 2019. The relevant letter is at page 300.

(10) 9 January 2019 – Gail Richardson meets with Kirsty Sherburn in order to facilitate Gail Richardson's investigation into the claimant's grievance. The notes of this meeting are within the supplemental bundle (and were produced during the hearing).

(11) 11 January 2019 – Mrs Richardson attempts to contact the claimant in order to inform her of the outcome of the grievance. Mrs Richardson noted in the relevant section of the respondents' internal record at page 415 that the claimant's grievance had been unsuccessful. The claimant in unaware of this until 14 January 2019.

(12) 14 January 2019 – the mediation takes place. Shortly before it commenced, Mrs Richardson informs the claimant of the grievance outcome.

(13) 18 January 2019 – Mrs Richardson sends to the claimant the written outcome of the grievance which is at pages 321 to 325.

96. The respondent therefore took around 10 weeks from start to finish to conclude the investigation into the grievance and furnish the claimant with a detailed outcome. Built into the process was the mediation. The timetable overlapped with the busy festive season. Further, the claimant was on long term sickness absence. There was therefore some sensitivity and the claimant was allowed a period over the Christmas and New Year holiday to reflect upon whether she wished to go ahead with mediation after all.

97. In all the circumstances, we agree with Miss Owusu-Agyei that there was constant progress with the grievance. She is right to submit that the mediation forms part of the grievance process as we have just seen. (As will be seen, in our judgment the respondent misapplied their own policy but that does not detract from the fact that matters were progressed with reasonable expedition). There was no unreasonable delay in the handling of the grievance in and of itself.

98. The claimant complains about the way in which the respondent handled the mediation which was held on 14 January 2019. The claimant complains firstly that the meeting was delayed by 45 minutes. There is no dispute that Mrs Sherburn was late in arriving at the meeting. Mrs Sherburn says that this was due to a need to get cover for her store and due to bad traffic.

99. Mrs Richardson's account is that she took the opportunity presented by Mrs Sherburn's late arrival to talk to the claimant that day (14 January 2019) about her grievance outcome. Mrs Richardson says (in paragraph 39 of her witness statement0 that, *"I told her I had decided not to uphold it and talked her through the reasons. I was conscious this wouldn't be the outcome she'd hoped*

for and so asked if she felt ok to continue with the mediation. She said that she felt ok to go ahead".

100. We can see from the notes of the meeting with Kirsty Sherburn of 9 January 2019 that Mrs Richardson told Mrs Sherburn, at the very end of the meeting, that no further action would be taken. Mrs Sherburn therefore effectively knew before the claimant that the claimant's grievance had been rejected. Although this might strike the claimant as unfair, she was not aware of this until the production of the notes during the course of this hearing. Plainly therefore, it cannot have been a reason for her resignation.

101. Mrs Richardson accepts that there was something of a delay before she was able to hold her meeting with Mrs Sherburn in order *"to find out her side of events".* She attributes this to the busy Christmas trading period. The delay in Mrs Richardson speaking to Mrs Sherburn appears not to have contributed to any unreasonable delay with the procedure as a whole, given the context of the claimant initially agreeing to mediation, then appearing reluctant to embark upon mediation, being permitted at the first health and welfare meeting to consider her position and then finally agreeing in the early part of the year to mediation.

102. On 11 January 2019, just three days prior to the mediation meeting, Kirsten Self had written to the claimant (page 227). She directed the claimant to consider the outcomes which she wished to achieve at the mediation session. Kirsten Self told the claimant that a note taker would not be present. This accords with the respondent's policy that, because mediation is an informal process, there is no need for a note taker to be present.

103. There is therefore much justification in the claimant's case that she was surprised that the mediation meeting of 14 January 2019 was attended by Melanie Dodsworth who acted as note taker. The claimant was put in a position of finding herself in a meeting with three managers and, contrary to her expectations, discovering that one of them was there in the capacity of a note taker.

104. The claimant says that *"on multiple occasions"* Melanie Dodsworth contributed to the meeting. Ms Dodsworth's notes in fact make no record of her saying anything. These notes were signed by the claimant as accurate. We therefore reject this aspect of the claimant's account of the mediation meeting.

105. On 15 January 2019, Gail Richardson sent a report about the mediation meeting to the respondent's human resources team. This is within the supplemental bundle. Mrs Richardson said that "*tensions ran high"* from the start of the meeting and the claimant *"got very upset and raised her voice towards [Mrs Sherburn]. At this point I adjourned the meeting to allow both parties to reconsider their behaviour".* Mrs Richardson then reports that the claimant made a telephone call from the toilets. This was in fact made to Mrs Elsey. The claimant returned and, according to Mrs Richardson, said that she was *"unable to speak now as there are three store managers against me. Everything has been covered up by everyone. I want an apology and everything investigating impartially. I knew I wouldn't get either, so my mental health has suffered."* Mrs Richardson says the claimant then read a statement which she had prepared in the toilet. This was effectively a statement of mediation expectations including an apology, the provision of a contact for the eventuality that the claimant suffers bullying in the future and discrimination and equality training to be provided for Mrs Sherburn.

106. Mrs Richardson reports that she then adjourned the meeting to seek advice from human resources. Mrs Richardson describes the course of the mediation meeting during what doubtless was a difficult afternoon for all present in paragraphs 38 to 45 of her witness statement.

107. We do not consider it necessary to go into any great detail about the ebb and flow of that meeting. There is no dispute that there were several adjournments and that the claimant and Mrs Sherburn were not together the whole time as one or the other of them sat out. Further, there is no dispute that the claimant was very upset during the course of the meeting and the immediate aftermath. The claimant said that afterwards she *"was so emotional that [she] hysterically cried to be let out of the building as I could not take any more of this distress and intimidation."* She then describes being unfit to drive home immediately and talked to Mrs Elsey for about 40 minutes before making her way home after leaving the store. The Tribunal accepts the claimant's account which is corroborated by Mrs Elsey.

108. The claimant was concerned that the respondent's managers were effectively accusing her of lying. The contemporaneous notes make no reference to an accusation levelled at her of lying albeit that (at page 315) Mrs Sherburn asked the claimant for specific examples of the bullying and harassment alleged against her (Mrs Sherburn).

109. From the relevant passages contained in Gail Richardson's witness statement, we can see that the mediation focused (at least in part) upon the merits or otherwise of the claimant's grievances. In paragraph 43, she says that, *'We then went back to talking about the [till and trainers' incident]"* and in paragraph 44 about the issue of the shift patterns. In paragraph 45 she records there being discussion over the flexible working request. This was at odds with the objectives of the mediation outlined to the claimant by Kirsten Self on 11 January 2019. The claimant was not told that the mediation would be concerned with the merits of her compliant. The claimant had been encouraged to think about what she wanted to achieve from the mediation (as a forward-looking process *per* the respondent's policy) and in particular:

- *Objectives: what did the claimant wish to achieve from the mediation session?*
- *What concerns and reservations did the claimant entertain about achieving the objectives?*
- *Why did the claimant wish to achieve those objectives and what benefits would she gain from them?*
- *Who else is impacted through the breakdown in the relationship between her and Mrs Sherburn?*
- *What steps may be taken to resolve the relationship?*

110. In our judgment, therefore, there is much in the claimant's point (as pleaded in paragraph 10 of her grounds of claim) that there was little attempt at the mediation meeting to resolve issues and move on. These expectations were not met in the mediation where Mrs Richardson's focus appeared to be upon debating what had happened in the past.

111. Mrs Richardson sent to the claimant a written confirmation that her grievance was not upheld. The grievance outcome letter dated 18 January 2019 is at pages 321

to 325. In the Tribunal's judgment, Mrs Richardson considered the claimant's grievances in a conscientious manner. The Tribunal only departs from Mrs Richardson's findings upon the question of the till and trainers' incident. However, the mere fact that Mrs Richardson did not uphold the claimant's grievance upon this issue (notwithstanding the Tribunal's findings) is not suggestive of an investigation falling below reasonable management standards. There is, we think, much merit in Miss Owusu-Agyei's observation (in paragraph 63 of her submissions) that Gail Richardson is neither a professional investigator nor a lawyer. In our judgment, she undertook a reasonable investigation and reached reasonable and tenable conclusions.

112. The grievance outcome letter also recorded the outcome of the mediation which had been held four days earlier. Mrs Richardson recorded the claimant's concerns that she (Mrs Richardson) was "*not impartial enough"* to facilitate mediation. She therefore recommended that the mediation be rescheduled and be managed by Hannah Wade, the store manager of the Leeds White Rose store. It is perhaps unfortunate that this suggestion was not made before Mrs Richardson embarked upon the process.

113. The claimant appealed against the grievance outcome (pages 326 to 328). Amongst other points raised by her, the claimant expressed her unhappiness about the presence of Mrs Dodsworth which was contrary to her expectations that there would be no note taker. She also complained about Mrs Richardson effectively eliding her role as fact finder and mediator. At the bottom of page 327 she records that, *"Gail [Richardson] outlined the facts that she had found in favour of my manager Kirsty Sherburn and believed I had only suffered due to the breakdown in the employee to manager relationship that mediation would resolve."* She referred to the letter from Kirsten Self to which we referred in paragraph 109 above. The claimant copied and pasted this into her grievance appeal letter. She drew attention to the fact that her expectation was that only three people would be in attendance (the claimant, Mrs Sherburn and Mrs Richardson). The claimant says that in the appeal letter she had (within the letter) *"outlined some of my issues with how my grievance has been dealt with in this letter and will take the opportunity to expand on these along with my other issues at the appeal meeting."*

114. Mr Kirby dealt with the claimant's appeal. The grievance appeal minutes are in the bundle between pages 339 and 361.

115. Mr Kirby methodically went through each of the claimant's grievances. The meeting touched upon the issue of the mediation process at pages 359 and 360. The claimant complained that a note taker was present when she had been informed to the contrary. She complained that Mrs Dodsworth had involved herself in the meeting. She said that during the course of the meeting Mrs Sherburn had called the claimant a liar and that the conduct of the meeting had not been fair and impartial.

116. Mr Kirby interviewed Mrs Sherburn and Katie Frith as part of his investigation. Again, these notes were produced during the course of the hearing. Surprisingly, Mr Kirby did not interview Gail Richardson about her conduct of the mediation process.

117. Mr Kirby then wrote to the claimant. He rejected the claimant's appeal. The letter is at pages 363 to 366. It is mistakenly dated 8 February 2019. There is no dispute that the correct date is 8 March 2019.

118. Mr Kirby found there to be no undue delay with Mrs Richardson processing the grievance. In our judgment, this is a sustainable conclusion for the reasons which we have set out above. In particular, the grievance was taking place against a background of the peak trading season and of allowing the claimant time to consider how she wished to proceed with matters.

119. Mr Kirby acknowledged that the mediation session took place before the claimant had received her formal written outcome and that such was *"not best practice".* Upon the question of Mel Dodsworth's presence at the mediation meeting, Mr Kirby said, *"whilst we don't usually have a note taker at mediation meetings, Gail felt that it would be beneficial to have Mel present to have brief notes so she could focus on the discussions and facilitating the actual meeting."* Mr Kirby endorsed Mrs Richardson's conclusion that the matter should proceed by way of mediation to be carried out by Hannah Wade. He then went on to say that should the mediation not succeed then there was the possibility of re-deployment to another store.

120. The claimant suggested to Mr Kirby, during his cross-examination, that Mrs Richardson should have had no involvement in the mediation. This was upon the basis of the procedure which we have cited above in paragraphs 90 to 94. Mr Kirby defended his position upon the basis that he had sought advice from Employee Relations.

121. Mr Lewis asked Mr Kirby upon what basis mediation may be introduced in the middle of a grievance process. Mr Kirby replied that an outcome of a grievance may be a recommendation for mediation.

122. Mr Kirby's position appears to be a misreading of the respondent's procedure. Where the matter is (as here) dealt with under the formal process, a mediation may only take place where the manager finds evidence to support some or all of the employee's concerns. In this case, Mrs Richardson (and then Mr Kirby) had not found in favour of the claimant upon any of the issues raised by her.

123. Indeed, there was a further breach by the respondent of their own policy as Mrs Richardson recommended mediation before she had reached her conclusions upon the claimant's complaint. This plainly was the case because she recommended it at the first meeting with the claimant held upon 28 November 2018. The matter was explored again at the two subsequent health and well being meetings. These three meetings took place before Mrs Richardson had met with Kirsty Sherburn to get her side of the story. It follows therefore that Mrs Richardson could not have reached a conclusion upon the claimant's complaints when she made the recommendation of mediation.

124. The difficulty for the respondent upon this issue is that by the time of the mediation meeting, Mrs Richardson reached conclusions upon the claimant's grievance. These were set out in some detail in the grievance outcome letter at pages 321 to 325. The respondent's procedure dictates that mediation may be used outside the formal process but may only be used within the formal process in the event of findings in the employee's favour. What is impermissible is for there to be a formal process, for the outcome to notified to those concerned and then for there to be a subsequent mediation where determinations had been found wholly against the employee.

125. Further, the mediator must be a neutral third-party manager. Gail Richardson did not meet that requirement. In addition, the mediation must take place without a note taker.

126. Regrettably, therefore, there were a number of significant breaches by the respondent of its own procedure.

127. These procedural breaches were not properly investigated by Mr Kirby. As we say, he did not even interview Mrs Richardson. He found that proceeding with the mediation before the claimant had received her formal written outcome did not impact upon the process. This is, with respect, a remarkable conclusion given that the claimant was notified of the outcome of the grievance verbally very shortly before the mediation commenced. On any view, this had a significant impact upon the conduct of the mediation and doubtless led to the heightened state of emotion of both the claimant and Kirsty Sherburn (who had been told that the allegations against her were not upheld only three days prior).

128. The Employment Judge asked Mr Kirby whether he was concerned that Gail Richardson had dealt with both the grievance and the mediation. Mr Kirby replied rather vaguely and unsatisfactorily that he would have been concerned but "*I cannot remember the advice"* that he was given (presumably by the respondent's human resources department).

129. The Tribunal therefore determines that Mr Kirby reached reasonable conclusions upon the appeal against Mrs Richardson's findings upon the claimant's grievances. This is for the same reason as we concluded that Gail Richardson had reached reasonable conclusions. However, we find that Mr Kirby reached unsustainable conclusions upon the reasonableness of the procedure carried out by the respondent around the mediation.

130. In paragraph 61 of her witness statement, the claimant says that *"At the end of March [2019] on my bank statement I found that I had not been paid correctly in regard to my sick pay for March and that for two months February and March I would have received a total of approximately £105 to live on".* The claimant telephoned to enquire of the position. She spoke to Miss Swindells. This conversation took place on 20 March 2019.

131. Miss Swindells' evidence is that the claimant had run out of her entitlement to sick pay by this stage. She had been absent from work, as we know, from the end of October 2018. Miss Swindells looked into the matter and found that the claimant had been underpaid by £5.17. Her calculations are at page 378. Miss Swindells says that the claimant "*seemed to understand this and be happy enough".* A copy of the calculations at page 378 were sent to the claimant on 22 March 2019 (page 376).

132. The claimant was paid the £5.17 owed to her in the pay run at the end of April 2019. Evidence of this is at page 432.

133. In July 2019, the claimant resurrected the matter claiming that she had not been paid the correct amount of statutory sick pay. Miss Swindells looked into the case again and agreed with the claimant that an error had been made. She explains in paragraph 11 of her witness statement that, *"it seemed her manager had made a mistake and put one week's absence into the system on a single day, so that it appeared she had only one day sick that week. This meant only one day was counted for calculating her SSP".* She goes on to say that, *"unfortunately this can happen occasionally, as it's a manual process for a manager to complete and is*

open to human error. In this case it resulted in an underpayment of £52.50. Please see my emails with our payroll provider at page 389B explaining this". The £52.50 was paid to the claimant in August 2019.

134. The claimant says in paragraph 61 of her witness statement that she remained sure at the time that she had not received the correct amount of sick pay in March 2019. She says that she had lost trust in the respondent and resigned with immediate effect.

135. Her letter of resignation is at pages 381 and 382. It is worth setting this out in full:

*"**Resignation from post as part time sales assistant***

On 9 March 2019 you wrote to me to let me have your decision regarding my grievance appeal. Your letter is dated 8 February 2019 although it was posted much later than this. Towards the end of the letter you explained that New Look would be in contact with me to set up a mediation and to review my flexible working contract. Receiving your letter, I have not heard from anyone at New Look at all to further these ideas, and as you will appreciate, I do not agree with the fairness of the outcome of my grievance appeal.

To add to the stress and concern that I have about New Look's management of my grievance, and the conduct of my manager, Kirsty Sherburn, I have now received only a small proportion of the statutory sick pay to which I am entitled, and despite a request for this to be investigated I am told that it is correct as I was not set up on the system as long term sick by my manager.

My most recent payslip confirms that you have paid only £105 for the entire month when I should have been receiving Statutory Sick Pay at the statutory rate for each week during which I have been absent from work and sick. The previous month I received no wage at all due to this error and I have received no contact informing me of any issues during any of my absence. Clearly, I cannot survive on £105 for two months.

In addition, I have asked New Look to pay unused holiday pay for the holiday year ending 31 March 2019 but have been told that this has not been authorised despite my obvious need.

I also need to add that my grievance has been based upon the bullying conduct of Kirsty Sherburn. Although New Look has no established dress code, and although I have always dressed appropriately for work, during August 2018 I was criticised for wearing training shoes – shoes which I have worn for a number of months prior to this without any issue or comment from any manager – because (as you are aware) of a medical condition associated with my knees – hyperflexion.

Mrs Sherburn's insistence that I do not wear training shoes to work, and her conduct following that incident – conduct that was bullying and victimising – has led me to be absent from work suffering from stress, a fact confirmed by my GP's fit notes.

Having received the benefit of legal advice about my position I can see that these are examples of direct discrimination.

New Look clearly had a responsibility to make reasonable adjustments to the way I conducted my work to take into account my known knee condition and had to ensure that Mrs Sherburn did not bully or victimise me so as to cause me stress in the way she has.

In these circumstances, and as a result of New Look's conduct, and its clear indication that it has no belief in the reasonableness of my complaints I regard my contract of employment as at an end. For the avoidance of doubt this letter should be treated as my letter of resignation which I tender as a direct response to New Look's breaches of contract. I'm looking for you to make proposals to compensate me for discrimination and unfair dismissal but make the point that I intend to take this matter further."

136. Mr Kirby spoke to the claimant on 10 April 2019. He followed up with a letter of 11 April 2019 at pages 384 and 385. He asked the claimant to reconsider her resignation. He offered the claimant a week to *"cool off"* and reconsider. He mentioned that there was a new store manager at Crystal Peaks following Mrs Sherburn's departure.

137. On 15 April 2019, the claimant replied to Mr Kirby (pages 387 and 388). Amongst other things, the claimant observed that Mr Kirby had informed her in his letter of 11 April 2019 that there was no guarantee that, if she retracted her resignation, he could assure her that she would be able to continue working 20 hours per week. It was upon this basis, the respondent suggested that the claimant resigned because she could no longer sustain working for the respondent alongside her university schedule.

138. This concludes our findings of fact.

The relevant law

139. We now turn to a consideration of law. Upon the complaint of constructive unfair dismissal, it is for the claimant to show that she was dismissed. By section 95(1)(c) of the 1996 Act, there will have been a dismissal where the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to determinate it without notice by reason of the employer's conduct.

140. It is therefore for the claimant to satisfy the Tribunal that the respondent was in repudiatory breach of contract, that the claimant resigned at least in part in response to the breach and that she did not waive or affirm her right to resign in response to it.

141. The relevant term of the contract in question in this case is the implied term of mutual trust and confidence. In **Malik v Bank of Credit and Commerce International SA** [1997] IRLR 462 the term was defined as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

In **Baldwin v Brighton and Hove Council** [2007] IRLR 231, the Employment Appeal Tribunal confirmed that the original formulation of *"calculated <u>and</u> likely"* was an error. The correct formulation is that *"the employer shall not without reasonable and proper cause conduct itself in a manner calculated <u>or</u> likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

142. Where there is conduct which amounts to a breach of the implied term of trust and confidence it will follow that there has been a fundamental or repudiatory breach going to the root of the contract entitling the employee to resign and claim constructive dismissal. It is not enough for the employee to find the employer's

actions upsetting or to feel that they are unreasonable. Unreasonable behaviour on the part of the employer does not amount to a breach of the implied term of mutual trust and confidence. The breach must be so fundamental and serious that the employee cannot be expected to work any longer for the employer. Authority for this proposition may be found in **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908.

143. The Tribunal's task therefore is to look at the employee's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. The Tribunal will take into account all the circumstances which have a bearing upon this objective assessment.

144. Where the employee waits too long after the employer's breach of contract before resigning, they may be taken to affirm the contract and thereby lose the right to claim constructive dismissal. The issue of affirmation is essentially one of conduct and not simply the passage of time. What matters is whether, in all of the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign. Resigning from a job is a serious matter with potentially significant consequences for the employee. The more serious the consequences, the longer the employee may take to make such a decision.

145. Where, as here, an employee is on sick leave at the relevant time, it is not so easy to infer that they have decided not to exercise their right to resign. Affirmation may be implied by prolonged delay or if the innocent party calls on the guilty party for further performance of the contract by, for example, claiming sick pay. As observed by Langstaff P in **Chindove v William Morrisons Supermarkets Plc** [UKEAT/0201/13), the question of affirmation is one of conduct rather than of time. An important part of the context is whether the employee was at work, so that it could be concluded that they were honouring the contract and continuing to do so in a way inconsistent with deciding to go. Where the employee is on sick and not working, that observation has nothing like the same force.

146. A course of conduct can cumulatively amount to a fundamental breach entitling an employee to resign and claim constructive dismissal following a *"last straw"* incident, even if the last straw by itself does not amount to a breach of contract. The final act in the series must contribute to the breach and cannot be innocuous or utterly trivial.

147. An employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation. In **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1 CA it was held that if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after the previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign. Where the act that tips the employee into resigning is entirely innocuous it will be necessary to consider whether any earlier breach has been affirmed.

148. The repudiatory breach need not be the sole reason for the claimant's resignation. It need only be a material reason. We refer to **Meikle v Nottinghamshire County Council** [2005] ICR 1 and **Wright v North Ayrshire Council** [2014] ICR 77 as authority for this proposition. The essential question is whether the repudiatory breach played a part in the constructive dismissal.

149. Upon a constructive dismissal case, the Tribunal may only take into account those facts that were known to the claimant at the time of her resignation. Subsequently acquired information plainly cannot be a material reason for an employee's decision to resign. We refer to the case cited by Miss Owusu-Agyei as authority for this proposition: **W Devis and Sons Limited v Atkins** [1977] ICR 662, HL. It follows therefore that the claimant cannot rely upon her after acquired knowledge, for example, of Kirsty Sherburn finding out the outcome of her grievance before she was told as a material reason for her resignation.

150. Should the claimant succeed in establishing that she has been constructively dismissed, then it will be for the respondent to show that the dismissal was for one or more of the statutory permitted reasons. As we said earlier, the respondent does not seek to advance a permitted reason for dismissal. Accordingly, it follows that if the claimant establishes that she has been constructively dismissed, then the complaint of constructive unfair dismissal will succeed.

151. We now turn to the claimant's complaint brought under the 2010 Act. By section 26 of the 2010 Act, a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating the other's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. The prohibited conduct of unlawful harassment related to a relevant protected characteristic is unlawful in the workplace pursuant to section 40 of the 2010 Act.

152. By section 136 of the 2010 Act, the burden is upon the claimant to prove facts from which the Tribunal could decide that an unlawful act of harassment has taken place. If she does so, then the burden shifts to the respondent to prove a non-discriminatory explanation unrelated to the protected characteristic in question.

153. There are three essential elements of a harassment claim:

- Unwanted conduct.
- That has the proscribed purpose or effect, and
- Which relates to a relevant protected characteristic.

154. The Equality and Human Rights Commission's Code of Practice on Employment notes that unwanted conduct can include *"a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour"* – paragraph 7.7. In 7.8 of the Code, guidance is given to the effect that the word *"unwanted"* is essentially the same as *"unwelcome"* or *"uninvited".*

155. The unwanted conduct must have the purpose or effect of violating the complainant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

156. Conduct that is intended to have this effect will be unlawful even if it does not in fact have that effect.

157. However, conduct that does have that effect will be unlawful even if that was not the intention. In deciding whether the conduct has the proscribed effect the following must be taken into account:

- The perception of the complainant.
- The other circumstances of the case.
- Whether it is reasonable for the conduct to have that effect.

Therefore, 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 complainant. The objective part requires the Tribunal to ask whether it was reasonable for the complainant to claim that the conduct had that effect. The object of the legislation is to ensure that claims are not brought upon the basis of hypersensitivity.

158. The unwanted and offensive conduct must be related to a relevant protected characteristic. One of these is disability. Whether or not the conduct is related to the characteristic in question is a matter for the appreciation of the Tribunal. The mere fact, in disability cases, that unwanted conduct occurs at a time when a claimant satisfies the definition of a disabled person will not necessarily mean that it is related to the disability.

159. The necessary link will be relatively easy to establish where reference is made to the protected characteristic. On the other hand, where the link between the conduct and the protected characteristic is less obvious, Tribunals may need to analyse the precise words used together with the context in order to establish whether there is any association between the two.

160. By section 123 of the 2010 Act, a complaint of a contravention of the 2010 Act in the work place must be brought to the Employment Tribunal within three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period.

161. If a complaint is out of time, it for the complainant to convince the Tribunal that it is just and equitable to extend time for the presentation of her claim. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, Underhill LJ said that 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."* The Tribunal's exercise of the power to extend time is the exception and not the rule and should be used with restraint (**Robertson v Bexley Community Centre** [2003] IRLR 434 CA). That said, exceptional circumstances are not required to be shown.

162. The focus when considering a just and equitable extension should not simply be upon whether the claimant ought to have submitted the claim in time. Tribunals must weigh up the relevant prejudice that extending time would cause to the respondent and to the claimant.

Conclusions

163. We now turn to our conclusions. We shall apply the legal principles which we have outlined to the findings of fact which we have made in order to arrive at our conclusions upon the issues in the case.

164. We shall start with the complaint of constructive unfair dismissal. Employment Judge Rostant identified the claimant to have raised seven aspects of the respondent's conduct which she contended breached the implied term of trust and confidence. We shall consider each of these in turn.

165. The first is the conduct of Kirsty Sherburn as described in paragraph 5 of the claimant's grounds of claim. We cited paragraph 5 above. By way of reminder, this is the till and trainers' incident. The relevant factual findings are in paragraphs 50 to 78.

166. It is our judgment that Kirsty Sherburn's conduct upon the day of the till and trainers' incident breached the implied term of trust and confidence and was repudiatory. It is the case that there was reasonable and proper cause for her to speak to the claimant about the difficulties which she was having operating the till. There was also reasonable and proper cause to enquire of the claimant as to whether there was a training need. However, there was no reasonable and proper cause for this discussion to take place in a public area. There was also no reasonable and proper cause to rebuke the claimant about the condition of her footwear, much less to do so in a public area. Objectively, Kirsty Sherburn's conduct that day was likely to seriously damage trust and confidence. There can be no reasonable and proper reason for a store manager to treat a junior employee in this manner.

167. The second issue is the claimant's contention that she suffered bullying at the hands of Kirsty Sherburn between August and November 2018. This contention fails on the facts. The factual findings are in paragraphs 41 to 49 and 80 to 87. We agree with Miss Owusu-Agyei's submission that the claimant was reduced to reliance upon generalities and was unable to point to any specific instances of conduct seriously damaging of trust and confidence. She led no evidence upon the clocking in or inhaler incidents. Her evidence did not come up to proof upon the issue of the allocation of shifts. The episode around annual leave in November 2018 was simply an administrative error.

168. The third issue is the claimant's contention that there was a delay in dealing with her grievance. This allegation fails upon the facts. The factual findings are in paragraphs 95 to 97. There was no actionable delay in dealing with the grievance. We agree with Miss Owusu-Agyei that there was constant process in dealing with the grievance. There may be some criticism of Gail Richardson for not interviewing Kirsty Sherburn for almost two months after the submission by the claimant of her grievance. However, this did not contribute to any delay given the context of the health and well-being meetings and the claimant's understandable uncertainty over whether to pursue mediation.

169. The fourth contention is that the respondent's handling of the mediation on 14 January 2018 was a repudiatory breach. The claimant's contention upon this is set out in paragraph 10 of her grounds of claim which we cited above. This essentially amounted to a contention that the respondent was not seeking to mediate but rather focused upon the facts of the case and *"defending Kirsty".*

170. In our judgment, the respondent's conduct of the mediation was likely to seriously damage trust and confidence. The factual findings are in paragraphs 98 to 110 and 122 to 129. Firstly, the respondent failed to follow their own procedure as set out above. Secondly, Gail Richardson (who was the fact finder) undertook the mediation. This was an unfortunate eliding of roles. It was contrary to the respondent's policy that the mediation should be conducted by a neutral third-

party manager. Thirdly, the claimant had been led to believe that only Kirsty Sherburn and Gail Richardson would be present and that no notes would be taken. The claimant then found herself in a meeting with three store managers, one of who was taking notes. The claimant was not warned beforehand that the respondent was proposing to depart from their procedure in this way. Fourthly, the tenor of the meeting focused upon what had happened rather than looking to mediate a solution as the claimant had been led to believe by Kirsten Self would be the process. Fifthly, the claimant had been told that her grievance had failed minutes before the mediation commenced. As the respondent was conducting a formal grievance process, mediation was therefore contra-indicated pursuant to the respondent's policies. The matter was then compounded by the belated suggestion of a neutral third-party mediator. Again, this is contrary to the respondent's procedure (as the grievance was rejected as a whole) and may be viewed as acknowledgement by the respondent of the inadvisability of Gail Richardson conducting the mediation at all given her fact-finding role.

171. Plainly, there was no reasonable and proper cause for the respondent's conduct. They appear to have misunderstood their own policy. There was no real attempt to mediate. There can be no justification for springing upon the claimant the presence of a third manager to take notes contrary to her clear expectations. The claimant was justifiably upset by the respondent's handling of the mediation.

172. The fifth issue is the rejection by Gail Richardson of the claimant's grievance. In our judgment, this fails upon the facts. The factual findings are in paragraphs and 112. The Tribunal parts company with Gail Richardson upon the issue of the till and trainers' incident. However, it does not follow from this that Mrs Richardson's investigation was below reasonable management standards such as to constitute a breach of the implied term of trust and confidence. We have little doubt that the outcome of the grievance came as a disappointment to the claimant and that subjectively this was damaging of trust and confidence. However, there was reasonable and proper cause for Gail Richardson to reach the conclusions which she did. Objectively, therefore, there was no breach of the implied term of trust and confidence.

173. The sixth issue is the rejection of the claimant's appeal against Gail Richardson's decision. The Tribunal upholds the claimant's complaint about this in part. The factual findings are in paragraphs 113 to 129. We find that Mr Kirby reached reasonable and sustainable conclusions in upholding Gail Richardson's decision upon the grievances themselves. However, on any view, his conclusions upon the claimant's complaints about the conduct of the mediation was one which no reasonably competent manager properly directed could have reached. It was therefore seriously damaging of trust and confidence.

174. It is difficult to see how Mr Kirby could have concluded that the decision of Gail Richardson to informally impart the outcome of the grievance to the claimant shortly before the commencement of the mediation had no impact on the procedure. The most cursory of investigations would have shown that (as a consequence) the mediation was beset by an air of tension from the outset such that the mediation was unlikely to succeed.

175. Mr Kirby appears to have not considered whether the respondent's conduct was in breach of their own procedures. His reply to the Employment Judge's question as to whether he was concerned about Gail Richardson adopting a dual position

of mediator and fact finding was unimpressive. He could not recall what advice he had been given by the respondent's human resources department upon this which is indicative of a lack of concern about the eliding of her roles contrary to the respondent's own policy. No reasonable manager properly directed and carrying out a reasonable investigation could have concluded that there was little of concern about the process followed around the mediation. There was no reasonable and proper cause for Mr Kirby to fail in his investigation as he did. Such was therefore damaging of trust and confidence.

176. The seventh and final issue concerns the underpayment of the claimant of her sick pay in February and March 2019. The factual findings are in paragraphs 130 to 134. There appears to be no factual dispute that the claimant was underpaid. Miss Swindells identified an underpayment of £5.17. Miss Swindells was incorrect in her calculations. The claimant was right to suggest that the underpayment was in a greater amount.

177. Miss Owusu-Agyei submits that the claimant accepted Naomi Swindells' explanation given on 22 March 2019. In our judgment, this submission is not factually sound. The claimant plainly did not accept the explanation. In her resignation letter she continued to maintain that she had received only a small proportion of the statutory sick pay to which she was entitled. Only when the matter resurfaced in July 2019 did the respondent look at matters again and determine that the claimant was in fact correct after all. It follows therefore that Naomi Swindells carried out an inadequate investigation prior to the claimant's resignation.

178. There can be no reasonable and proper cause for underpaying the claimant in this way. Human error is not an adequate excuse. Given the claimant's circumstances, the shortfall was financially significant. The underpayment was therefore seriously damaging of trust and confidence.

179. The claimant resigned just two weeks after her enquiry of Naomi Swindells and the notification that the claimant would only be paid a further £5.17 as opposed to £65. The claimant therefore resigned quickly after the underpayment had occurred and the respondent's failure to correct it. She was absent from work through ill health at the time. In the circumstances, it is difficult to see any basis upon which it can be said that she affirmed the contract between 22 March and 8 April 2019. This is a very short period in the context of almost 20 years of employment and where the employee is upon long term sick leave.

180. The failure to pay her the proper amount of sick pay was clearly a material reason for her decision to resign. It is included in her resignation letter. It is not the only reason for her resignation. However, it need not be the only reason. We agree with the respondent that part of the reason for her resignation was the claimant's ongoing concerns about working hours. That does not avail the respondent given our finding that the sick pay issue was a material reason for her resignation.

181. Upon this basis, we find that the claimant was constructively dismissed by the respondent. Her success upon the seventh aspect of the respondent's impugned conduct is sufficient.

182. As the underpayment of her wages was in itself a fundamental breach, she has no need to rely upon the "*last straw"* doctrine. The final act in the series of acts upon which the claimant relied was in and of itself a fundamental breach in any

case. The claimant therefore has no need of a final straw in order to revive any earlier affirmed breaches.

183. For the avoidance of doubt, we find that the claimant did affirm the contract following the till and trainers' incident. At the latest, this occurred in mid-September 2018. There was no further conduct from Kirsty Sherburn constituting a breach of the implied term of trust and confidence. By her conduct, the claimant after mid-September 2018 affirmed the contract. She turned in for work until the end of October 2018. After 2 November 2018, she was on long term sick leave. She availed herself of the grievance and mediation procedures. She accepted salary and the sick pay. She indicated her intention to be bound by and perform her employment contract. Her resignation was seven months after the till and trainers' incident. On any view, therefore, the claimant waived her right to resign in reliance upon Kirsty Sherburn's conduct in September 2018. In any case, she said in paragraph 5 of the claim form that being berated about the till issue was *"not something that I got upset about."* It follows that the claimant resigned in response only to the trainers' rebuke (albeit that on our findings she affirmed the contract afterwards in any case upon this aspect of matters).

184. We reach a similar conclusion upon the issue of mediation. The impugned conduct occurred on 14 January 2019. The claimant did not then resign for almost three months. She continued to call upon the respondent to perform the contract by sending her the grievance findings and embarking upon the appeal process. Again, she continued to draw statutory sick pay. In those circumstances, the claimant waited too long and waived her right to resign in response to the fundamental breach around the conduct of the mediation.

185. We find that the claimant did not waive the breach around the rejection of her appeal (in part). The appeal outcome was only received by her on or around 9 March 2019. She resigned a month later. By this point, the respondent was failing to pay her statutory sick pay. The claimant remained absent from work upon ill health. The claimant's conduct therefore does not constitute a waiver of that fundamental breach in the context of such a long employment. The claimant was entitled to resign and did resign in part in response to this breach.

186. If the Tribunal is wrong to find that the underpayment of the statutory sick pay was a fundamental breach, in our judgment, it nonetheless cannot be said to be innocuous or utterly trivial. It contributes to the series of acts constituting a breach of the implied term of trust and confidence. Therefore, if the underpayment of the statutory sick pay is to be viewed through the prism not of a fundamental breach in and of itself but as a final straw, it is sufficient to revive the waived fundamental breaches around the conduct of Kirsty Sherburn regarding the claimant's trainers (the first allegation) and the conduct of the mediation (the fourth allegation). (The rejection of the appeal is a fundamental breach in any case which was not waived by the claimant).

187. The claimant made express mention of Kirsty Sherburn's conduct in her letter of resignation of 8 April 2019. Whilst she did not expressly refer to the conduct of the mediation in her resignation letter, we are satisfied from the evidence that it did contribute to her unhappiness with the respondent and was a reason for her resignation. She made clear her unhappiness with the conduct of the mediation in the course of the appeal hearing before Mr Kirby.

188. In summary therefore we find that the respondent was in breach of the implied term of trust and confidence and therefore in fundamental breach of the contract

arising from Mr Kirby's conduct of the claimant's appeal against the grievance outcome and the failure to pay statutory sick pay. The claimant did not affirm the contract of employment and waive her right to resign in response to those breaches. The breaches were a material reason for her decision to resign. She was therefore constructively dismissed.

189. Alternatively, if (contrary to our findings) the failure to pay statutory sick pay (and indeed Mr Kirby's conduct) were not breaches of the implied term they were more than innocuous and trivial. They materially contributed to the series of acts constituting a breach of the implied term of trust and confidence. They are therefore sufficient to revive the otherwise waived breaches concerning the till and trainers' incident and the conduct of the mediation. They were material reasons for the claimant's decision to resign.

190. Either way, therefore, the claimant's complaint of constructive dismissal succeeds. As she has been dismissed, it is for the respondent to show a statutory permitted reason for the dismissal. None has been advanced. It follows therefore that the claimant was constructively unfairly dismissed.

191. We now turn to the harassment complaint. This in part is about the till and trainers' incident. We have found as a fact that Kirsty Sherburn improperly criticised the claimant's footwear. We have determined that the claimant was not prevented from wearing trainers at work between August and November 2018. The harassment complaint therefore, on the facts as found, centres upon the events that took place upon the day of the till and trainers' incident only and the treatment of the claimant by Mrs Sherburn at the mediation meeting.

192. We have little difficulty in finding that from the claimant's perspective there was unwanted conduct upon both of those days. It was uninvited and unwelcome. There was also no proper cause for what happened in September 2018 given that the claimant's trainers, on our findings, were not dirty and unkempt. Kirsty Sherburn's questioning of the basis for the claimant's allegations was improper in the context of the mediation and was caused because of the respondent's mishandling of it.

193. The difficulty for the claimant is upon the issue of whether the unwanted conducted related to the protected characteristic of disability. This turns to a large degree upon the question of Kirsty Sherburn's knowledge of the claimant's disability.

194. Mrs Sherburn did know that the claimant had fallen at college in January 2018. She was aware that the claimant had need for a crutch for several weeks and wore a knee support over her clothing over this time. We have also found that Mrs Sherburn knew from Katie Frith's risk assessment that there was a risk of the claimant's knee *"popping out".*

195. There is no evidence that there was any further need for medical intervention (to the respondent's knowledge) after the end of January 2018. In those circumstances, we find that Mrs Sherburn did not have actual knowledge of the claimant's disability nor was there enough to put her on notice that there was an issue around disability such as to constitute constructive knowledge of it. The circumstances are little different to a member of staff suffering, say, a sporting injury and attending work on crutches for a short period. That would not be sufficient to vest the employer with actual or constructive knowledge of disability.

196. The claimant complains, with some justification, that personnel records are missing. This is consistent with a theme which emerged during the course of the hearing of poor record keeping upon the part of the respondent, hence the very late disclosure of documents and records around the grievance and mediation. We therefore accept the claimant's case that the respondent has been unable to produce all the records pertaining to the claimant in the respondent's possession.

197. However, a difficulty for the claimant is that there was no need for her to undergo medical treatment for her knee between 2006 and 2018 and after January or February 2018. Doing the best we can therefore in this somewhat unsatisfactory situation we are compelled to conclude that even if personnel records were available there would be little to put the respondent on notice that the claimant's knee condition constituted a disability for the purposes of the 2010 Act. If no medical records were created over this period, it is difficult to see why personnel records would be created pertaining to the claimant's medical condition either.

198. Even if we are wrong on the issue of knowledge, we find that Kirsty Sherburn's comment about the condition of the claimant's footwear was not something that is inherently related to the protected characteristic of disability nor were the remarks made during the mediation.

199. In reply to a question from the Employment Judge, Mrs Sherburn accepted that she knew that the claimant had a need to wear trainers because of her knees.

200. However, we find that the remark about the condition of the trainers was said to the claimant by Kirsty Sherburn in a fit of pique or temper. Further, we found as a fact that Mrs Sherburn did not prevent the claimant from wearing trainers after the till and trainers' incident. We find as a fact that Mrs Sherburn's demeanour in the mediation was because she knew she had been vindicated as she had been told five days prior that no action was to be taken against her.

201. We conclude therefore that the remark made by Mrs Sherburn about the claimant's footwear was unprofessional. It was a rebuke made to the claimant as she turned away from Mrs Sherburn after the discussion about the operation of the till. The remark was made in a public area which was inappropriate. It was, on our findings, made in circumstances of stress. The Tribunal cannot accept, given these findings, that Kirsty Sherburn's conduct related to the claimant's protected characteristic of disability. If it were, we may have expected to see Mrs Sherburn preventing the claimant from wearing trainers thereafter.

202. We conclude that the conduct of the mediation by Mrs Richardson was unprofessional. It should not have been entertained because the claimant's claims were dismissed in their entirety. There were many flaws with the way it was carried out as we have said.

203. The Tribunal finds that the two instances of impugned conduct were unwanted. We find that the remarks about the claimant's trainers were said with the purpose of violating the claimant's dignity and creating an intimidating, degrading and humiliating environment for her. Kirsty Sherburn spoke to the claimant this way because she was cross with her. She had spent too long on the till dealing with a customer. This had caused Kirsty Sherburn the need to conduct an investigation by viewing CCTV that day. It distracted Mrs Sherburn from her numerous other duties. It led to her speaking inappropriately to the claimant by doing so on the shop floor.

204. We find that the conduct of the mediation was not done for the purpose of violating the claimant's dignity or creating an intimidating *etc* environment for her. However, it reasonably had that effect. The claimant was faced with three managers in circumstances where: all knew that her grievance had been dismissed *in toto*, the claimant found that out just minutes before the meeting, one of the managers was taking notes and there was no real attempt to engage with mediation as a process as outlined to the claimant by Kirsten Self.

205. Crucially, however, we find that the comment and the conduct of the mediation were not related to the claimant's disability.

206. We accept of course that the claimant's need to wear trainers arose from the disability. However Mrs Sherburn had insufficient information to constitute actual or constructive knowledge of disability such that the two instances of impugned conduct were related to disability.

207. The fact that the claimant in any event had a disability was not the reason why the remark was said. It was not a comment which related to disability but rather which related to Kirsty Sherburn's state of mind that day and wish to take matters out on the claimant. The conduct at the mediation was unrelated to disability as it arose from Mrs Sherburn's vindication (and doubtless her relief at the outcome) and Gail Richardson's mishandling of it.

208. A question arises in any case as to whether the Tribunal has jurisdiction to consider the harassment complaint. The till and trainers' incident was a one-off fact occurring at the latest on 18 September 2018. It was a one-off act as the mediation did not take place until 14 January 2019, around four months later. It was not part of a continuing act. We have found as a fact that there were no incidents of harassment between the date of the till and trainers' incident and the mediation. The claimant cannot plug the gap by reliance upon acts which do not infringe the provisions of the 2010 Act. The claimant therefore needed to bring proceedings upon the till and trainers' issue by 17 December 2018. She did not commence ACAS conciliation until 11 April 2019. This is almost four months outside the limitation period laid down by section 123 of the 2010 Act.

209. Even taking the claimant's case at its height, the bullying of her by Kirsty Sherburn ended prior to her taking a holiday in the last week of October 2018. The claimant never returned to work afterwards. She was no longer exposed to Mrs Sherburn's management. On that analysis, therefore, at the height of the claimant's case, the claim has been brought around three months out of time. However, as there were no acts of discrimination or harassment after 18 September 2018 (on our findings) the fact remains that the claim about the till and trainers' incident has been brought almost four months out of time.

210. The claim about the conduct in the mediation was also brought out of time. Early conciliation commenced within the primary limitation period. The mediation took place on 14 January 2019. Again, it was a one-off act. Acas conciliation commenced on 11 April 2019. It ended on 11 May 2019. The limitation period expired on 11 June 2019. This claim was presented out of time.

211. Upon the till and trainers' incident, the generalised bullying complaints and the complaint upon the harassment within the mediation the claimant sought to deal with the matter internally. She raised a grievance about the first two matters. She raised the grievance promptly after she went on long term sick leave. Kirsty Sherburn was interviewed by Gail Richardson on 9 January 2019. The interview

was therefore proximate to the events in question. Any delay in Gail Richardson interviewing Kirsty Sherburn was not attributable to the claimant but rather was to cater for the respondent's commercial convenience. She appealed against the grievance findings and the conduct of the mediation. Mr Kirby could have but did not interview Gail Richardson about her conduct of the mediation.

212. Given those circumstances, there is no forensic prejudice to the respondent. There is a good explanation for the delay in that the claimant was seeking to deal with matters internally. The balance of prejudice therefore favours the claimant. In the circumstances, it is our conclusion that it is just and equitable to extend time to vest the Tribunal with jurisdiction to consider the harassment claims albeit that it they fail upon their merits.

213. The matter shall now be listed for a remedy hearing upon the claimant's successful constructive unfair dismissal complaint. In the interests of the future good conduct of the case, a case management preliminary hearing shall be conducted by the Employment Judge by telephone. The parties must therefore write to the Tribunal with their dates of availability within the next two months in order to facilitate the listing of the case management hearing. This step must be taken within 21 days of the date of promulgation of this Reserved Judgment.

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Employment Judge Brain

18 January 2022

Reserved Judgment & Reasons

sent to the Parties On

19 January 2022