# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **AND** | **Respondent** |
|---|---|---|
| Ms E Tilli | | Fresh & Wild Limited (t/a Whole Market Foods) |

**Heard at**: London Central **On**: 1, 2, 3, 4 and 15 March 2022

**Before:** Employment Judge H Stout
Tribunal Member S Aslett
Tribunal Member J Marshall

**Representations**
**For the claimant:** In person
**For the respondent:** Lydia Banerjee (counsel)

# LIABILITY JUDGMENT

***(Reissued 9 May 2022 under Rule 69 with minor corrections)***

The unanimous judgment of the Tribunal is that:

a. The Claimant's claim of constructive unfair dismissal under Part X of the Employment Rights Act 1996 (ERA 1996) is well-founded. That claim is upheld.
b. The Respondent contravened ss 20 and 39 of the Equality Act 2010 (EA 2010) by failing to make reasonable adjustments for the Claimant when it scheduled her for late shifts on Monday 20 May, Saturday 25 May, Tuesday 28 May, and Thursday 30 May 2019. That claim is upheld in those respects, but otherwise dismissed.
c. The Respondent did not contravene EA 2010, ss 13 and 39 of the EA 2010 by directly discriminating against the Claimant because of her disability. That claim is dismissed.

d. The Respondent did not contravene EA 2010, ss 26 and 39 of the EA 2010 by harassing the Claimant for a reason related to her disability. That claim is dismissed.
e. The Respondent contravened ss 15 and 39 of the Equality Act 2010 (EA 2010) when it scheduled the Claimant for late shifts on Monday 20 May, Saturday 25 May, Tuesday 28 May, and Thursday 30 May 2019. That claim is upheld in those respects, but otherwise dismissed.
f. The Respondent did not contravene EA 2010, ss 15 and 39 of the EA 2010 by discriminating against the Claimant because of her something arising in consequence of her disability. That claim is dismissed.
g. The Respondent did not contravene EA 2010, ss 27 and 39 of the EA 2010 by victimising the Claimant. That claim is dismissed.

# REASONS

1. Ms E Tilli (the Claimant) was employed by Fresh & Wild Limited (the Respondent) from 7 June 2010 until 9 June 2019 when she resigned with immediate effect in circumstances which she contends amounted to constructive unfair dismissal under Part X of the Employment Rights Act 1996 (ERA 1996). In these proceedings she also brings claims under the Equality Act 2010 (EA 2010) for direct disability discrimination, failure to make reasonable adjustments, discrimination arising from disability, harassment and victimisation.

**The type of hearing**

2. This has been an in-person hearing that was open to members of the public.

**Rule 50**

3. On Day 4 of the hearing, on the Claimant's application in a **closed** part of the hearing, we made an order under Rule 50 in respect of the Claimant's home address, email address, telephone number and date of birth. This was because a member of the public had been approaching the Claimant both in the Tribunal room and in the waiting room, giving her cause for concern. This had affected her to such an extent emotionally that we considered her rights under Article 8 of the European Convention on Human Rights (ECHR) were engaged. We also considered that her right under Article 6 of the EHCR was engaged as the situation was also affecting her ability to continue representing herself at the hearing as competently as she had done up to that point. We gave due weight to the principle of open justice, but concluded that the Claimant's contact details added little to the public interest in open

justice and the balance weighed in favour of protecting the Claimant's Article 8 and Article 6 rights.

4. The Claimant also asked us to make an anonymity order for her in respect of the proceedings. However, balancing the same considerations as indicated above, we concluded that in that respect the principle of open justice outweighed the concerns raised by the Claimant. This was because in our judgment the Claimant's name was more important to the principle of open justice than her contact details, she had brought the claim knowing it would be in public and had been in a public hearing for three days before she made an application. There was therefore an element of seeking to close the door on a bolted horse. However, most importantly, we considered that the Rule 50 Order we made did provide the Claimant sufficient protection for her Article 6 and Article 8 rights, and should give her the confidence to continue with the hearing without undue personal discomfort.

5. Having made the Rule 50 Order, we arranged for the contact details to be redacted from the public copy of the bundle. We explained the Order in open Tribunal, making clear that any member of the public who had previously made a note of her contact details was to destroy that and not make any further use of it. The remainder of the hearing passed without incident and the Claimant continued to represent herself well.

## The issues

6. The issues to be determined were identified in the Case Management Order of Employment Judge J S Burns following a hearing on 12 March 2020 as follows:-

The Claimant (Cl claims disability discrimination
C claims arthritis affecting her hips, spine and shoulders as the impairment and claims it causes chronic pain.

C claims direct discrimination contrary to section 13 Equality Act 2010.
The claimed less favourable treatment is:
(i) the comments relied on as harassment below;
(ii) the investigation started on 11/6/2019; and
(iii) the fact that her grievance was not properly dealt with and then dismissed

C claims failure to make reasonable adjustments contrary to section 20 and 21 EA 2010.
The reasonable adjustments which she claims should have been provided were:
(i) assigning her on the rota to work middle shifts only on Friday Saturday and Sundays only (which Patel had agreed to do on 8/5/2019) but which he failed to do - he assigned the Claimant to shifts on 13/5; 14/5,15/5 20/5; 23/5; 25/5 (late shift); 28/5 (late shift);

30/5 late shift; 11/6; 12/6; 19/6; 20/626/6 and 27/6. All these were contrary to what had been agreed. (She however did not work the shifts after 11/6 because she went on sick leave from 12/6/2020)

(ii) not offering her alternative work at another work place away from Patel and Lainez after 11/6 alternative after her lodging of her grievance on 11/7/2019

C claims harassment on the grounds of disability contrary to section 26 EA 2010.

The claimed unwanted conduct was on 14/5/2019 being:

(i) two comments by Simona Birtalan namely *“Yeah some people are millionaires they can afford to be off work so long" and “haha* we *are going to make our torture plan for you guys hahaha"* and

(ii) one comment by Mr Lainez namely *"Elvira, you need to speed up with delivery'.*

C claims disability- discrimination contrary to section 15.

The matters arising from disability were

(i) the timekeeping and slow performance issues which the Respondent started investigating on 11/6/2019 and

(ii) the Claimant’s inability to complete the (inappropriate) shifts she was assigned by Patel, which caused her loss of pay.

C claims victimisation contrary to section 27 EA 2010.

The claimed protected acts were:

(i) C complaining to Patel on 14/5/2019 about a comment made to C by Lainez on the same day and

(ii) C complaining to Patel on 23rd and/or 25/5/2019 that Patel was not assigning C to middle shifts only on Friday Saturday and Sundays (which Patel had agreed to do on 8/5/2019).

The claimed detriments are:

(i) Lainez telling security personnel to watch C on CCTV and

(ii) starting and proceeding with a formal investigation against C on 11/6/2019

C claims unfair constructive dismissal.

She claims a breach of the implied term of trust and confidence and (subject to providing particulars) any relevant material in the Respondent’s staff/company handbooks which the Claimant claims were incorporated by her employment contract as terms. The resignation email of 9/9/2019 details the claimed breaches of contract relied on which can be summarised as follows:

(i) The claimed comments relied on as harassment above.

(ii) The failure to provide the agreed shifts (see reasonable adjustments claim above)

(iii) The unjustified disciplinary investigation based on unfair criticism of the Claimant instigated by Patel and Lainez as a response to her disability

(iv) The Claimant being monitored and subjected to surveillance

(v) The Respondent's staff adopting a false and wrong interpretation of the Respondents legal entitlement to carry out staff surveillance
(vi) Misleading the Claimant about the extent of the CCTV footage and the number of USB sticks on which the footage of the Claimant was recorded
(vii) Not providing a copy of the video footage of the Claimant when she asked for "her data"
(viii) HR delay between 12/6 and about 10/7 in suggesting that C raise a grievance
(ix) Once the grievance was raised on 11/7, the subsequent delay in dealing with it (it took 6 weeks)
(x) The fact that the grievance investigation was not carried out reasonably in that C was not re-interviewed and the final outcome reached conclusions which C would have wished to contradict in re-interview.
(xi) The dismissal of her grievance on 4/9/2019 (this is the claimed last straw)

## The Evidence and Hearing

7. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle.

8. We received witness statements and heard oral evidence from the Claimant and, for the Respondent, from Mr Patel, Mr Lainez and Mr Benfield.

9. We explained our reasons for various case management decisions carefully as we went along.

## Adjustments

10. The Claimant has a problem with her vocal cords following a car accident many years ago and has difficulty projecting her voice. We confirmed at the start of the hearing that we could all hear her. We discussed adjustments and agreed that we would take more frequent breaks as needed. Because of the Claimant's arthritic-type difficulties she also finds early mornings hard as it takes time for her pain medication to work. She asked if we could start at 11am each day, to which we agreed.

11. The Claimant also provided us with a Medical Report from Dr Britto dated 14 February 2022. We took this into account. The Claimant became upset on a number of occasions during the hearing. We took breaks as needed to allow her to compose herself.

## The facts

12. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

### The Claimant's employment with the Respondent

13. The Claimant is a qualified Naturopath holding a BSc Honours in Health Sciences from the University of Westminster.

14. The Respondent is a food retail business owned by Amazon that trades as Whole Foods Market (WFM). It focuses on supplying high quality and wholesome foods. It employs around 1,000 people in the UK.

15. The Claimant commenced employment with the Respondent on 7 June 2010 as a Team Member in the Whole Body Department based at the Camden Store.

16. On 23 January 2017 the Claimant transferred to the High Street Kensington Store. The Team Leader of the Health and Beauty Team there was Mitul Patel and the Assistant Team Leader was Juan Lainez. There were approximately 14 members of the team in total at the material time.

17. The Claimant was contracted to work 24 hours per week on a flexible shift pattern. Rotas are published two weeks in advance, but after being published if they need to be changed that can happen.

18. The Claimant's responsibilities included greeting, serving, advising and assisting customers, processing transactions at the till, keeping the sales floor and back stock organised and well-stocked, replenishing the supply of stock on the shelves, assisting with department deliveries, following cleaning and date checking schedules, and creating attractive displays. The Respondent's Customer Service Standards (858) emphasise that customers are the most important stakeholder in the business and that *"Customer Service comes first, stocking and cleaning are necessary but they come second to serving a customer"*.

19. From at least the end of 2018 the Claimant has had a practice of making notes of particular events and conversations. She made those notes either at the time of the conversations (when they were on the telephone) or shortly afterwards. The Respondent has not suggested that the notes are inaccurate and we have found them to be reliable.

### The Claimant's alleged disability and the Respondent's knowledge of it

20. The Claimant in these proceedings relies on arthritis affecting her hips, spine and shoulders and causing chronic pain as her alleged disability. She does not rely on her other health difficulties, physical or mental. In this section of the judgment we set out the evidence that we have heard that is potentially relevant to the Claimant's alleged disability and the Respondent's knowledge of it.

21. Following her transfer to Kensington the Claimant had a mini induction with Mr Patel (459) on 23 January 2017. He set out what her role was, including *"High level of customer service especially as she's a senior TM across the whole department; Educate customers and fellow TMs by sharing your knowledge."* Mr Patel was told by HR that she was having CBT at that time, but he did not know what CBT meant and did not ask. The Claimant accepts the CBT (cognitive behaviour therapy) did not relate to the Claimant's arthritis. This was therapy that the Claimant was undergoing because of the stress that she had suffered at work in the latter part of 2016 and a major episode of anxiety and depression which followed.

22. From about this time the Claimant also started to suffer from pain in her back, neck, shoulders and hips.

23. On 6 March 2017 the Claimant and Mr Patel had a 'catch-up' meeting. Mr Patel's handwritten annotations on these notes indicate that the Claimant was still having counselling and that Mr Patel was scheduling around her counselling appointments (633). These did not relate to her alleged disability.

24. On 7 October 2018 the Claimant had been late in for work and she had a 'recorded conversation' with Mr Patel. In this she explained that she had been tired after doing the late shift the night before and had overslept. She explained (676): *"It's never happened before, I am sorry it's just my physiology"*. In oral evidence to us the Claimant explained that by 'physiology' she meant what she now knows to be her arthritis condition which makes it particularly difficult for her to 'get going' in the mornings.

25. As at the end of 2018 the Claimant was on 'regular ibuprofen' for what she now knows to be her arthritis condition (922). In January 2019 her condition began to deteriorate and the Claimant started taking the stronger painkiller Naproxen 500mg 'as required up to twice daily' (913). Her GP notes at this time record *"has to crawl on all 4s in morning due to pain … pain tends to resolve as day progresses NSAIDs help"* (NSAIDs are non-steroidal anti-inflammatory drugs).

26. From 21 Jan 2019 the Claimant was signed off sick with chronic pain.

27. On 20 February 2019 the Claimant attended a Welfare Meeting with Mr Patel. Mr Lainez was there as note taker. She informed them that her condition was under investigation, but indicated her GP suspected it was 'rheumatoid arthritis' (113). The Claimant explained that for the last two years she had pain in back, neck, shoulders, hips, that some days it is really bad and takes her two hours to get up in the morning.

28. A consultant letter of March 2019 (890), not shared with the Respondent at the time, notes that the Claimant's problems started about three years ago and that *"Clinical presentation is highly suspicious of an evolving inflammatory arthropathy"*.

29. At a Welfare Meeting on 13 March 2019 the Claimant informed Mr Patel that the investigation was still ongoing and she was being referred to a rheumatologist (125).

30. At a Welfare Meeting on 17 April 2019 (133) the Claimant said that she was not better, her pain medication had been increased. The Claimant said that her body, hips and spine are stiff and that she is unable to do any physical activities or duties. She explained how her condition was particularly painful in the mornings.

31. A letter of 30 April 2019 (135) from Rheumatology Consultant Dr Carlucci states that he has given her a working diagnosis of spondyloarthropathy (which is an inflammatory like bilateral buttock pain, tender, right sternoclavicular joint and normal inflammatory markers), but all tests have so far been negative and presentation in all respects is noted to be unremarkable. He indicated that the Claimant's condition was worse "*During the night and in the morning"*. He stated that he had directed further tests and that, *"Due to her symptoms she should avoid any stress on the lumbar spine such as heavy lifting or standing for long hours which could aggravate her condition. … I will review the patient again in about five months' time."*

32. The Claimant shared Dr Carlucci's letter with Mr Patel at a Welfare Meeting 8 May 2019 (140), which we deal with further below. At this meeting the Claimant told Mr Patel that her condition gets worse by the evening.

33. On 22 May 2019 the Claimant's GP (Dr Joan Pattle) (150) provided a letter describing the Claimant as suffering from *"considerable stress and discomfort due to her pain"* and for adjustments of avoiding late shifts (because her pain gets worse in the evenings), avoiding heavy lifting and standing for long hours. The Claimant shared this with Mr Patel on 23 May 2019.

34. A letter of 28 May 2019 from Dr Carlucci (not shared with the Respondent at the time) indicates that more test results have come back and Dr Carlucci 'is reassured by the negative results' and would like to follow up in 2 months time to assess progress (893).

35. A letter from Dr Carlucci of March 2021 states that the Claimant is now diagnosed with radiologically negative spondyloarthropathy, suffers from long-lasting stiffness in the morning, symptoms can last all day and get worse at the end of the day. Dr Carlucci states this is a chronic disease that can impair considerably any activity of daily life.

The Respondent's policies on personal data, information sharing, disciplinary and performance

36. When the Claimant joined the Respondent in 2010 she signed Rules of Conduct (344) which stated that misconduct would include *"Not following the time clock rules including misrepresenting the time that you worked to gain more pay, punching for a friend, or lying about a missed punch"*. At the end of the document it said that: *"If inappropriate actions are suspected, any events captured on our many security cameras will be used as evidence in the disciplinary decision"*. The document said nothing about the use of CCTV for performance management. The Claimant had forgotten the contents of this document until it was put to her in cross-examination in these proceedings. When the Claimant was asking the Respondent during the course of her employment for information about its CCTV policy, no one referred her to this document.

37. The Respondent displays a sign on the outside of its premises which states (837):

> Images are being monitored via CCTV cameras for the purposes of the monitoring and collection of sound and/or visual images for the purposes of:
>
> - Maintaining the security of premises;
> - Prevention and investigation of crime;
> - Prosecution of offenders;
> - Good property managements;
> - Safety of employees and members of the public;
> - Health and safety management
>
> This scheme is controlled by The Barkers Centre. For further information please contact 020 7937 4256.

38. The telephone number was invalid when the Claimant tried it in June 2019.

39. The Respondent has a Handbook, to which all employees are expected to adhere.

40. It contains a disciplinary policy, capability procedure, grievance procedure, information systems and privacy policies, among other matters. We refer to these policies as needed in this judgment, but it is relevant to note the following at this point:-

41. Concerns over performance are to be *"dealt with fairly and … steps are taken to establish the facts and to give Team Members the opportunity to respond at a hearing before any formal action is taken … In the first instance performance issues should normally be dealt with informally between you and your Team Leader as part of day-to-day management … The formal procedure should be used for more serious cases, or in any case where an earlier informal discussion has not resulted in a satisfactory improvement … If we have concerns about your performance, we will undertake an assessment to decide if there are grounds fo taking formal action under this procedure. The procedure involved will depend on the circumstances, but*

*may include … monitoring your work and, if appropriate, interviewing you and/or other individuals confidentially regarding your work"* (534).

42. As to disciplinary matters, we note that *"bad timekeeping"* and *"time-wasting"* are examples of *"misconduct"*. Examples of *"gross misconduct"* include *"unauthorised use, processing or disclosure of personal data"* (544-6). The policy is to conduct an investigation before commencing formal action. *"Minor conduct issues can often be dealt with informally between you and your Team Leaders … Formal steps will be taken under this procedure if the matter is not resolved or if informal discussion is not appropriate (for example because of the seriousness of the allegation)"* (547).

43. The Respondent has a policy in its Handbook on monitoring employee use of its information systems (754-755). In its updated version this policy states that it applies to *"all information systems* ***provided to you*** *by Whole Foods Market, including any computer, communications, telephone, wireless, remote access and network systems, owned, operated, licensed, leased and/or administered by [WFM]. All* ***use by Team Members*** *of [WFM's] computers, laptops, hardware, mobile devices, software and other technology resources, as well as approved personal mobile devices used to access [WFM's] information systems … Every Team Member* ***who uses an information system*** *plays a part in protecting sensitive data and is responsible for following these guidelines".* That policy goes on to state that *"[WFM] may monitor, inspect and/or search all [WFM] information systems, including but not limited to e-mail, social media posting and activities and internet usage. We may monitor your usage of these systems for the following reasons: (a) to ensure that you comply with [WFM's] policies, procedures and practices … and/or investigating any breaches (or alleged breach) of them ; (b) to ensure that you achieve acceptable standards in relation to the performance of your duties and observance of [WFM's] policies (including but not limited to as asset out in this Team Member Handbook and/or investigating any breaches (or alleged breach) of them …".* We observe that this policy (as our **bold** emphases indicate) applies only to monitoring by the Respondent of information systems that WFM provides to its employees for use by them. CCTV is not in that category.

44. The Respondent has an EU Team Member Privacy Policy (767) which *"relates to the processing of personal data … of current and past EU Team Members"*. This sets out the *"Types of personal data we collect and use"*. This includes information that the employee provides to the Respondent. A non-exhaustive list is set out, including *"IT related information – information collected by your use of our information systems and other computer equipment …"* (which cross-refers to the Information Systems Security Guidance and thus has the same definition of *"information systems"* as in that Guidance).

45. The EU Team Member Privacy Policy also states that the Respondent may use *"Information we obtain from other sources"*, which includes *"information about you that we have obtained from third parties, such as other group companies, business partners, other Team Members, your previous*

*employers … law enforcement, tax or other regulatory authorities, and publicly available resources, as permitted by applicable law"*.

46. There is no explicit reference in the privacy policy to collection or use of CCTV data, whether CCTV of which the Respondent is the 'controller' or CCTV of which a third party is the 'controller'.

47. The policy goes on to state that the purposes for which data covered by the policy may be processed includes: *"3 …(e) performance management"* and *"(h) disciplinary, grievance and other investigations"*. The Claimant had not signed to acknowledge the update to this document and had not seen it (776-779).

48. The Handbook also contains a section on Team Meetings (484) which warns people not to record other people's conversations, phone calls, images etc without prior approval and continues: *"Please note that while many Whole Foods Market locations may have security or surveillance cameras operating in areas where company meetings or conversations are taking place, their purposes are to protect our customers and Team Members and to discourage theft and robbery".*

49. The Claimant says that the Respondent did not prior 11 June 2019 have any signs up anywhere in the building relating to the use of CCTV. She says there were no signs at all, not at the main entrance, exit, in her department or in the changing room (there is even a camera in the changing room). The Respondent says that there were signs up. The Claimant says that a sign was put up after she complained on or around 20 June 2019 on a door stating *"Warning: CCTV in operation 24hr recording in progress"*. For the purposes of the issues we have to decide it does not matter whether there were generic CCTV signs displayed in the building, as even on the Respondent's evidence, none of them stated what their purpose was.

50. The Respondent's 2011 Team Handbook that the Claimant had at all material times up to 16 August 2019 made no reference to interior CCTV recording. On 16 August 2019 the Claimant located the updated Team Handbook which contains the material we have set out above.

Performance issues

51. The Claimant was always highly regarded by the Respondent for her customer service skills and on 'Secret Shopper' assessments she performed outstandingly. However, at various times in her employment, managers had cause to speak to the Claimant about her timekeeping, time management, working too slowly and spending too long with customers. We were shown documents from 2014 demonstrating this (363, 397) and 2015 (404). The Claimant did not consider that these criticisms were fair and regarded them as a cynical attempt to avoid giving her pay rises (although she did get a pay rise in at least 2015: 407). She felt that her Team Leader was overly critical and not complying with company policy of putting the customer first.

52. The Claimant was given some informal warnings for timekeeping. In February 2016 the Claimant was sent a formal letter with an Action plan for how to improve her performance in various respects (417). The Claimant complained about the Team Leader's approach in February 2016 (419-421) and action was taken about the Team Leader.

53. By the time of the 2016 Job Dialogue similar criticisms about timekeeping and spending too long with customers were still being raised. The Claimant still did not consider these to be valid criticisms (427).

54. On 8 November 2016 a theft was being investigated (437) as a result of which it was noticed on CCTV that the Claimant had been serving a customer for 20 minutes and she was spoken to about that. The Claimant was upset by being challenged about this, and what she regarded as the misuse of CCTV data. The Claimant required counselling following this incident in part because of what she regarded as the misuse of CCTV footage. The Claimant was signed off with work-related stress and she then transferred to the Kensington store.

55. Following her transfer to Kensington the Claimant had a mini induction with Mr Patel (459) on 23 January 2017. He set out what her role was, including *"High level of customer service especially as she's a senior TM across the whole department; Educate customers and fellow TMs by sharing your knowledge."* Mr Patel was aware that the Claimant was receiving counselling when she transferred, although he did not know the reasons for that.

56. On 6 March 2017 at a 'catch up' meeting Mr Patel provided her with feedback on her performance (633), indicating that she needed to spend less time with individual customers, to approach all customers and to balance this with other tasks such as dealing with deliveries.

57. In April 2017 another Associate Team Leader in the Health & Beauty Department (Gaby Boorova) asked HR to have a catch up with the Claimant about wearing her apron wrongly, not paying enough attention to deliveries and talking to customers for too long and issues with time-keeping (635).

58. On 18 July 2018 Mr Lainez had an informal conversation with the Claimant about the policy on lateness and attendance and set targets for attendance on time (668). The Claimant could not remember this specific discussion, but did recall being spoken to about lateness on one occasion.

59. The Job Dialogue for 2018 (670) again notes concerns about the length of time that Claimant is spending with customers and points out the effect that this has on other team members. It also notes issues with her timekeeping and time management. The Claimant again disagreed with the feedback and considered it unfair as she considered it was a result of the department being understaffed. She did not sign the Job Dialogue.

60. On 7 October 2018 the Claimant was late by over an hour as she had overslept because she was not feeling well following late working the night before. She had a 'recorded meeting' with Mr Patel about her timekeeping (being late and management of time around breaks) (676). The Claimant requested not to work late.

61. On 18 November 2018 the Claimant was accused by another employee, Bianka Szatmari (Health and Beauty Associate Team Leader) of 'Time Theft' (88), i.e. not clocking out when on breaks or taking longer breaks than permitted. Mr Lainez regarded this as stealing company time and gross misconduct although it is not specified as such in the Handbook; time-keeping is listed as 'minor' misconduct in the Handbook. Employees are paid based on clocking-in and -out time. Another employee, Kim Senft made a similar allegation (91) and also complained that the Claimant was 'very slow'.

62. On 20 November 2018 Mr Patel referred the matter for investigation by someone outside the department as he considered he and Mr Lainez were too involved in the matter (104). An investigation was commenced, but not progressed as it was the run up to Christmas which is the Respondent's busiest period and the Claimant then went off sick in January 2019. The Claimant was unaware an investigation had even started.

63. On 11 December 2018 another employee, Simona, complained about the Claimant's poor performance and failure to follow rules about breaks (93). Around this time Mr Lainez spoke to the Claimant about this.

64. On 20 December 2018 the Claimant took a long time (about 45 minutes Mr Lainez estimates) wrapping several presents for a customer that had been bought in another department. Mr Lainez was unhappy about this as he needed help closing up the store. He spoke to the Claimant about it.

65. On one occasion when Mr Lainez spoke to the Claimant about an issue, either in December 2018 or (as the Claimant says) January 2019, the Claimant started to cry and explained she was in pain and worried about her health conditions and was waiting for test results. Mr Lainez offered her the chance to go home, but she declined. Mr Lainez says he gave her a hug when she cried, but the Claimant denied this. Whether he did or not does not matter for our purposes.

66. At some point towards the end of 2018 the Claimant sent Mr Lainez a card and a special mug thanking him for accommodating her schedule requests over the summer. She closed, *"Thank you Juan! Big HUG Elvira [pair of lips] Keep on being the relaxed you 😊".* She said in oral evidence that she wrote this to urge him to be nice and relaxed with her. The Respondent invited us to view the Claimant's evidence about this card as her having reinvented history in what she now says about Mr Lainez, but we find that the card could have been sent for the reasons suggested by the Claimant, given that it was around this time that Mr Lainez started picking her up on performance concerns. We have not therefore placed any weight on this card either way.

67. Regarding the above occasions when the Claimant was spoken to about timekeeping, time management, working too slowly and spending too long with customers, we find that the Respondent was justified in principle in raising those concerns with her as negative performance indicators which marred what they otherwise acknowledged as her significant strengths in customer service. The concerns raised were long-standing, they had been raised with the Claimant in the appropriate way, such as in 1-2-1s and end of year reviews over a considerable period of time. The same sorts of concerns were raised by several different people, both managers and colleagues. We are satisfied this was not a case of an individual manager 'picking' on the Claimant, but of these being genuine observations of the Claimant's behaviour over a long time by several different people. As was apparent from her evidence to us, the Claimant did not accept the criticism, but in our judgment this was unreasonable of her. As a Team Member in a hierarchical structure, she needed to accept these legitimate criticisms from her more senior colleagues and should have taken steps to adjust her behaviour accordingly. It was not for the Claimant to decide how she spent her time at time at work or what her priorities should be: that was a matter for her managers.

The Claimant's absence from work and return

68. From 29 January 2019 to 7 May 2019 the Claimant was absent from work. The reason for absence was given by her GP as 'Chronic Pain'. The Claimant's condition was being investigated during this period.

69. As noted above, during this period the Claimant attended welfare meetings with Mr Patel on 20 February, 13 March and 17 April 2019. Mr Lainez was present at the meeting on 20 February. In that meeting (113) she explained that she had been suffering pain in her back, neck, shoulders and hips for the last two years, but no specific diagnosis. She said that her GP says she is young to have 'rheumatoid arthritis' and that *"Some days is really bad, … it is like 2 hours to get up on my feet. Overnight it gets worst"*. For the meeting of 12 March 2019, Mr Patel copied Ms Birtalan in on the invitation to the meeting, to which the Claimant objected. Mr Patel by email of 12 March 2019 apologised *"I will take care and not include her in your personal health issue but I still needs to inform her what's going on with you because she is part of our leadership group"*. At the meeting of 17 April 2019 the Claimant reported that her condition was worse and her pain medication had been increased (133).

70. On 8 May 2019 the Claimant returned to work. She had a welfare meeting with Mr Patel, but no notetaker present. The Claimant brought the letter from Dr Carlucci of 30 April 2019 the contents of which we have set out above.

71. At the meeting the Claimant explained she had no specific diagnosis, but the working diagnosis was spondyloarthropathy (an inflammatory condition). She explained that she was on painkillers, attending physiotherapy on Mondays and needed to avoid standing, and lifting. She suggested it might be better

for her temporarily to work two days per week or fewer hours and to do the middle shift because her pain gets worse in the evening and that she should have more frequent breaks. Mr Patel then asked her specifically whether any adjustments were required as to hours, duties, etc and she replied: *"It will be helpful if I can do more middle shifts and working over weekends so I can help the department when we have low volume of deliveries. I need to avoid all heavy liftings and dragging trollies"*. Mr Patel checked whether the Claimant was able to work on Mondays, which she said she could if she came after her physiotherapy session. Mr Patel asked if there was anything else to consider, to which the Claimant answered in the negative. He asked when her condition was next due to be reviewed and the Claimant answered in July.

72. Mr Patel's evidence was that, despite this conversation (which he noted in the terms we have set out) he did not understand the Claimant to be asking for adjustments immediately. We accept his understanding in this regard to be genuine as it is consistent with what he did next and what he has said at all times that we have seen. However, we find Mr Patel's understanding of this meeting was unreasonable. He had specifically asked the Claimant what adjustments she required and she answered. He did not indicate he was not going to make the adjustments. He cannot reasonably have thought that the question of whether or not adjustments needed to be made should wait until July. He had signed Dr Carlucci's advice that indicated adjustments were required immediately to avoid exacerbating her condition and it was not reasonable to conclude that the Claimant was mentioning further adjustments just as matters to be considered after a review in two months' time.

73. On 12 May 2019 Mr Patel sent a WhatsApp message to the team informing them that the Claimant and another colleague could not do heavy lifting and asking the team to help. Mr Patel did not obtain the Claimant's consent before circulating this personal data about her health to the team. This upset the Claimant, although she made no specific complaint about it at the time and does not make it part of her claim in these proceedings.

74. The Claimant and Respondent did not wholly agree as to which days were 'heavy' delivery days and which were not. The Claimant's position was that Tuesday to Friday were heavy delivery days. Mr Patel considered it was not so straightforward, but in his grievance interview with Mr Benfield (270) he acknowledged that Wednesdays to Fridays tended to be heavier delivery days. He did not regard Tuesday as a heavy delivery day. However, Mr Patel also did not think that it really mattered which day were heavier delivery days as he had agreed that the Claimant did not need to do the lifting anyway. The Claimant, on the other hand, told us that she felt it was still detrimental to be scheduled for a heavy delivery day because it made it more likely that her colleagues would resent her for being slow and/or not helping so much with deliveries.

The Claimant's shifts between 8 May and 23 May 2019

75. On 5 May 2019 the Claimant requested to be scheduled off for medical days on 16, 17, 18 and 19 May and that she could only start at 2pm on 15 May as she had a hospital appointment (136). (The Claimant had a long-standing arrangement for monthly medical days off, which was nothing to do with the disability she relies on in these proceedings.)

76. The week she returned to work (w/c 6 May) she was scheduled to do Mid shifts on Tuesday, Wednesday and Thursday (137).

77. In the w/c 13 May 2019 (143) the Claimant was scheduled for mid shifts Monday, Tuesday and Wednesday. The Claimant voluntarily swapped to the late shift on Wednesday 15 May because of her hospital appointment.

78. For the w/c 20 May 2019 (147) the Claimant was scheduled for a late shift on Monday, a mid shift on Thursday and a late shift on Saturday.

79. During this period Mr Patel was simply scheduling the Claimant as usual. He made no effort to adjust her shifts to take into account her arthritis condition because he did not consider that at the meeting on 8 May she had been asking for any immediate changes to her shifts.

Detrimental comments and checking of CCTV footage

80. The Claimant alleges that during her first week back Simona Birtalan made comments including that on or around 8 May 2019, in response to the Claimant saying that she had been off due to illness, Ms Birtalan said *"some people are millionaires and can afford to be off for so long"*. The Claimant was offended by this as she considered that money had nothing to do with her medical condition and she perceived Ms Birtalan's remark as belittling her medical condition. We accept the Claimant's evidence in relation to the alleged remark and her feelings about it as the Claimant has been a generally reliable witness and the Respondent has no evidence to contradict it.

81. On 14 May 2019 the Claimant alleges (and for the same reasons we again accept) that Ms Birtalan said *"hahaha we are going to make our torture plan for you guys hahaha"* in response to the Claimant asking her if she was leaving for a Team Leader meeting. The Claimant said that she felt intimidated by her 'threatening comment' and responded that it was not a nice thing to say. Ms Birtalan then stopped smiling. In oral evidence, the Claimant explained that as she is in pain all the time, references to 'torture' are 'not funny' because that is her life. Mr Benfield found that Ms Birtalan could not recall these comments, but could recall making other similar comments and these were dealt with formally by the Respondent.

82. On 14 May 2019 Mr Lainez was working on the same shift as the Claimant. He says in his witness statement that he noted she did not pick up a delivery for 30 minutes and that she was interrupting the work of another colleague

(Viktorija) and he (Mr Lainez) told her to stop doing this. The Claimant denied that this had happened. She said that she was working and that Mr Lainez did not speak to her about this at this point. Mr Lainez's evidence on this point is the first of a number of instances where is witness statement is inconsistent with contemporaneous emails he wrote, in particular his email of 1 June 2019 to Mitesh Ganatra (161). We found Mr Lainez's oral account to be confused in many respects; often when confronted with what he wrote in his emails he accepted what he wrote in the email at the time was correct; he accepted that he had prepared his witness statement without reviewing all of the documents and we find that what is in his witness statement represents his memories as they were when he drafted it, but those memories are (as is commonplace) not wholly accurate. We find that his account as recorded in his contemporaneous emails is more reliable, especially as on this and some other points, his account in his email accords with the Claimant's recollection whereas what is in his witness statement does not, and there seems to be no reason for this other than that he had misremembered when writing his witness statement.

83. Accordingly, we find that on 14 May 2019 although Mr Lainez had observed the Claimant (in his view) in the morning talking to Viktorija more than she should have been, he did not speak to the Claimant about it until later that day when he noted that the Claimant had still (as he viewed it) barely started on the delivery. The Claimant denies that she had been slow with the delivery (she says she was ¾ done), but they are agreed that Mr Lainez said to her (in front of Viktorija and Basia/Barbara, although Mr Lainez did not notice that Viktorija was there at the time) words to the effect of *"Elvira you need to speed up with delivery!"* (Mr Lainez says he said *"Elvira, do you mind to speed up on delivery please"* and this is what he wrote in his email of 1 June 2019, but the difference is not material to the issues we have to decide.) The Claimant felt humiliated by Mr Lainez picking her out like this in front of colleagues. She took Mr Lainez to one side and asked him why he was singling her out, and why he did not ask first if she needed help as she was just back from sick leave. She asked him why he did not address them collectively as *"girls"* or *"ladies"*. He said that he did not like to use that word, which she noted in her contemporaneous records as being an *"absurd/abnormal answer"*. (We accept the Respondent's submission that this reveals that the Claimant had developed a somewhat irrational dislike for Mr Lainez at this point as it is hardly an absurd or abnormal answer.) He also suggested that if she wanted to get to know her colleagues she should go for drinks after work rather than chatting during work, which the Claimant recorded as being *"insulting"* because she feels she cannot go out for drinks because her laryngeal condition makes it hard for her to talk in noisy places. The Claimant told Mr Lainez that it was not good management style, she did not like the way he spoke to her and she was going to complain to Mr Patel about him. The Claimant made notes on this incident in her diary. She then spoke to Mr Patel about this later that day and he said it was not right she was singled out in front of others and he would speak to Mr Lainez.

84. Mr Lainez was unhappy that the Claimant was challenging him and had complained about him. He said in oral evidence that he thought maybe he

had not been fair, so he went to check the CCTV footage of the day to see for himself what had happened. This meant going to ask the security guards if he could see the footage from a particular camera and a particular time period in the day, and then downloading onto USB stick the footage that he was interested in. He did not ask security guards to monitor the Claimant. He did not ask for authority to check the footage, although Mr Benfield gave evidence (that we accept) that the usual procedure before checking CCTV is to seek authority from a senior manager. Mr Lainez thought he had checked CCTV for another member of staff previously, but could not remember specifically; he had never checked CCTV as many times with another member of staff as he did with the Claimant. He accepted that there was as a result more than one USB stick with the Claimant's data on it.

85. On 15 May 2019 a colleague came to ask the Claimant if she was in trouble as they had overheard Mr Lainez talking to the security guard about her and asking them to 'keep an eye on her' on the CCTV cameras. This is not quite what she said in her grievance meeting with Mr Benfield (255), but it is what she said in her email of 16 May 2019 when she first complained (144) and we accept that the Claimant is in her witness statement honestly recounting what she believed her colleague had said to her, notwithstanding that we accept Mr Lainez's evidence that the colleague must have been wrong as it is implausible that Mr Lainez would have asked security to 'keep an eye' on her generally. In any event, the Claimant was extremely upset to learn that she was going to be subjected to covert surveillance. It re-triggered feelings she had had in October 2016 when learning that a previous Team Leader had used CCTV footage of her to commence a performance conversation, following which she had suffered a major episode of anxiety and depression and received counselling.

86. On 16 May 2019 the Claimant emailed Mr Patel complaining that she had been told by a colleague that Mr Lainez had asked for her to be monitored on CCTV (144). She said this was creating a stressful environment and causing her emotional distress. She asked why Mr Lainez had given this instruction and on what basis (i.e. part of what investigation). She also complained again about Mr Lainez *"unreasonable and unfair"* conduct on 14 May 2019 about which she had already spoke to Mr Patel.

87. Mr Patel met with the Claimant on 20 May 2019 to discuss her complaint with a notetaker present (148). Mr Patel asked her to disclose the name of the colleague but the Claimant refused. She suggested that the matter could be investigated by viewing CCTV to see if footage of Mr Lainez correlated with what her colleague had said. Mr Patel asked the Claimant what she had felt was unfair and unreasonable about Mr Lainez's conduct, but the Claimant then said she felt unwell (she was feeling emotionally stressed) and asked if they could do this part later.

88. Mr Patel and the Claimant reconvened on 23 May 2019 (151). The Claimant still refused to give the colleague's name as she felt it was information she had been given in confidence. She said she would check with HR whether she could or not. She said that investigation could be done with the security

guard without that. She said that her complaint about Juan was that he *"came up to Basha, Victoria and myself and he said in a demanding way 'Elvira you need to speed up with delivery'"*. She suggested she had been treated differently to Basha and Victoria who were not spoken to, that they were all talking and there were no deliveries to deal with at that point.

GP letter / adjustments

89. On 22 May 2019 the Claimant's GP (Dr Joan Pattle) (150) provided a letter describing the Claimant as suffering from *"considerable stress and discomfort due to her pain"* and asking for adjustments of avoiding late shifts (because her pain gets worse in the evenings), avoiding heavy lifting and standing for long hours. The Claimant shared this with Mr Patel on 23 May 2019.

90. Late evening on 23 May 2019 the Claimant emailed Mr Patel (153) asking to be scheduled for middle shifts and to have Monday off altogether for her physiotherapy. She also thanked him for his 'consideration' in light of her GP's letter *"and for offering me to start at 12 noon instead of 2pm this Saturday"*.

91. On 25 May 2019 Mr Patel met with the Claimant to discuss her medical condition and adjustments required in the light of her GP's letter (154). At this meeting the Claimant asked for five specific adjustments, including *"more mid shifts and weekends when volume of deliveries are low"*. She also mentioned that her doctor had asked if she could do lighter work but she could not do that unless she worked in the regional or office work, but this is not discussed further.

92. By letter of 28 May 2019 Mr Patel confirmed in writing that adjustments would be made as follows (159):

    a. *"In order to support recovery, you will be scheduled to work mid-shifts up to 7:30pm the latest and you will be scheduled to weekends when the volume of deliveries is low until 16th June 2019"*
    b. *"You will have to make sure you avoid all heavy lifting and dragging trollies*"
    c. *"Taking extra unpaid breaks to manage the condition. Make sure you inform leadership for any extra breaks and clock in and out for all extra breaks you take"*
    d. *"Welfare follow up meeting will be conduct by 16th June 2019"*

93. It was agreed to review in three weeks' time. The Claimant was offered the services of the Team Member Wellbeing Programme. The Claimant signed the letter, as did Mr Lainez who gave it to her.

94. Mr Patel's understanding of what he had agreed to do in this letter was to schedule the Claimant to mid-shifts **or** weekends, not that she would be scheduled only to mid-shifts at weekends. We accept that this was both his genuine and reasonable understanding because the Claimant in her email

and meetings with him only asked for 'more' weekends and mid-shifts, not exclusively weekend-working. In any event it would not be possible for her to do her 24 contracted hours only at the weekend. Further, on Sundays there is no 'mid shift', so it would make no sense to promise only mid-shifts at weekends. We further find that the Claimant was not expecting him to schedule her only to weekend/Monday shifts as that was not what she had asked for and she did not after this point complain when she was scheduled to mid shifts on heavy days.

95. For Saturday 25 May the Claimant had been scheduled for a late shift. This was not in accordance with the request she had made on 8 May. It happened because Mr Patel had (unreasonably) not regarded any adjustments as having been requested or agreed on 8 May. Following the Claimant producing the GP letter of 22 May, as noted Mr Patel allowed her to leave early on 25 May. This meant that her requested adjustment was accommodated, but she lost pay as she could not do her full contractual hours. The Claimant did not complain about that at the time.

96. For w/c 27 May 2019 the Claimant was scheduled to work late shifts on Tuesday and Thursday (156) and a Sunday shift. This rota had been prepared before the Claimant had submitted her GP letter of 22 May, and was again prepared on the basis that Mr Patel did not think he had agreed to make any adjustments at the meeting on 8 May. Again, following receipt of her GP letter, as the Claimant was feeling unwell towards the end of her late shifts, Mr Patel/Mr Lainez allowed her to leave early. Again, the Claimant was not happy about this as it meant losing pay, but she did not complain at the time.

97. For w/c 3 June 2019 (165) the Claimant was scheduled to work a mid-shift on Tuesday and Friday and an early shift on Sunday 9 June, when there was a team meeting at 9.30am. The Claimant was unhappy about this as she regarded Tuesdays and Fridays as 'heavy days', but she did not complain at the time. Mr Patel for his part regarded Tuesday as a 'light day'.

98. For w/c 11 June (172) Mr Patel scheduled her for mid shifts on Tuesday 11 June and Wednesday 12 June and on Sunday 16 June. Again, the Claimant was unhappy but made no complaint. In fact, 11 June was her last day at work as she was thereafter signed off work sick and did not return before resigning.

99. In the grievance process, it was explained that the shifts were scheduled as they were because there were three team managers on holiday and one left the business unexpectedly, but this was not explained to the Claimant at the time and it is apparent from reviewing the rotas that, while this may have been true, it does not explain why the Claimant was scheduled as she was. The Claimant was scheduled as she was because Mr Patel (unreasonably) did not think that that the Claimant required any adjustments after 8 May, and after 23 May because Mr Patel thought (reasonably) that he was complying with her wishes.

Complaints about the Claimant and handling of her complaints

100. Mr Lainez emailed Mr Ganatra on 1 June 2019 (161) to 'give an update' on the Claimant's case. His understanding was that Mr Ganatra had been appointed to investigate the complaint that the Claimant had raised about him and he in response raised a lot of complaints about the Claimant. He was frank in oral evidence that his email of 1 June 2019 was sent because the Claimant had complained about him. However, we find that Mr Ganatra cannot in fact have been responsible for investigating the Claimant's complaints about Mr Lainez because that was being dealt with by Mr Patel. None of the Respondent's witnesses knew why Mr Ganatra had become involved, who had appointed him or on what terms of reference; Mr Patel's understanding was that the decision was taken by someone in HR in light of the previous investigation that had been commenced but not progressed at the end of 2018.

101. In Mr Lainez's email of 1 June he sets out multiple complaints about the Claimant's conduct and performance and explains how he has reviewed CCTV to see how she works on multiple occasions to see whether she was talking to team members and customers. He invites Mr Ganatra to review the CCTV too and wrote that she *"looks like she is in her leisure time/place"*. He refers to her health issues about not being able to bend or lift heavy weight and urges Mr Ganatra to *"check CCTV and what she does with boxes and how she bends"*. In oral evidence Mr Lainez initially denied having ever doubted the Claimant's claimed medical condition, but he confirmed in this email he was suggesting that it did not look as if she had anything very much wrong with her, and that he accordingly did doubt her disability.

102. Mr Lainez referred to the incident where he had reprimanded her for being too slow in front of others and complained about the way she had spoken to him and 'threatened' him about speaking to Mr Patel about him. He referred back to previous incidents in December 2018 and January 2019 when she had been slow and spent too much time with customers and said *"We had CCTV for that, but it was in January and then she went off sick for 3 months"*. He mentioned other incidents where in his view the Claimant had been shirking work, noting *"We have CCTV for that too"*. He referred to other CCTV that the Respondent had of her spending too long with customers who did not spend much money. In total, the email refers to Mr Lainez having viewed CCTV footage on six occasions and taken copies of CCTV footage on five occasions. The purposes for which he accessed the footage include: checking to see what happened on the day that the Claimant complained about his conduct (14 May); checking up on her health condition; and checking whether she is talking too much to other staff or customers or taking too long doing tasks such as taking rubbish out (performance). Mr Lainez concluded the email by noting that he was expecting an *"official complaint from my team member"* to *"add to the case"*.

103. The complaint from team member Ms Senft then came in on 5 June 2019. It is apparent from the email (166), and Mr Lainez accepted in oral evidence, that he asked Ms Senft to put her complaint in writing. It was not something

she had thought to put in writing herself. She complained regarding the Claimant's conduct on the evening of Thursday 30 May (the date is wrong in the email). 30 May was the evening that the Claimant had been scheduled (despite her requests) to work a late shift on a heavy delivery day. Ms Senft alleged the Claimant had been talking for a long time with two customers between 8pm and 9.20pm and not dealing with a trolley full of stock. Ms Senft said the day had been particularly busy, that neither she or a colleague had had time to take a break, and that the Claimant's trolley did not have anything heavy in it. She felt it was not fair that the Claimant was not working hard when others were. The Claimant did complete her trolley when challenged by Ms Senft.

104. Mr Lainez forwarded Ms Senft's email to Mr Ganatra indicating that he would need to ask security to provide him with footage from that time. He said that what he had put on the USB stick was footage from an earlier period.

105. On Sunday 9 June 2019 the Claimant was due to come in at 9.30am for a team meeting with other colleagues. She was in pain, but took medication to get going. She felt she had left plenty of time but was delayed by public transport and informed her Team Leader. She says she later found out that other colleagues were late too that day. There was a team meeting in the morning at which the Claimant raised that she felt overwhelmed by the stressful environment and would like to *"find ways of inspiration, better communication for a less stressful atmosphere"*. Mr Lainez responded in front of everyone that *'this is why they organise team builds but [the Claimant doesn't] come'*, a comment we accept was made as it is reflected in his email the next day (173). The Claimant says that she felt hurt and humiliated by his comment because as a result of her laryngeal problem she cannot participate in noisy restaurant meals. Mr Patel asked her why she does not try to inspire the team and the Claimant offered to write inspiring quotes on the message white board in the store room, which she did later that day writing *"Carpe Diem" – "Seize the day"*.

106. Later on 9 June 2019 the Claimant met with Mr Patel for a third time regarding her complaint about Mr Lainez (169). Mr Patel informed her that because the Claimant had not given the name of the individual she said had seen Mr Lainez asking security guards to watch on CCTV he could not continue with the investigation 'due to lack of evidence and information'. The Claimant said again that she had not had a chance to check with HR whether she should give the name of the individual when it was given in confidence. Mr Patel further said that whoever had told her about Mr Lainez checking the CCTV *"should not be telling you of Juan's actions. The reasons being it is necessary to check cctv in order to find the facts. It is part of Juan's job."* The Claimant asked whether there was a way in which she could find out what CCTV was used for in her workplace because *"in UK law cctv is supposed to be disclosed the reasons for having it"*. Mr Patel replied *"The note is on the front door and it is visible only when the door is closed. We check cctv if something is missing, for people's safety … as leadership we need to check it, part of fact finding process".* In response to the Claimant saying that she understood it was only permitted if part of a specific investigation and the employee was

informed and aware. Mr Patel replied *"It is on government website that we are allowed to check cctv without informing team members personally"*.

107. On the same day Mr Patel met with Mr Lainez (170) to remind him of the need to be fully professional with team members, and not to talk to them in front of others if you have an individual point to make, and that especial care should be taken where someone returns from long-term sickness.

108. Following her meeting with Mr Patel the Claimant went to speak with HR (Pamela Burgueno) about the Respondent's use of CCTV. She responded that the Claimant read the government website wrong and that the Respondent could use CCTV for fact finding without telling employees. Ms Burgueno also said that unless the Claimant disclosed the name of the individual who told her that Mr Lainez was trying to watch her on CCTV they could not investigate whether Mr Lainez watched her on CCTV or not.

109. On 10 June 2019 Mr Lainez sent a further complaint about the Claimant to Mr Patel who forwarded it on to Mr Ganatra to add to his investigation. In this email Mr Lainez suggests that the Claimant clocks out later than she should and makes shorter breaks than she should. He complained that she was "*49 minutes late"* for the meeting on 9 June 2019 (173), although in fact this was wrong as she was only 19 minutes late. This is clear as the meeting start is shown on the schedule as 9.30am and her clocking-in time was 9:49am. Mr Lainez corrected this in a further email he wrote on the topic the next day (175). In his further email, he also accused the Claimant of taking 18 minutes overtime on Tuesday 4 June by clocking in five minutes before starting her shift, taking only 25 minutes break and clocking out 8 minutes after finishing her shift.

110. The Claimant did not see any of these complaint emails from Mr Lainez or Ms Senft until she received them in response to a subject access request shortly before her resignation.

111. The Claimant believed that Mr Lainez, Mr Patel and a member of HR, Ms Mack, were all aware of the impacts of CCTV on her following what happened in 2016. However, there is no evidence that Mr Lainez or Mr Patel knew any of the detail about that incident. There is no reason why any detail should have been passed on by HR (indeed, in accordance with normal data protection arrangements, it should not have been passed on without consent as there was no 'need to know'). Ms Mack, we accept, must have known more about it because of her previous dealings with the Claimant, but we do not accept the Claimant's contention that Ms Mack must have known the likely impact on the Claimant that viewing CCTV footage of her would have. There is nothing to suggest that any detailed medical evidence was provided to Ms Mack and, in any event, there is no reason for Ms Mack to have realised that, over two years' later, viewing of CCTV of the Claimant would be as 'triggering' for her as it was.

Mr Ganatra's investigation into the Claimant

112. On 11 June 2019 at about 5.30pm the Claimant was invited without prior notice to a meeting with Mitesh Ganatra (Customer Services). It is the Respondent's normal procedure not to provide employees with any notice of disciplinary/performance investigations. However, Mr Benfield confirmed that, in line with the Respondent's written policy, before a formal investigation is commenced it is usual for there to be an informal conversation with a line manager first. In the Claimant's case, none of the complaints that Mr Lainez had raised about her in his emails of June 2019 had been raised with her before; and no complaints of that sort had been raised with her since prior to her going on sick leave in January 2019.

113. While waiting for Mr Ganatra the Claimant asked Mr Patel if he knew what the meeting was about but he said he did not know. At the start of the meeting, Mr Ganatra explained that he was conducting the investigation as the investigation had been initiated by Mr Patel and Mr Lainez and they needed someone independent to investigate it. The Claimant then thought that Mr Patel had lied to her, but we find he had not lied. Although he was aware that complaints had been forwarded on to Mr Ganatra for investigation, he had not been informed in advance that the Claimant was being invited to an investigation meeting.

114. The notes of the meeting state that the purpose of the meeting was: *"Time Keeping and Un-authorized OT, Performance related to job"* (177), but this was not communicated to the Claimant in so many words. Mr Ganatra began by asking her questions about her employee number, shifts, contract, job description, etc which she did not see the relevance of and was unwilling to answer. He then asked her about a shift on 4 June when she was supposed to be working 11am to 7.30pm with a 30 minute break. He said that she had done 18 minutes unauthorised overtime on that date. He asked her about being 19 minutes late on 9 June 2019 and she said that she had been late because of public transport delays and many other colleagues were late too. He asked her about leaving early on that day at 4.02pm and she said that she was not feeling well. The Claimant asked how many hours in total she had done that week and was told it was 22.62 which was less than her contracted hours. She explained that what she did with breaks depended on her pain and medication levels as this affected her performance, work and and focus. He then went on to ask further questions about clocking in and out. He then returned to the Job Dialogues from 2017 and 2018 when she had been asked not to focus too much on particular customers. He then showed her a video of her talking to a Team Member on the shop floor, fast-forwarding through to a point where she was smiling at the Team Member while putting stock on shelves, and said that she was *"talking more than working on this particular day which it was the 14th of May of 2019"*. He asked her about the content of the conversation with the Team Member and whether it was related to work. The Claimant then became upset and explained that she had to take a break as she had not had it and it would lead to overtime if she did not. The meeting had lasted 2 hours. Mr Ganatra said that the investigation was not completed so they would meet again *"asap"*.

115. The Claimant felt that her privacy had been violated by the use of CCTV, she felt she was 'ambushed without warning' and that she had been targeted with manifestly unreasonable criticisms. On her way out she asked the security guard where the CCTV signs were and he said he did not know. She then took photographs of the entrance because she could not see the signs anywhere. She found that she was psychologically badly affected by the meeting. She could not sleep, she was crying too much to attend work the next day. The Claimant went to see her doctor on 12 June 2019 and was then signed off sick.

Subject access request / contact with HR

116. On 14 June 2019 the Claimant (202) emailed Ms Mack at Team Member Services and asked for help with making a Data Subject Access Request (DSAR), and for the telephone number for the CCTV operators and asked to speak to someone about what had happened at work. She received an auto-response saying that Ms Mack was out of the office until 20 June.

117. On 18 June 2019 the Claimant contacted Alex Ferrario (Head of HR) raising her DSAR request, issues relating to CCTV and what she described as a 'serious issue' that she wanted to speak to someone about in confidence. Mr Ferrario responded that she should speak to Ms Mack. Ms Mack replied on 20 June telling her how to make a DSAR and providing other information. In response to a further email from the Claimant, Ms Mack said that she would call the Claimant. The Claimant responded also raising the question of what she should do about her work situation which she describes as having caused her to take time off sick with stress.

118. Ms Mack spoke to the Claimant on 21 June 2019. The Claimant queried the lawfulness of the CCTV use. Ms Mack emailed her a copy of the EU Team Member Privacy Policy which indicated that the Claimant had acknowledged reading it on 10 December 2018 (although in fact this was not correct, as the Claimant later established that she had not seen the policy). Ms Mack said that CCTV signs were not displayed on the inside of the building only the outside and that the signs did not need to explain what the CCTV was used for. The Claimant said that there were no signs at all, not at the main entrance, exit, in her department or in the changing room. Ms Mack said she would check, but confirmed that staff were allowed to use CCTV for disciplinary investigations and that if the Claimant did not identify the member of staff who had told her about Mr Lainez accessing the CCTV then her complaint could not be investigated.

119. The Claimant pointed out that the version of the Team Member Handbook that she had (2011) stated that *"CCTV system monitor the exterior of our buildings 24 hours a day. This data is recorded"*, but said nothing about the inside of the buildings. On 21 June 2019 Ms Mack emailed the Claimant a picture of a generic yellow CCTV sign sticker which states *"Warning CCTV in operation 24hr recording in progress"* that she said was *"on the Kensington*

*window as you enter on the left hand side"*. The Claimant's position is that had just been put up as it was not there the week before. As already noted, we do not have to resolve the dispute about whether generic CCTV signage was displayed.

120. By letter of 21 June (197) Ms Mack informed the Claimant about the availability of the Employee Assistance Programme, the possibility of a referral to Occupational Health (OH) and Access to Work Mental Health service.

121. By email of 24 June 2019 the Claimant asked (209) to be told the lawful basis for which the Respondent was using the CCTV system and pointed out that the documents that Ms Mack had sent her did not mention CCTV (209).

122. On 27 June 2019 the Claimant made a formal DSAR (211) and Ms Mack acknowledged this (207). The Claimant also reminded Ms Mack that she had not replied to her question about the basis for processing (209).

123. On 3 July 2019 Agnieska Wlodarek emailed the Claimant stating that the CCTV footage that the Respondent had of her would be provided on a (single) USB stick (214). There was then a delay as the Respondent appears then to have realised that it needed to find software to blank out other people identified in the recordings, but in the end never did obtain such software. In a conversation with Ms Mack on 11 July the Claimant asked if this was necessary because the other people had not given their consent to be recorded either and Ms Mack said yes. In the same conversation Ms Mack asked the Claimant to consider an occupational health referral. She also advised the Claimant to raise a grievance, which the Claimant did the same day (see further below).

124. In the meantime, by email of 4 July the Claimant contacted Mr Ferrario again and as well as raising again the issues in relation to the DSAR and CCTV, she wrote *"In regards to the serious issues that had occurred at my work, I have not been able to talk to Chernelle in detail. I am concerned that she may not understand that while she's helping me with the information on the privacy policy I would still need to speak with someone … [about] discrimination, bullying, harassment, hostile environment"* (222).

125. Ms Mack attempted to call the Claimant when Mr Ferrario got back from holiday on 10 July, and they managed to speak on 11 July 2019. In this conversation, the Claimant did manage to tell Ms Mack more about her work concerns and Ms Mack advised her to raise a grievance.

126. By further email of 11 July 2019 the Claimant reminded Ms Mack (as she had in the telephone call of the same date) that she was still waiting for responses to her two emails of 24 June 2019 where she had asked to be told the lawful basis for processing and pointed out that this was not set out in the privacy policy.

127. Later on 26 July 2019 Ms Mack confirmed that the Claimant could not be provided with a copy of the CCTV recordings but could view it in the Respondent's offices. Ms Mack did not respond to the Claimant's queries of 24 June. The Claimant submitted a complaint to the Information Commissioner's Office (ICO) the same day (699).

128. On 2 September 2019, not having had a response from Ms Mack, the Claimant decided to go into the store to collect what there was of her DSAR request (281). Among these documents were the emails from 1-11 June 2019 from Mr Lainez and Ms Senft complaining about the Claimant and revealing that Mr Lainez had repeatedly been accessing CCTV footage of her.

129. Some documents were missing and the Claimant notified Ms Mack of these. She also asked why she could not have the CCTV and Ms Mack said that it would have required the purchase of software to blank out identities which would have had to be charged to the Claimant. The Claimant asked how much the software would have costed and she replied she did not know. By email exchange the next day Ms Mack explained (288) that the CCTV could not be given to the Claimant as that would be for a different purpose than that for which it was collected and the Respondent would not know what she would do with it. Also, that she had not been able to find any software to blank out other people's faces.

130. On 5 September 2019 Ms Wlodarek sent the Claimant the missing meeting notes that had been omitted from the documents supplied on 2 September (300,301).

131. On 26 November 2019 the Claimant received a response from the ICO to her complaint (864). Of note, the response states: *"It is likely to be unfair to workers to tell them that monitoring is undertaken for a particular purpose and then use it for another purpose that they have not been told about, unless the information reveals activity that no employer could reasonably be expected to ignore"*. It acknowledges that monitoring may be justified on the basis that it is necessary to enforce the Respondent's own rules and standards, and that signage in areas would meet the obligation to let people know that CCTV is being used. The ICO determined that the Respondent's failure to provide a redacted copy of the CCTV footage was an infringement of her rights, albeit that the ICO could not require it to comply if doing so would infringe the rights of others and it could no longer control how that personal data is stored, used or shared.

<u>Grievance</u>

132. The Respondent has policies in its Handbook on grievances and on harassment and bullying. The policy states that where there is a formal complaint of harassment and bullying, a meeting will normally be arranged within one week. The policy provides that 'serious consideration' will be given to any request that an employee makes to change their own working

arrangements during an investigation, such as to minimise contact with the alleged harasser or bully (531).

133. As already noted above, the Claimant had from 18 June onwards been attempting to ask Ms Mack and others in HR for guidance as to what do about what she described as a 'serious issue' that had arisen at work and which she characterised as bullying/harassment/discrimination. However, the Claimant herself acknowledged in her email of 4 July to Mr Ferrario that Ms Mack had not understood she was trying to raise such a complaint and that she had been focusing on the DSAR/CCTV issues. Reviewing the emails, we find it was reasonable for Ms Mack to focus on the DSAR / CCTV issues as it is not in our judgment clear from the emails (and, we infer, was not clear from the telephone conversations either) that the Claimant had grievances to raise about what had happened that were not covered by the matters she was raising about CCTV and DSAR. Once Ms Mack did realise, in a conversation on 10 July, she advised the Claimant to raise a grievance and it is apparent from Ms Mack's email of 11 July 2019 (228) that she expected it to be possible for the grievance to be heard within the week *"on Monday"*.

134. The Claimant's formal grievance complained of bullying by her supervisor, Ms Birtalan, and harassment and discrimination by Mr Lainez and discrimination by Mr Patel. She identified the discrimination by Mr Lainez as being *"based on my medical condition"*.

135. On 11 July 2019 in a further telephone conversation with Ms Mack she encouraged the Claimant to contact OH. The Claimant wanted more information, and Ms Mack provided her with a link to more information after the call (230).

136. By letter of 15 July 2019 the Claimant was invited to a grievance meeting with Ian Benfield (Associate Store Team Leader) on 23 July 2019. This was 12 days after she had raised the grievance. Mr Benfield could not remember why he had been unable to meet within the week.

137. The meeting itself on 23 July 2019 is well noted and the notes are agreed (250); we have taken them into account. At the end of the meeting, Mr Benfield asked the Claimant what she wanted to achieve from the process. She said that she wanted to feel safe at work physically and emotionally and asked about transferring stores. She also asked for compensation for her lost salary for the period she had been signed off sick. At this meeting Mr Benfield said that they did have signs up about the CCTV. The Claimant says she saw a bunch of CCTV sign stickers hanging from the board on the wall in his office and surmised that these were *"left overs from the recent application"*. (We make no finding whether they were or not.)

138. Mr Benfield emailed the Claimant after the meeting on 25 July indicating he would be following up with her and also that he had asked Ms Mack about complying with DSAR timelines, but also suggesting that it would be a good idea to get in touch with OH (285). The Claimant was not sure that this would be helpful as she was already seeing a GP and consultant.

139. Mr Benfield interviewed witnesses in connection with the Claimant's grievance. On 1 August 2019 he interviewed Mr Lainez (266). On 1 August 2019 he interviewed Mr Patel (269). On 4 August 2019 he interviewed Ms Birtalan (272).

140. On 21 August 2019 the Claimant chased Mr Benfield for an update on her grievance complaining about the delay (285, 286). He apologised for the delay but said he was on holiday (he was away for two weeks) and would respond after he had returned on 1 September 2019. The Claimant felt let down by this response. She complained about the delay by further email of 25 August 2019. She asked why she had not been provided with alternative employment whilst the grievance outcome was awaited. She contacted Mr Ferrario again (Head of HR) sent a brief email on 30 August recommending that if the Claimant wished to speak to anyone she speak to someone in the PRS team or Ms Mack.

141. On 29 August 2019 Mr Lainez emailed the Claimant inviting her for a welfare meeting (282). The Claimant was disturbed that the person she had grieved about was contacting her in this way before the grievance had been determined. She complained about it to Mr Benfield by email of 31 August 2019.

142. By email of 1 September 2019 Mr Benfield explained the delay in dealing with the grievance by reference to the holiday season and that there was a *"key individual on vacation for much of August"* (287). He was unable to identify who this was and as he had completed interviews on 4 August, we find that there was no 'key individual' away in August. Regarding the Welfare Meeting, he wrote that Mr Patel and Mr Lainez were best placed to understand the challenges that she faced in coming back to work.

143. On 30 August 2019 the Claimant contacted ACAS (24). There was a period of ACAS Early Conciliation between 30 August 2019 and 30 September 2019.

144. On 3 September 2019 Mr Benfield sent her a grievance outcome letter rejecting her grievance (290). He found that Ms Birtalan had not been bullying the Claimant, that she could not recall making the comments alleged by the Claimant but could recall making other similar comments, in respect of which formal action was taken. He concluded that Mr Lainez's conduct was not inappropriate, but was seeking appropriately to balance the Claimant's medical needs with the needs of the team. He noted that productivity was a theme with the Claimant and he would ask Mr Ganatra to look into this.

145. Regarding Mr Lainez's viewing of CCTV footage on 14 May 2019, Mr Benfield concluded:

> Regarding the occasions whereby Juan Lainez viewed CCTV footage of you on the shop floor on the 14th May 2019 I cannot consider this harassment. The critical distinction here is that Juan did not ask any of the guards or other TMs to watch you nor did he himself indiscriminately view footage of you. Rather he viewed the footage himself and only retrospectively following occasions that he felt needed further clarification, searching within very specific windows of time. Juan was fact finding prior to initiating his investigation which is the appropriate order of doing things and not outside of his remit. Furthermore, following the email you originally sent to Mitul Patel on the 16th of May posing concerns about the way Juan addressed you in front of other TMs, Mitul visited this formally with Juan.

146. He did not uphold her complaint about scheduling by Mr Patel. He concluded that there had been no discrimination, bullying or harassment.

147. He did not otherwise deal with the Claimant's complaints about the use of CCTV.

148. The outcome letter gave the Claimant the right of appeal, but the Claimant did not appeal.

149. The Claimant felt that she should have been re-interviewed by Mr Benfield before he reached a conclusion. This was her understanding based on the grievance policy at 580 in the Respondent's Handbook which states *"We may initiate an investigation before holding a grievance meeting where we consider this appropriate. In other cases, we may hold a grievance meeting before deciding what investigation (if any) to carry out. In such cases, we **will** hold a further grievance meeting with you before we reach a decision."* (Our emphasis added.) In the Claimant's case Mr Benfield had adopted the second option and under the policy he should therefore have held a further grievance meeting with the Claimant. Mr Benfield acknowledged he was not aware of this part of the policy and this is why he had not done that. The Claimant thought that as this had not happened there was no point appealing as she had lost trust in the Respondent.

150. By this point the Claimant had also seen in her DSAR emails from Mr Lainez to Mr Ganatra of 1 and 5 June 2019 which made clear he had the viewed the CCTV of her several times going back to January 2019. This made her feel *"extremely upset and … physically sick"*.

151. On 5 September 2019 the Claimant was invited by Bianca Rojas to a Welfare Meeting (295). Ms Rojas invited her because Mr Benfield had arranged for her to take over from Mr Lainez following the Claimant's complaint. On 6 September 2019 Mr Patel asked her if she would also like to attend a Job Dialogue meeting on the same date (316). The Claimant replied to Ms Rojas that she would not be attending (317).

<u>Resignation</u>

152. On 9 September 2019 the Claimant emailed Shaun Coombes, copying in Alex Ferrario, tendering her resignation with immediate effect (318). Her

resignation email describes her decision to resign as ‘involuntary’. She identified ‘fundamental breaches of contract’ as including:

a. Mr Patel and Mr Lainez *“wrongly subjecting me to … disciplinary proceedings against me and failing to follow company procedures”*;
b. Mr Patel and Mr Lainez *“wrongly subjecting me to unjustified criticism”*;
c. Mr Lainez *“wrongly embarrassing and humiliating me in front of other colleagues without any reasonable justification”*;
d. *“wrongly subjecting me to unreasonable, unjustified and unlawful monitoring/surveillance (breaching by Human Right)”*;
e. *“wrongly subjecting me to unjustified criticism in relation to my disability by Juan Lainez”*;
f. *“wrongly subjecting me to unreasonable delay in accommodating my disability needs by Mitul Patel”;*
g. *“all the above breaches causing me psychiatric injury”*.

153. And that upon her raising concerns about the above:

a. *“repeatedly not provide with timely help when I was seeking help and information from HR/TMS representative Chernelle Mack”*;
b. *“deceived and lied to … in relation to employers lawful basis on staff surveillance”*;
c. *“deceived by PRS representative Agnyeska Wlodraek that there was only one CCTV footage processed of me, whereby where were two usb sticks with my name on it on the investigation conducted by Mitesh Ganatra on 11 June 2019”*;
d. *“refused to exercise my right to have a copy of my data …*”;
e. *“ignored by Chernelle Mack despite several attempts to exercise my right to be informed in relation to my employer’s lawful basis under which they monitor staff and process their data”*;
f. *“failed to perform your duty to take proper and timely account of my legitimate grievance which cause me substantial financial loss, physical and psychiatric injury”*.

154. The Respondent suggested to the Claimant in cross-examination that she really resigned to avoid performance/capability proceedings, just as she had moved store in 2016/2017 to avoid such proceedings. However, the Claimant responded (reasonably in our view) that she did not see moving store as a way to avoid performance/capability proceedings and she had assumed that if the proceedings were legitimate they would have been continued in any event. We further find as a fact that although the commencement of performance/disciplinary proceedings against the Claimant was part of the reason why the Claimant resigned when she did, each of the other matters that she raised in her email, and on which she has relied in these proceedings, were more important elements in her decision to resign. This is clear from what she wrote in her resignation email and her continuing strength of feeling about those issues. The Claimant has never accepted criticism about her performance and although it must subconsciously have been part of her reasons for acting at the time, we find it did not figure significantly in her thinking when deciding to resign.

155. On 28 October 2019 the Claimant submitted her claim in these proceedings.

156. On 13 December 2019 the Respondent filed its response.

157. Finally, we record that the Claimant has since the events above, suffered poor psychological health. In particular, the Respondent's use of CCTV has caused her significant distress and she has required counselling. We make no further detailed findings at this stage because the Claimant's medical report from Dr Britto was produced late and the Respondent has not had an opportunity to deal with it or respond. However, it is relevant to note for the purposes of this liability stage that, as was clear from the oral evidence we heard from the Claimant in any event, the Claimant was badly affected by what she perceived to be the Respondent's misuse of CCTV data.

## Conclusions

Disability and the Respondent's Knowledge

*The law*

158. By s 6 of the EA 2010, a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. The term 'substantial' is defined by s 212 EA 2010 as 'more than minor or trivial'. An effect is 'long-term' if it (a) has lasted for at least 12 months, (b) is likely to last for at least 12 months, or (c) is likely to last for the rest of the life of the person affected: EA 2010, Sch 1, para 2.

159. The Tribunal must have regard to the government's guidance *Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011) (the Guidance) insofar is it considers it relevant: EA 2010, Sch 1, para 12. There is also guidance in Appendix 1 to the Code of Practice on Employment published by the Equality and Human Rights Commission (EHRC), which the Tribunal must take into account if it considers it relevant: Equality Act 2006, s 15(4).

160. In *Elliott v Dorset County Council* (UKEAT/0197/20/LA) Tayler J emphasised that the Tribunal must consider the statutory definition, which takes precedence over anything in the EHRC Guidance or Code of Practice and (at [43]): *"The determination of principle is that the adverse effect of an impairment on a person is to be compared with the position of the same person, absent the impairment. If the impairment has a more than minor or trivial effect on the abilities of the person compared to those s/he would have absent the impairment, then the substantial condition is made out."* The focus must be on the identification of day-to-day activities, including work activities, that the Claimant cannot do or can do only with difficulty: *ibid* at [82].

161. When determining whether the adverse effect is long-term, 'likely' means 'could well happen' in the sense of being 'a real possibility'. It is not a balance of probability assessment: see the Guidance, paragraph C3, reflecting the decision of the House of Lords in *Boyle v SCA Packaging Ltd* [2009] ICR 1056.

162. The Guidance at D4 states: *"The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is carried out by people on a daily or frequent basis."*

163. The Guidance at B7 states that the account should be taken of how far a person can reasonably be expected to modify their behaviour to prevent or reduce the effects of an impairment on normal day-to-day activities. *"In some instances, a coping or avoiding strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities"*. The Guidance goes on to give the example of someone with allergies avoiding certain foods, or someone with a phobia avoiding the triggering thing. At B9 the Guidance makes clear that where someone avoids doing something that causes pain, fatigue, or substantial social embarrassment, it would not be reasonable to conclude that they were not disabled. At B10: *"In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment"*.

164. The question of long-term effect is to be judged at the date of the act of discrimination concerned: *Tesco Stores Limited v Tennant* (UKEAT/0167/19/OO) at [7].

165. When determining whether or not a person has a disability, the Northern Ireland Court of Appeal in *Veitch v Red Sky Group Limited* [2010] NICA 39 at [19] held: *"The presence or absence of medical evidence may be a matter of relevance to be taken into consideration in deciding what weight to put on evidence of claimed difficulties causing alleged disability but its absence does not of itself preclude a finding of fact that a person suffers from an impairment that has a substantial long-term adverse effect."*

166. So far as the requirements of knowledge of disability are concerned, the Respondent has a defence to most of the Claimant's discrimination claims if it did not have the requisite knowledge of her disability. What is required for knowledge of disability in general terms is that the employer have actual or constructive knowledge of the facts that constitute the definition of disability under s 6 of the EA 2010. The employer must have actual or constructive knowledge that the claimant has an impairment that has each of the elements

of the statutory definition of disability, i.e. that it has a substantial and long-term effect on her ability to carry out day-to-day activities: see *Stott v Ralli Ltd* (EA-2019-000772-VP) at [57]-[58] and the cases quoted therein.

*Conclusions*

167. The Respondent accepts that the Claimant arthritis condition was by at least January 2019 having a 'substantial adverse effect' on her ability to carry out day-to-day activities. This was obvious because she had been signed off sick with 'chronic pain' from 29 January 2019 to 7 May 2019 and when she returned to work she required, on the advice of her doctor, adjustments to be made to her work. The key question, however, is whether, as at the time of the discrimination alleged in these proceedings (i.e. May-September 2019) it was 'likely' that the Claimant's arthritis condition was going to continue having these substantial effects, and also whether the Respondent knew or ought to know that. In determining these questions, we put out of mind the fact that in the event the Claimant's condition has persisted; we view the matter solely by reference to the information available as at May 2019.

168. As at May 2019 there was no definitive evidence that the Claimant's condition was likely to persist for another eight months. No medical practitioner was asked or instructed to give a view on that question at the time. However, medical evidence is not necessarily required to establish a disability within the meaning of the Act. In this case, the position by May 2019 was that the Claimant had been suffering from pain in her back, neck, shoulder and other joints for about three years. The cause was non-specific and non-diagnosed, but what was clear was that this was not a condition that had resulted from a particular accident from which a period of recovery might be expected. Rather, although the Claimant lacked a formal diagnosis, the symptoms described were of a general deteriorating physiological condition. It had deteriorated to the point where she was signed off work for over three months. Although she had returned to work, she was still in pain and on medication. All this information was confirmed in Dr Carlucci's letter of 30 April 2019 (135), which also indicated that *"stress on the lumbar spine … could aggravate her condition"*, and that there was to be a further review *"in about five months' time"*. The reference to 'aggravation' of the condition by certain activities, a five-month review period and no reference to any anticipated recovery or likely improvement in our judgment all indicates to the lay reader that Dr Carlucci was not anticipating any significant change in the Claimant's condition over the five-month review period.

169. Against that background, we find that there was a 'real possibility' as at May 2019 that the Claimant's condition would still be having a substantial adverse effect on her in January 2020. Indeed, if we turn the statutory question on its head and ask whether the evidence was such that we could say that there was a good (i.e. more than 50% chance) that the Claimant would be fully recovered by January 2020, we have to say that the answer is clearly 'no'. All the evidence pointed towards this being a long-term physiological condition with no real prospect of substantial improvement by January 2020.

It follows that we must conclude that it was as at May 2019 'likely' that the Claimant would still be suffering substantial adverse effects from her condition in January 2020, in the sense that there was a real possibility that would be the case. She was accordingly disabled within the meaning of the Act.

170. Moreover, as we have reached our decision as lay people and based on the same information as was before the Respondent (Mr Patel and Mr Lainez in particular) at the relevant time, we further find that if they had given thought to it they ought reasonably to have reached the same conclusion that we have, and thus we find that they did have knowledge as at May 2019 (and thereafter) that the Claimant had a disability within the meaning of Act.

## Direct discrimination

*The law*

171. Under ss 13(1) and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, by subjecting her to any detriment, discriminated against the Claimant by treating her less favourably than it treats or would treat others because of a protected characteristic. The protected characteristic relied on by the Claimant is her disability.

172. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [34]-[35] per Lord Hope and at [104]-[105] per Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123) agreed with Lord Hope.)

173. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). However, we may also consider how a hypothetical comparator would have been treated.

174. The Tribunal must determine "what, consciously or unconsciously, was the reason" for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]). It must be remembered that discrimination is often unconscious. The individual may not be aware of their prejudices (cf *Glasgow City Council v Zafar* [1997] 1 WLR 1695, HL at 1664) and the discrimination may not be ill-intentioned but based on an assumption (cf *King v Great Britain-China Centre* [1992] ICR 516, CA at 528).

175. It is not necessary that the employee themselves has the protected characteristic. If the alleged discriminator acts because they perceive the employee to have that characteristic that is discrimination: *Chief Constable of Norfolk Constabulary v Coffey* [2019] EWCA Civ 1061, [2020] ICR 145 at [11]. In the case of perceived disability discrimination the Court of Appeal in that case gave the following guidance at [35]:

> The starting point for the issues raised by these grounds is that it was common ground before us that in a claim of perceived disability discrimination the putative discriminator must believe that all the elements in the statutory definition of disability are present—though it is not necessary that he or she should attach the label “disability” to them. As Judge Richardson put it succinctly [2018] ICR 812, para 51:
>
> > “The answer will not depend on whether the putative discriminator A perceives B to be disabled as a matter of law; in other words, it will not depend on A's knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation.”
>
> That distinction between knowing the facts that constitute the disability and knowing that they amount to a disability within the meaning of the Act had already been drawn, albeit in a different context, by Baroness Hale of Richmond in her speech in *Malcolm [2008] AC 1399* , para 86. Again, although it was common ground that this was the right approach, I should say that I agree that it is correct. In a case of perception discrimination what is perceived must, as a simple matter of logic, have all the features of the protected characteristic as defined in the statute.

176. If a decision-maker's reason for treatment of an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the individual: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 especially at [33] per Underhill LJ. What matters is what was in the mind of the individual taking the decision. It is also important to remember that only an individual natural person can discriminate under the EA 2010; the employer will be liable for that individual’s actions, but the legislation does not create liability for the employer organisation unless there is an individual who has discriminated: see Underhill LJ, ibid, at [36].

177. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at [56]). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38.

178. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] per Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at [32]), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 per Mummery J at 874C-H and 875C-H.

*Conclusions*

179. In this case, the Claimant claims that the following matters constituted direct discrimination:
    a. a comment by Ms Birtalan,*"Yeah some people are millionaires they can afford to be off work so long"*;
    b. a comment by Ms Birtalan, *"haha* we *are going to make our torture plan for you guys hahaha"*;
    c. a comment by Mr Lainez, *"Elvira, you need to speed up with delivery"*;
    d. Mr Ganatra's investigation commenced on 11 June 2019; and
    e. Failure to deal properly with her grievance.

180. Taking each in turn:-

181. We have accepted that Ms Birtalan made the comment, *"Yeah some people are millionaires they can afford to be off work so long"*. We accept that the Claimant could reasonably regard that as a detriment, and was in fact offended by it. We have not heard any evidence from Ms Birtalan, but the initial burden of proof is on the Claimant to raise a *prima facie* case that in making the comment Ms Birtalan was consciously or subconsciously influenced by the Claimant's disability. We find that the Claimant has not discharged that burden. While we can see that on its face the comment was made because the Claimant had been off work for a long period, there is no evidence before us that Ms Birtalan had seen Dr Carlucci's letter of 30 April 2019 or was otherwise privy to the detailed information about the Claimant's condition which has led us to conclude that Mr Lainez and Mr Patel ought to have known that the Claimant was disabled. Indeed, the Claimant had objected to Ms Birtalan being given this information in March 2019. There is therefore no evidence before us from which we could conclude that Ms Birtalan knew, or ought to know, or perceived, the Claimant to be disabled. Further, the nature of the comment made is, in our judgment, very much the sort of comment that might be made to anyone who had been off for any length of time for any reason. It is jokey and inappropriate but it is not disability-specific and we find that the Claimant has not discharged the burden on her in this respect. This is not direct discrimination.

182. We have also found that Ms Birtalan made the comment *"haha* we *are going to make our torture plan for you guys hahaha"*. This was clearly a joke that was taken the wrong way by the Claimant as even on the Claimant's evidence as soon as she complained Ms Birtalan stopped smiling. However, the Claimant's condition is such that (as she explained) she is in 'torture' all day so references to torture are 'not funny'. Although this is close to the (admittedly very low) threshold for establishing a detriment, in this case, with this particular Claimant and her particular condition, we accept that it crosses the line and was in law a detriment. However, we do not consider that the Claimant has discharged the burden of showing that her disability had anything to do with it. Again, there is no evidence that Ms Birtalan knew or perceived the Claimant to be disabled. Moreover, the comment on the Claimant's evidence was generic, directed at *"you guys"*, not the Claimant specifically. This is not direct discrimination.

183. As to Mr Lainez's comment *"Elvira, you need to speed up with delivery"*, we accept that this constitutes a detriment as it was embarrassing for the Claimant to be singled out in front of colleagues and Mr Patel actually gave Mr Lainez an informal reprimand for having dealt with it like this. However, we do not consider that the Claimant's disability had anything to do with it. Mr Lainez made the comment to the Claimant because he had long had concerns about the amount of time she spent talking to colleagues, he saw her back at work after a long break resuming her old 'bad habits', and he genuinely thought she was taking a long time with the delivery that day. Her disability had nothing to do with it. This is not direct discrimination.

184. As to Mr Ganatra's investigation commenced on 11 June 2019, we have heard no evidence from either the Claimant or the Respondent as to why it was decided to commence this investigation at this time. It was not Mr Patel's or Mr Lainez's decision. Insofar as it was prompted by Mr Lainez's complaints, these were raised by him at this time because the Claimant complained about him. The performance/conduct concerns about the Claimant were, however, very much the same long-standing concerns as were raised from 2014 onwards and had nothing to do with the Claimant's disability. Moreover, an investigation had been commenced (albeit without the Claimant's knowledge) at the end of 2018 before the Claimant went off sick with 'chronic pain' and thus before anyone could have known that she was disabled. Putting all that together, we find that the Claimant has not discharged the initial burden of showing that her disability had anything to do with the decision to start the investigation at this point.

185. Finally, as regards Mr Benfield's handling of the Claimant's grievance, the issues on which the Claimant has focused are: the delay in holding the grievance meeting (more than a week), the failure to re-interview her (contrary to the policy), the delay in informing her of the outcome between the last witness interview on 4 August and the outcome letter of 3 September, and the failure to uphold her grievance. We do consider that there was unreasonableness in Mr Benfield's handling of the grievance. There does not seem to have been any particular reason why the initial meeting could not have been held within the week (Ms Mack anticipated it would be), Mr

Benfield's two weeks' annual leave is not a good enough reason for taking a month to provide her with a grievance outcome (especially given that it was left to the Claimant to chase what was happening), and the failure to re-interview the Claimant was a clear breach of the Respondent's policy and also unfair in circumstances where the witnesses interviewed had introduced new information that the Claimant needed to be given a chance to comment on. However, none of this is so unreasonable as to lead us think that Mr Benfield's handling of the grievance has been influenced by the Claimant's protected characteristic. The Claimant assumed at the time that the date for the grievance meeting was the earliest Mr Benfield could manage, a month to deal with a grievance of this scope was in our judgment unreasonable, but it is not wholly outside the norm, the failure to re-interview is completely explained by Mr Benfield having failed to read the policy and thinking it was not necessary. There is no evidence from which we could infer that Mr Benfield would have handled the grievance any differently if the Claimant was not disabled. This is not direct discrimination.

186. The Claimant's direct discrimination claims are therefore dismissed.

<u>Failure to make reasonable adjustments</u>

*The law*

187. Under s 20 of the EA 2010, read with Schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person. By section 212(1), 'substantial' in this section also means 'more than minor or trivial'.

188. A respondent is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know both that the complainant has a disability and that he or she is likely to be placed at the relevant substantial disadvantaged (EA 2010, Sch 8, para 20): see further *Wilcox v Birmingham CAB Services Ltd* (UKEAT/02393/10) at [37].

189. In considering a reasonable adjustments claim, a Tribunal must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant: *Environment Agency v Rowan* [2008] ICR 218, EAT at [27] *per* Judge Serota QC. The Tribunal must also identify how the adjustment sought would alleviate that disadvantage: *ibid,* at [55]-[56]. The nature of the comparison between disabled and non-disabled people is not like that between claimant and comparator in a direct discrimination claim: it is immaterial that a non-disabled person with all the characteristics of the disabled person but for the

disability would be treated equally, what matters is whether *"the PCP bites harder on the disabled, or a category of them, than it does on the able-bodied"* as a result (for example) of the disabled person being more likely to be disadvantaged by the PCP than a non-disabled person: see *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160 at [58].

190. The concept of a PCP does not apply to every act of unfair treatment of a particular employee. A one-off decision can be a practice, but it is not necessarily one; all three words connote a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again: *Ishola v Transport for London* [2020] EWCA Civ 112 at [38] *per* Simler J. For something to amount to a PCP, there does not have to be evidence that the employer has treated another employee similarly, but there must be an element of persistence or repetition about the way the employer has treated the individual complainant: *Williams v The Governing Body of Alderman Davies Church in Wales Primary School* (UKEAT/0108/19/LA) at para 79 *per* Auerbach J.

191. The duty to make reasonable adjustments may (indeed, frequently does) involve treating disabled people more favourably than those who are not disabled: cf *Redcar and Cleveland Primary Care Trust v Lonsdale* [2013] EqLR 791.

192. What is reasonable is a matter for the objective assessment of the Tribunal: cf *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments, nor with the employer's reasoning: *Royal Bank of Scotland v Ashton* [2011] ICR 632, EAT.

193. Carrying out an assessment or consulting an employee as to what adjustments might be required is not of itself a reasonable adjustment: *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664, EAT.

194. Although the EA 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should generally have regard, including but not limited to:

    a. The extent to which taking the step would prevent the effect in relation to which the duty was imposed;
    b. The extent to which it was practicable for the employer to take the step;
    c. The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities;
    d. The extent of the employer's financial and other resources;
    e. The availability to the employer of financial or other assistance in respect of taking the step;

f. The nature of the employer's activities and the size of its undertaking;
g. Where the step would be taken in relation to a private household, the extent to which taking it would: (i) disrupt that household or (ii) disturb any person residing there.

195. Under s 136 EA 2010, the Claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may even be as late as the tribunal hearing itself. Once that threshold has been crossed, the burden shifts to the Respondent to show that the proposed adjustment is not reasonable: *Project Management Institute v Latif* [2007] IRLR 579, EAT.

*Conclusions*

196. The Claimant claims that the Respondent's normal requirements as to shifts constituted a PCP that placed her at a substantial disadvantage because her condition tended to be worse in the mornings and evenings and she needed to avoid heavy lifting. She contends that she was also substantially disadvantaged by having to work on heavy delivery days because on such days it would be more obvious that she was not working as quickly or doing as much work as her colleagues and they would be more likely to complain.

197. According to the agreed list of issues, the Claimant contends that the reasonable adjustments which she should have been provided were assigning her on the rota to work middle shifts only on Friday, Saturday and Sundays.

198. We accept that the Claimant was substantially disadvantaged by a requirement to work either an early morning or an evening shift, and that Mr Patel knew of that disadvantage by 8 May 2019. The Claimant explained to Mr Patel on 20 February 2019 how difficult it was for her to get up in the mornings and on 8 May 2019 she explained that her pain was worse in the evenings. The Respondent does not contend that it could not have scheduled her for only mid shifts. We find this was a modest and reasonable adjustment that could easily have been made.

199. Between 8 May and 11 June, the Claimant was scheduled to work late shifts on Monday 20 May, Saturday 25 May, Tuesday 28 May, and Thursday 30 May. There was no reason why the late shift on Monday 20 May could not have been avoided and this was a failure to make a reasonable adjustment. In so finding, we accept that the Claimant had herself said that she could work after her physiotherapy appointment on a Monday, but the point is that because her condition is worse in the evenings she was at a substantial disadvantage on a late shift, and there was no need to put her on a late shift at all so this was a failure to make a reasonable adjustment.

200. Following receipt of her GP letter of 22 May, the Respondent agreed to her leaving early on Saturday 25 May, Tuesday 28 May and Thursday 30 May, but this did not actually remove the disadvantage because she had still been scheduled for shifts she could not (or struggled to) do because of her disability. While she avoided the physical pain, she now lost out on pay. That was not therefore a reasonable adjustment. We acknowledge that the Claimant did not specifically complain at the time, but this is in the context of her having asked Mr Patel on 8 May for adjustments to avoid late shifts, and him having done nothing about despite having not contested her request at that meeting, so that she had to get a letter from her GP. We accept that the Claimant had done enough on 8 May to make clear what adjustments she considered were reasonable and required. There was no reason why the late shifts could not have been avoided. They were only scheduled as they were because Mr Patel had unreasonably ignored the adjustments the Claimant requested on 8 May. There were therefore failures to make reasonable adjustments when the Claimant was scheduled for late shifts on Monday 20 May, Saturday 25 May, Tuesday 28 May, and Thursday 30 May 2019.

201. The position with heavy delivery days is more difficult. For a start, it is not wholly clear which were heavy delivery days. Both parties now appear agreed that Friday was a heavy delivery day, but in the list of issues the Claimant's position was recorded differently. Further, the Claimant considered Tuesday was a heavy delivery day, but Mr Patel thought not. That said, there is agreement that at least Wednesday and Thursday were heavy delivery days and there is, moreover, evidence that when required to work a late shift on a Thursday the Claimant's concerns about being perceived by her colleagues as slow were realised as Ms Senft did indeed raise such a complaint about the Claimant's performance on Thursday 30 May 2019. However, for reasons we set out in further detail below in relation to the s 15 claim, we do not consider that the matters about which Ms Senft complained had anything to do with the Claimant's disability; what she describes is merely more of what had been said about the Claimant by various people since 2014. Given that the Claimant had already been excused heavy lifting (and Ms Senft specifically noted in her email that the Claimant was not being expected to do any heavy lifting), we do not therefore consider that the Claimant was placed a substantial disadvantage by reason of her disability by being required to work a mid-shift on a heavy delivery day.

202. Even if we are wrong about that, we consider that it was reasonable for the Respondent only to avoid some but not all heavy delivery days. Given that the Claimant had said she could not work on Monday and considered Tuesday to Friday to be heavy delivery days, unless she was scheduled on one of those days she could not have been given three shifts in the week. Moreover, she never asked to be excused all heavy delivery days, only to be given *"more*" mid-shifts and weekend shifts. It was therefore reasonable in principle for the Respondent not to adjust so as to avoid all heavy-delivery days.

203. As to the Claimant's claim that she was placed at a substantial disadvantage by the Respondent's continuing requirement for her to work with Mr Patel and Mr Lainez after 11 June 2019 or alternatively after her lodging of her grievance on 11 July 2019, we accept this was a PCP, but do not accept that the Claimant was at a disadvantage because of her disability in this respect. The Claimant was during this period signed off work sick not because of her disability but because of her reaction to events. Further, the cause of the disadvantage here was that the Claimant had raised a grievance and this made it difficult for her to continue working alongside Mr Patel and Mr Lainez, not her disability. In any event, even if the Claimant was at a substantial disadvantage because of her disability, given that she was signed off sick it would not have been reasonable for any employer to require her to work elsewhere.

Harassment

*The law*

204. By s 26(1) of the EA 2010 a person harasses another if: (a) they engage in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of (i) violating the claimant's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. By s 26(4), in deciding whether conduct has the requisite effect, the Tribunal must take into account: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. In *Land Registry v Grant* [2011] EWCA Civ 769, [2011] ICR 1390 at [47] Elias LJ focused on the words of the statute and observed: *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment"*. As the EAT explained at [31] in *Bakkali v Greater Manchester Buses (South) Ltd* [2018] ICR 1481, harassment involves a broader test of causation that discrimination which requires a *"more intense focus on the context of the offending words or behaviour"*. The mental processes of the putative harasser are relevant but not determinative: conduct may be 'related to' a protected characteristic even if it is not 'because of' a protected characteristic. The provisions on harassment take precedence over the direct discrimination provisions: conduct which amounts to harassment does not (save where the harassment provisions are disapplied for the specific protected characteristic) constitute a detriment for the purposes of ss 13 or 27: see EA 2010, s 212(1).

*Conclusions*

205. The three comments that the Claimant relies on in her claim of harassment are the same three comments as she relied on in relation to her direct discrimination claim. For the same reasons that they did not constitute direct discrimination, they also do not constitute harassment and were unrelated to her disability.

Discrimination arising from disability

*The law*

206. In a claim under s 15 of the EA 2010, the Tribunal must consider:
    a. Whether the claimant has been treated unfavourably;
    b. The reason for the unfavourable treatment;
    c. Whether that reason is something arising in consequence of the employee's disability;
    d. Whether the employer knew, or could reasonably have been expected to know, that the employee had the disability relied on;
    e. If so, whether the alleged discriminator has shown that the treatment is a proportionate means of achieving a legitimate aim.

207. The question of whether something arises in consequence of disability is an objective question and does not involve consideration of the mental processes of the alleged discriminator: *Pnaiser v NHS England and anor* [2016] IRLR 170, EAT at [31]. Whether something arises 'in consequence of' is a looser connection than 'because of' and might involve more than one link in the chain of consequences: *Sheikholeslami v University of Edinburgh* (UKEATS/0014/17/JW) at [66].

208. Then the Tribunal must consider what the reason was for the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator. The test is the same as for direct discrimination, i.e. the 'something' must be the conscious or unconscious reason for the treatment, in the sense of having a more than minor or trivial influence on the unfavourable treatment, even if it is not the main or sole reason: *Pnaiser* (ibid) at [31].

209. While it is a necessary element of liability for the employer to have knowledge (or constructive knowledge) of the disability, it is not necessary that the employer should know that the relevant 'something' arose in consequence of the Claimant's disability when subjecting the Claimant to unfavourable treatment: *York City Council v Grosset* [2018] ICR 1492 at [39]. On the question of the requirements for knowledge in this context, what is required is that the employer have actual or constructive knowledge of the facts that constitute the definition of disability under s 6 of the EA 2010. The employer must have actual or constructive knowledge that the claimant has an impairment that has each of the elements of the statutory definition of disability, i.e. that it has a substantial and long-term effect on her ability to carry out day-to-day activities: see *Stott v Ralli Ltd* (EA-2019-000772-VP) at [57]-[58] and the cases quoted therein.

210. An employer also has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. If the aim is legitimate, the Tribunal must consider whether the means

used to achieve it correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end: *Stott v Ralli Ltd* (EA-2019-000772-VP) at [79]. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment on the employee and the reasonable needs of the party responsible for the treatment: *Hampson v Department of Education and Science* [1989] ICR 179, CA and other cases summarized recently in *Department of Work and Pensions v Boyers* (UKEAT/0282/19/AT) at [29] *per* Matthew Gullick (sitting as Deputy High Court Judge). The test is an objective one, not a range of reasonable responses test (*Stott*, ibid, at [80]).

211. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification' and it is unlikely that a disadvantage that could be alleviated by a reasonable adjustment will be justified: *Dominique v Toll Global Forwarding Ltd* (UKEAT/0308/13/LA) at para 51 *per* Simler J.

212. The burden of proof is on the Claimant initially under s 136(1) EqA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation or defence, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not unlawful. The burden is on the Respondent in relation to both the knowledge defence and the justication defence.

*Conclusions*

213. The Claimant complains about two matters under this head of liability:
    a. The commencement of the investigation by Mr Ganatra into the Claimant's timekeeping and slow performance issues; and,
    b. The Claimant's inability to complete the (inappropriate) shifts she was assigned by Patel, which caused her loss of pay.

214. In relation to the investigation, we accept that this constituted unfavourable treatment. Although it was only a fact-finding meeting, it was sprung on the Claimant without warning and caused her significant distress. We have not heard evidence from Mr Ganatra so the only evidence we have as to the reason for the investigation is what appears from the notes of the 11 June 2019 meeting itself. The title for the meeting indicates that the matters being investigated were *"timekeeping"*, *"unauthorised overtime"* and *"performance related to job"*. The topics covered in the course of the meeting included the Claimant not taking breaks when she was expected to, not clocking in and out precisely on time so that on one day she had done more than her contracted hours, although over the week she had done less, and the Claimant spending too long talking to customers and colleagues. We take these matters therefore to be the reason for the meeting.

215. The next question is whether these matters were 'somethings' that arose in consequence of the Claimant's disability or not. In the course of the meeting the Claimant suggested that the timekeeping issues were as a result in part of her medical condition as the pain and/or medication she was taking affected her focus and concentration. However, issues regarding timekeeping, breaks and talking too long to customers and colleagues were longstanding issues for the Claimant. Her behaviour in this respect does not appear to have changed significantly since 2014, which is before she reports even feeling symptoms of her arthritis condition. We cannot see that there was any significant change in the Claimant's behaviour as regards timekeeping, clocking in and out and talking too much at work, whether to other customers or colleagues. The Claimant has never accepted any criticism about her behaviours in this regard and thus has never recognised the need to moderate her conduct in these respects. In the circumstances, we are satisfied that the reasons for the investigation had nothing to do with the Claimant's disability. It follows that this was not an act of discrimination contrary to s 15 of the EA 2010.

216. As to the loss of pay as a result of her being scheduled for late shifts that she could not reasonably do because of her disability on Monday 20 May, Saturday 25 May, Tuesday 28 May, and Thursday 30 May 2019, we have already found above that the Respondent failed to comply with its duty to make reasonable adjustments in respect of those shifts. We accept that the Respondent's scheduling of the Claimant for late shifts was unfavourable treatment because of something arising in consequence of the Claimant's disability because, as a result of her disability, the Claimant could not reasonably complete the shifts and therefore lost pay. That treatment was not justified because the Respondent was under a duty to make adjustments to those shifts with which it failed to comply. This was therefore unlawful discrimination contrary to s 15 EA 2010.

<u>Victimisation</u>

*The law*

217. Under ss 27(1) and s 39(2)(c)/(d) EA 2010, the Tribunal must determine whether the Respondent has treated the Claimant unfavourably by subjecting her to a detriment because she did, or the Respondent believed she had done, or may do, a protected act.

218. A protected act includes (so far as relevant in this case) bringing proceedings under this Act or making an allegation (whether or not express) that a person has contravened this Act (ss 27(2)(a) and (c)). An act is not protected if it is done in bad faith (s 27(3)).

219. In considering whether an act is a protected act, we must remember that merely referring to 'discrimination' or 'harassment' in a complaint is not necessarily sufficient to constitute a protected act as defined. The EA 2010 does not prohibit all discrimination/harassment, it only prohibits

discrimination/harassment on the basis of a proscribed list of protected characteristics. The Tribunal must determine whether, objectively, the employee has done enough to convey, by implication if not expressly, an allegation that the Act has been contravened. In *Durrani v London Borough of Ealing* UKEAT/0454/2012/RN, that was not the case where the employee, when questioned, explained that the 'discrimination' complaint was really a complaint of unfair treatment, not of less favourable treatment on grounds of race or ethnicity. The EAT, the then President, Langstaff P, observed as follows at paragraph 27:

> 27. This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act . All is likely to depend on the circumstances, which may make it plain that although he does not use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground. However, here, the Tribunal was entitled to reach the decision it did, since the Claimant on unchallenged evidence had been invited to say that he was alleging discrimination on the ground of race. Instead of accepting that invitation he had stated, in effect, that his complaint was rather of unfair treatment generally.

220. The legal principles applicable to detriment, causation and burden of proof are all the same as for direct discrimination (see above).

*Conclusions*

221. The Claimant relies on two alleged protected acts. The first is the Claimant complaining to Mr Patel on 14 May 2019 about Mr Lainez asking her to speed up with the delivery. However, at no point prior to her grievance did the Claimant put her complaint about Mr Lainez in the form of a complaint about disability discrimination. She complains about Mr Lainez treating her differently to her colleagues and singling her out, but in her complaints to Mr Patel she does not suggest that the reason for this is her disability. As such, this complaint was not a protected act.

222. The second is the Claimant's complaint to Mr Patel on 23 or 25 May 2019 that he had failed to assign her to middle shifts only on Friday, Saturday and Sundays. However, there is no documentary evidence of the Claimant putting this in the form of a complaint of disability discrimination or failure to make reasonable adjustments, and the Claimant's witness statement also does not contain evidence that could be construed as such a complaint. As such, this was not a protected act either.

223. Even if either of those complaints did constitute protected acts, the first claimed detriment (Mr Lainez telling security personnel to watch the Claimant on CCTV) did not occur; Mr Lainez in fact 'only' viewed and obtained CCTV data on the Claimant. The second claimed detriment, starting and proceeding with a formal investigation was not a decision taken by Mr Patel or Mr Lainez, but by HR in response to complaints raised about the Claimant by Mr Lainez and Ms Senft. There is no evidence that HR's decision was influenced by any

complaint that the Claimant had made and as the initial burden is on the Claimant, that victimisation claim would have failed in any event.

224. However, it is important to record here that although the Claimant's victimisation claims fail, there is a significant element of retaliation in what happens in relation to the investigation: what is clear, and Mr Lainez accepts, is that he made complaints about the Claimant at this time because she had complained about him. Had he not done that, it is unlikely that an investigation would have been commenced at this stage. In other words, there is 'victimisation' here, but it is not victimisation within the definition of the EA 2010. We return to this below in relation to the Claimant's constructive dismissal claim.

<u>Constructive unfair dismissal</u>

*The law*

225. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct"*.

226. It is well established that: (i) conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer; (ii) the breach must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

227. Not every breach of contract is a fundamental breach: the conduct of the employer relied upon must be *"a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract"*: *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761. The assessment of the employer's intention is an objective one, to be judged from the point of view of a reasonable person in the position of the claimant. The employer's actual (subjective) motive or intention is only relevant if *"it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person"*: *Tullett Prebon v BGC Brokers LLP and ors* [2011] EWCA Civ 131, [2011] IRLR 420 at [24] per Maurice Kay LJ, following Etherton LJ in *Eminence Property Development Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All ER (Comm) 223, at [63].

228. In this case the Claimant claims breach of the implied term recognised in *Malik v Bank of Credit and Commerce International* [1998] AC 20 that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the

relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important: conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract because the essence of the breach of the implied term is that it is (without justification) calculated or likely to destroy or seriously damage the relationship: see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A and *Morrow v Safeway Stores* [2002] IRLR 9.

229. The Claimant also relies on the Respondent's legal obligations in relation to processing of personal data under the General Data Protection Regulation 2016 (the GDPR), the UK Data Protection Act 2018 (the DPA) and Article 8 of the European Convention on Human Rights (ECHR). The Respondent accepts that it is obliged to act compatibly with the GDPR and DPA, but does not accept that the GDPR and DPA form part of the Claimant's contract of employment. We agree. There is no express term to that effect, and it is unnecessary to imply a term because the law binds the Respondent whether or not it is part of the Claimant's contract. However, the Respondent accepts that whether or not the Respondent has complied with the GDPR/DPA in relation to the Claimant is a matter that can in principle be relevant to whether there has been a breach of the implied term of trust and confidence in this case, and that a sufficiently serious breach of the GDPR/DPA may of itself amount to a breach of the implied term of trust and confidence. We agree.

230. The Respondent further accepts that because the purpose of the data protection regime is to protect the rights of individuals under Article 8 of the Convention (see, eg., *Criminal Proceedings against Lindqvist* [2004] 2 WLR 1385, Case C-101/01 at [7]), a breach of the data protection regime may infringe an individual's rights under Article 8 of the ECHR. As a Tribunal we are obliged by s 3 of the Human Rights Act 1998 to interpret the legislation we have to apply (here the ERA 1996) compatibly with the ECHR, and by s 6 of the HRA 1998 we are obliged to act compatibly with the ECHR. We have therefore borne in mind the Claimant's rights under Article 8 of the ECHR in the course of our deliberations. We have not, however, assumed that every breach of the GDPR/DPA would amount to a breach of Article 8 of the EHCR. It does not follow that everything that constitutes someone's 'personal data' will inevitably engage their rights under Article 8 since (for example) personal data of which someone has no reasonable expectation of privacy will not engage Article 8 (cf *Campbell v MGN Ltd* [2004] 2 AC 457, as explained in *Khuja v Times Newspapers Ltd and ors* [2017] UKSC 49, [2019] AC 161 at [21]-[22]).

231. The Claimant also relies on a number of the Respondent's non-contractual policies and procedures. None of these form part of her contract, but again the Respondent accepts that a failure by the Respondent to follow its own policies and procedure could cause or contribute to a breach of the implied term of trust and confidence. We have considered the Respondent's policies in this light in our deliberations.

232. It follows from the foregoing that, despite the plethora of legal obligations/policies relies on by the Claimant, our focus in this case is on the implied term of trust and confidence. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978, [2019] ICR 1 the Court of Appeal held (at [55] per Underhill LJ, with whom Singh LJ agreed) that, in the normal case where an employee claims to have been constructively dismissed as a result of a breach of the implied term of trust and confidence it is sufficient for a tribunal to ask itself the following questions:
(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of mutual trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation because the final act revives the employee's right to resign in response to the prior breach.)
(5) Did the employee resign in response (or partly in response) to that breach?

233. In determining whether a course of conduct comprising several acts and omissions amounts to a breach of the implied term of trust and confidence, the approach in *Omilaju v Waltham Forest LBC* [2004] EWCA Civ 1493, [2005] ICR 481 is to be applied: see *Kaur* at [41]. The approach in *Omilaju* is that a breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so, and the 'final straw' may be relatively insignificant, but must not be utterly trivial. Where prior conduct has constituted a repudiatory breach, however, the claim will succeed provided that the employee resigns at least in part in response to that breach, even if their resignation is also partly prompted by a 'final straw' which is in itself utterly insignificant (provided always there has been no affirmation of the breach): *Williams v The Governing Body of Alderman Davie Church in Wales Primary School* (UKEAT/0108/19/LA) at [32]-[34] *per* Auerbach J.

234. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal. In *United First Partners Research v Carreras* [2018] EWCA Civ 323 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons. It is not necessary, as a matter of law, that the employee should have told the employer that he is leaving because of the employer's repudiatory conduct: see *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] ICR 425, at 431 per Pill LJ.

235. Finally, although the Court of Appeal's decision in *Kaur* limits the role for the question of 'affirmation' in a constructive dismissal case, it remains the case

that, in accordance with ordinary contractual principles, an employee who affirms the contract in response to a fundamental breach (or series of incidents amounting to a fundamental breach) loses the right to resign and claim unfair dismissal. The general principles set out by the EAT in *WE Cox Turner (International) Ltd v Crook* [1981] ICR 823 remain good law: "*Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged may be evidence of an implied affirmation... Affirmation of the contract can be implied. Thus,* if *the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to affirm the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract."* However, in the employment context an employee will not necessarily affirm a contract by remaining in post and not resigning immediately. As the EAT stated in *Quigley v University of St Andrews* UKEATS/0025/05/RN at [37]:

> "…in the case of an employment contract, every day that passes after the repudiatory conduct will involve, if the employee does not resign, him acting in a way that looks very much like him accepting that the contract is and is to be an ongoing one: if he carries on working and accepts his salary and any other benefits, it will get harder and harder for him to say, convincingly, that he actually regarded the employer as having repudiated and accepted the repudiation. The risk of his conduct being, as a matter of evidence, interpreted as affirmatory will get greater and greater. Thus, if he does stay on for a period after what he regards as repudiation has occurred he would be well advised to make it quite clear that that is how he regards the conduct and that he is staying on only under protest for some defined purpose such as to allow the employer a chance to put things right. It needs also, however, to be recognised that even that might not work if it goes on too long; it is all a matter of assessing the evidence."

236. Finally, if the employee establishes that the resignation was in law a dismissal, then it is for the employer to show a reason for the dismissal, which can feel like an artificial exercise in the context of constructive dismissal case. The Court of Appeal addressed this problem in *Berriman v Delabole Slate Limited* [1985] ICR 546 where the Court said that, in the case of a constructive dismissal, the reason for the dismissal is the reason for the employer's breach of contract that caused the employee to resign. This is determined by analysis of the employer's reasons for so acting, not the employee's perception (*Wyeth v Salisbury NHS Foundation Trust UK* EAT/061/15). If the employer establishes a potentially fair reason, the Tribunal must then consider whether dismissal was fair in all the circumstances within s 98(4) ERA 1996.

*Conclusions*

237. The Claimant in this case has identified a number of different matters that she says caused or contributed to a breach of the implied term of trust and confidence by the Respondent in response to which she resigned. We

consider each matter in turn, before standing back to consider the overall picture:-

*(i) the claimed comments relied on as harassment above*

238. For the reasons set out above, we did not find that any of these comments constituted unlawful conduct under the EA 2010, but we did in each case find that the comments amounted to detriments. The comments by Ms Birtalan were jokes, but they were insensitive, unnecessary and inappropriate and we accept that they are in principle capable of making a very small contribution to a breach of the implied term of trust and confidence, albeit that as jokes they come nowhere amounting to a breach on their own. The comment by Mr Lainez also makes a very small contribution: Mr Patel considered (and we agree) that he should not have told the Claimant off in front of her colleagues. Although Mr Lainez was justified in raising with the Claimant that she was taking too long with the delivery and/or talking too much, he was not justified in commenting on this in front of her colleagues.

*(ii) The failure to provide the agreed shifts (see reasonable adjustments claim above)*

239. We found that the Respondent failed in its duty to make reasonable adjustments in relation to the four shifts where the Claimant was scheduled late without good reason after 8 May 2019. In our judgment, these failures were not so significant as to amount in themselves to a breach of the implied term of trust and confidence, in particular because it was only four occasions and thereafter the Respondent scheduled her for mid-shifts and the Claimant knew that this was going to happen. She did not regard this as a resigning issue, and we do not consider that it would have been reasonable for her to resign in response to these failures to make reasonable adjustments. However, we have found that the Respondent did breach the EA 2010 in failing to make those adjustments. That is not insignificant and we find that it was capable of contributing to a breach of the implied term of trust and confidence.

*(iii) The unjustified disciplinary investigation based on unfair criticism of the Claimant instigated by Patel and Lainez as a response to her disability*

240. We have already concluded that the investigation by Mr Ganatra was not launched in response to her disability. We also consider that the Respondent would in principle have been justified, when issues with timekeeping and spending too much time talking to customers and colleagues arose again with the Claimant, in raising these with the Claimant. These were, as we have found above, long-standing issues that had nothing to do with the Claimant's disability. However, in our judgment it was 'unjustified' for the Respondent to commence a formal investigation with the Claimant on 11 June 2019 for two main reasons:-

241. *First,* the complaints that triggered the investigation at this point were complaints raised by Mr Lainez in retaliation for the Claimant complaining

about him. As the issues with the Claimant's performance and behaviour were long-standing issues there was no urgency to deal with them at this point, and retaliatory conduct of this sort by a line manager is likely seriously to damage the relationship of trust and confidence that ought to exist between employer and employee. It is not 'victimisation' within the definition of the EA 2010, but it is 'victimisation' in ordinary parlance and it is likely to cause serious damage to the employment relationship.

242. *Secondly*, while the Respondent would have been justified in having an informal conversation with the Claimant about these issues at this point, in our judgment it was not justifiable to proceed direct to a formal investigation. When a formal investigation had started at the end of 2018 that followed on a number of informal conversations that the Claimant had had with Mr Lainez about these issues. There was therefore a progression. However, in the end the Claimant had been unaware that the Respondent had decided to move matters to a more formal footing, and she had then been absent from work for over three months and had returned with a disability for which reasonable adjustments were required. This was a new situation and (notwithstanding that these behavioural/performances issues were long-standing issues unrelated to the Claimant's disability) it was in our judgment not appropriate for the Respondent to move straight to a formal process, rather than re-starting with an informal conversation. Moving, without any warning of any sort, straight into a formal investigation of the sort conducted by Mr Ganatra on 11 June 2019 was likely to seriously damage the relationship of trust and confidence that ought to exist between employer and employee. There was not 'just cause' for that as it would have been very easy to have had an informal conversation with the Claimant first, and the failure to do so in relation to these minor performance/conduct issues was not in accordance with the Respondent's own written policy.

*(iv) The Claimant being monitored and subjected to surveillance*

243. We have considered first whether the Respondent's use of CCTV in this case was compliant with the GDPR or not.

244. The GDPR imposes obligations on 'data controllers' in respect of 'personal data'. By Article 4(1), 'personal data' means any information relating to an identified or identifiable natural person. By Article 4(7) a 'controller' is the body which, alone or jointly with others, determines the purposes and means of the processing of personal data.

245. Article 5(1)(a) of the GDPR provides that: *"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency')"*. A necessary, but not sufficient, condition for the lawful processing of personal data is that one of the processing conditions in Article 6 applies. This includes Article 6(1)(f) *"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are*

*overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data"*.

246. Article 5(1)(b) provides that *"Personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation')*".

247. By Article 5(1)(c), *"Personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation')"*.

248. By Article 12 the data controller must take appropriate measures to provide any information referred to in Articles 13 and 14 in a *"concise, transparent, intelligible and easily accessible form, using clear and plain language"*. By Article 13, where personal data are collected from a data subject the controller must, at the time when personal data are obtained, provide the data subject with (among other things) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing and, where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party. Where personal data have not been obtained from the data subject, the same information must be provided by the data controller within a reasonable period after obtaining the personal data: Article 14. By Article 12(3) and Article 13(4) where the controller intends to further process personal data for a purpose other than that for which the personal data were collected, the controller shall provide the data subject prior to that further processing with information on that other purpose and any other relevant further information.

249. By Article 15 a data subject has a right of access to their personal data, subject to certain exceptions.

250. We are aided in our interpretation of these provisions, and their application to this case, by the fact that the Claimant complained to the ICO about the Respondent's handling of her personal data. The ICO did not have the benefit of all the material we have seen. Nor is the ICO's view binding on us. We have to reach our own conclusions. Nonetheless, its response of 26 November 2019 (864) provides some helpful guidance. The ICO accepted in principle that an employer may in principle have a legitimate interest in processing personal data for purposes of performance management and disciplinary, grievance and other investigations. We agree. However, the ICO also noted *"Generally, personal data obtained for a particular purpose should not be used in a way that is incompatible with that purpose. It is likely to be unfair to workers to tell them that monitoring is undertaken for a particular purpose and then use it for another purpose that they have not been told about, unless the information reveals activity that no employer could reasonably be expected to ignore"*.

251. We have considered whether the Respondent has, in the documentation it has provided to the Claimant, complied with the obligations under Articles 5 and 12-14 of the GDPR, to give her 'fair', 'transparent', 'easily accessible' warning that it might at any time access CCTV data of employees for the purposes of performance and/or disciplinary investigations. The Respondent in this regard points primarily to the Rules of Conduct that the Claimant signed on joining in 2010. On its face, that document gives transparent and fair warning that CCTV may be used for disciplinary purposes. It says nothing about performance management. However, 2010 was some time ago. The Respondent has since that date published a number of further documents that deal specifically with its handling of employee personal data. In our judgment, to the extent that the Respondent's later documents contradict the earlier Rules of Conduct, an employee would reasonably be entitled to regard the later document as being the employer's statement on data processing for the purposes of the GDPR. This is especially given that there has in general terms been a 'tightening up' of data protection law (or, rather, public understanding of data protection law) in recent years and an employee could reasonably expect to see an employer's policy on personal data processing 'tightened up' in more recent iterations. This view is strengthened in this case by the fact that the Claimant had forgotten the 2010 document and no one at the Respondent referred her to that when she was asking about the written basis for the policy in 2019.

252. We have therefore focused on what is stated in the Respondent's Handbook in relation to the Respondent's policy on monitoring its employees and handling their personal data. We have set out the relevant provisions of the Respondent's policies in our findings of fact above. As noted there, the Respondent's policy on monitoring employee use of its information systems does not assist in relation to CCTV. CCTV is not an information system that employees use, and the policy does not suggest it is. Contrary to the submission of Ms Banerjee, CCTV is not a system like the Respondent's email or clocking in or out system. Those are systems that are 'used' by employees in their performance of their roles. CCTV, in contrast, is passively monitoring and recording employees and customers. It is not being 'used' by them. It is a qualitatively different form of data collection.

253. The Respondent's EU Team Member Privacy Policy covers (following the structure of Articles 13 and 14 of the GDPR) information provided by the employee and information obtained from other sources. As one would expect, CCTV information is not listed as information 'provided by' the employee and in ordinary understanding it does not fall within that category. A CCTV camera records personal data, but a person who walks in front of such a camera is not ordinarily understood as 'providing' their personal data to the camera. The policy also applies to data that the Respondent obtains 'from other sources'. During the course of the hearing Ms Banerjee suggested that the CCTV data was data that the Respondent 'obtained from other sources', but there are two problems with that. First, if it was truly data obtained from a third party source, then the purposes for which it was collected would be the purposes of the third party, not the Respondent, and the question would arise as to whether the third party was complying with the GDPR in handing over personal data

collected for one purpose to the Respondent to use for other purposes. Secondly, in fact, the evidence we have heard does not suggest any relevant third party relationship between the Respondent and the security company that operates the CCTV. It appears from Mr Lainez' account that it is the Respondent that is the data controller in relation to that data, determining what is processed and why. Moreover, that is the position that the Respondent takes in its own Handbook when, in the only explicit reference to CCTV in the whole book, it states in the section on Team Meetings (484): *"Please note that while many Whole Foods Market locations may have security or surveillance cameras operating in areas where company meetings or conversations are taking place, their purposes are to protect our customers and Team Members and to discourage theft and robbery"*.

254. Ms Banerjee submitted that it would be wrong to place weight on the statement at 484 as it is in a section dealing only with Team Meetings and not with data processing generally, but it is in the same Handbook and in our judgment the Handbook must be construed as a whole. If the section on data processing/privacy clearly contradicted what was in the section on Team Meetings, we would have accepted that, objectively, the section on data processing/privacy should 'trump' that on Team Meetings. But the data processing/privacy sections do <u>not</u> clearly contradict what is in the section on Team Meetings. Indeed, objectively speaking, the section on Team Meetings clears up completely the question that might otherwise linger in the mind as to whether the Respondent intended the data processing/privacy sections to apply to CCTV data too. As it is, read together with the section on Team Meetings, the Respondent's policy is clear: its purpose in collecting CCTV data is to protect customers and Team Members and discourage theft or robbery. Given that the Respondent has not in fact in the Claimant's case limited itself to using the CCTV footage in that way, it appears to us that the Respondent's use of CCTV footage has breached Article 5(1)(a) and (b) of the GDPR in that unfair use of the CCTV data has been made by using it for purposes other than that which employees have been told it will be used for.

255. The Respondent submits that, whatever the position in the written policies, the Claimant did in fact know that the Respondent made wider use of CCTV. The Respondent points to the Claimant's own reviewing of CCTV in relation to a potential theft, but that does not assist: the Claimant has never suggested she was not aware that the Respondent has security cameras which it uses to investigate/deter criminal conduct. That is commonplace and entirely to be expected. Just because an employer has CCTV for crime prevention/detection does not mean that it needs (or uses) CCTV for other purposes. The Respondent also points to what happened in October 2016 in relation to the Claimant, but that also does not assist the Respondent in our judgment for a number of reasons. First, the Claimant thought that use of the CCTV was improper and distressing as well. Two wrongs do not make a right. Secondly, as the ICO notes, where CCTV footage accessed for one purpose (eg crime detection) reveals something that no employer can reasonably be expected to ignore (eg serious misconduct), it may be fair to make use of the CCTV data for that second purpose. What happened in October 2016 was closer to that situation: in looking for footage of a possible crime by a

customer, footage of the Claimant talking too long to a customer had been identified and she was challenged about that. We are not sure that what the Claimant was challenged about in October 2016 really fell within the category of 'something no employer can reasonably be expected to ignore', but it was in any event quite different to the use that Mr Lainez was making of the CCTV in relation to the Claimant in 2018 and 2019. Further, the fact that the Claimant on 23 May 2019 suggested that the Respondent could investigate her own complaint about Mr Lainez's use of the CCTV by looking at the CCTV also does not take matters much further: the Claimant was essentially at this point highlighting the hypocrisy of the Respondent in using CCTV to monitor her for minor performance issues but not to monitor Mr Lainez for misuse of personal data which is listed in the Respondent's Handbook as being 'gross misconduct'. In any event, it can be said again about this that 'two wrongs do not make a right'.

256. We therefore find that in using its CCTV for performance or disciplinary matters (falling short of criminal conduct/threats to health and safety) the Respondent breached Article 5(1)(a) and/or Article 5(1)(b) of the GDPR. The processing was not fair or transparent as the personal data was used for purposes other than that which the Respondent had told its employees it would use CCTV footage.

257. However, we consider that there was a further aspect to the unlawfulness of the Respondent's use of CCTV data in relation to the Claimant. This is a point that the Claimant raised orally in closing submissions and on which we invited Ms Banerjee's response. The Claimant submitted that the Respondent's use of CCTV data in relation to her went beyond what was 'necessary' in any event (i.e. was a breach of Article 5(1)(c) of the GDPR) because there was no need to view the CCTV to investigate the sort of performance/disciplinary issues that had arisen in relation to her. We agree. Mr Lainez's viewing of CCTV on 14 May 2019 was wholly unnecessary: indeed, it was not even for the purpose at that stage of performance management of the Claimant or a disciplinary matter. On his own evidence, he accessed the CCTV on that occasion to check whether *he* had been fair to the Claimant in commenting on her slowness with the delivery. In other words, he was using CCTV to check what he himself had done. That was not a legitimate purpose of the Respondent at all. Likewise, checking CCTV in order to see how the Claimant moved on the shop floor and to question (without cause) the extent of her claimed disability was also not in pursuit of a legitimate purpose of the Respondent at that time, but a personal vendetta by Mr Lainez. Further, it is hard to think of why it would ever be necessary to check CCTV *before* initiating a formal investigation into the sorts of minor performance/disciplinary issues that were raised in relation to the Claimant. A GDPR-compliant process with such issues would be first of all to speak to the individual against whom a complaint was made and any witnesses. If complainant and accused broadly agreed on what happened, there would be no need to access CCTV at all; if there was a dispute, then it might (or might not) be necessary to have recourse to the CCTV to resolve it. Moreover, it is clear from Mr Lainez's email of 1 June 2019 to Mr Ganatra that in relation to the Claimant he had adopted a practice of checking CCTV in

relation to every minor issue that arose. That was unnecessary. Mr Lainez's use of the CCTV breached Article 5(1)(c) of the GDPR.

258. We have considered whether the breaches of the GDPR that we have identified above were serious enough to cause or contribute to a breach of the implied term of trust and confidence. We consider that they were. CCTV is one of the more intrusive forms of surveillance as it captures data that is very personal to the individual even when they are moving in a public space or a workspace. Although people are used to being surveilled for security purposes in shop and work areas, using CCTV to check on such matters as a person's medical condition, who they are talking to, what use they are making of their working day, and so on, is highly intrusive. It would be upsetting for anyone, but the Claimant's case illustrates the importance of data protection principles and the link that they have to an individual's Article 8 rights and their personal and psychological integrity. The Claimant has been significantly affected psychologically by the Respondent's use of CCTV. It was at least part of what caused her to have time off and counselling at the end of 2016, and the same thing happened again in 2019. Moreover, the nature of Mr Lainez's conduct in our judgment goes to the heart of the trust and confidence that ought to exist between employer and employee. It is clear from his email of 1 June 2019 to Mr Ganatra (which the Claimant saw for the first time very shortly before she resigned) that he did not trust the Claimant and was essentially routinely using CCTV to 'spy' on her. That is conduct that is likely seriously to damage the relationship between employer and employee, and there was no just cause for it as it was unnecessary, unfair and unlawful under the GDPR.

*(v) The Respondent's staff adopting a false and wrong interpretation of the Respondents legal entitlement to carry out staff surveillance*

259. While we recognise that this upset the Claimant, we do not consider that the fact that the Respondent's staff believed they were making proper use of CCTV footage adds anything to the Claimant's case. As it turns out, we have disagreed with the Respondent's staff, but there is no evidence that any of them were deliberately misleading the Claimant. Adopting the opposite view on a point of law is not in our judgment (on its own) conduct that amounts to a breach of the implied term of trust and confidence.

*(vi) Misleading the Claimant about the extent of the CCTV footage and the number of USB sticks on which the footage of the Claimant was recorded*

260. We also do not think that this adds very much to the Claimant's case. In the light of Mr Lainez's evidence, it seems likely that there was at some point more than one USB stick with the Claimant's personal data on it, but as we have not heard evidence from HR we do not know whether that remained the case. It is entirely possible that a number of clips were combined onto one USB. In any event, this point is not in our judgment serious enough to contribute to a breach of the implied term of trust and confidence.

*(vii) Not providing a copy of the video footage of the Claimant when she asked for "her data"*

261. The ICO found that this was a breach of GDPR, and we agree that it was a breach of the Claimant's rights under Article 15 of the GDPR. However, it was not in our judgment a serious breach. The ICO declined to direct the Respondent to take any further steps, while the Claimant was offered the opportunity to view the footage at the Respondent's offices. Although the psychological effect on her had been such that she did not feel able to do this, she did not communicate that to the Respondent at this stage and so the Respondent's offer of viewing in its offices was on its face reasonable. Nonetheless, there was unlawfulness here and the unlawfulness upset the Claimant. As such we conclude that this was conduct by the Respondent that was capable of contributing to a breach of the implied term of trust and confidence, albeit that it was not itself a breach.

*(viii) HR delay between 12/6 and about 10/7 in suggesting that C raise a grievance*

262. We acknowledge that the Claimant was from 12 June 2018 onwards trying to ask Ms Mack and HR generally for advice about what to do about what she perceived as bullying and harassment and that, had this been appreciated earlier, the Claimant would have been advised earlier to raise a grievance. However, the difficulty was that the Claimant's correspondence focused on the GDPR/CCTV issue. It was only on a second reading of her emails that we realised that the Claimant had been asking about bullying and harassment from the outset and we consider it understandable that Ms Mack also overlooked this element. Moreover, the Claimant's email of 4 July acknowledges that Ms Mack has not understood this point yet. As such, we do not consider that this delay can properly be characterised as conduct likely to seriously damage the relationship of trust and confidence between employer and employee. During this period Ms Mack was (around holidays and other commitments) in our judgment making reasonable efforts to deal with the Claimant's queries and concerns. It is also good practice for HR to try to resolve concerns informally rather than encouraging employees to move straight to a formal grievance. In the premises the delay by HR did not materially contribute to a breach of the implied term.

*(ix) Once the grievance was raised on 11/7, the subsequent delay in dealing with it (it took 6 weeks)*

263. We acknowledge that six weeks is not an especially long time to take dealing with a grievance of the sort that lead to Employment Tribunal claims: we have seen many cases where employers have taken longer. However, each case must be assessed on its own facts. In this case we consider that the delay was unreasonable because: there was no explanation for not holding the first meeting within a week in accordance with the policy; all witnesses were

interviewed by 4 August; Mr Benfield went on holiday without letting the Claimant know that the outcome would be delayed; the Claimant had to chase to find out what was happening having heard nothing a month after her grievance meeting; and there was no reasonable explanation for why in a relatively simple grievance such as this the outcome could not have been produced much more quickly. A month's delay between the last interview and sending the outcome letter was in this case unreasonable. Especially given the nature of the grievance, such delay was capable of contributing to a breach of the implied term of trust and confidence, albeit that it was not serious enough to amount to a breach by itself.

*(x) The fact that the grievance investigation was not carried out reasonably in that C was not re-interviewed and the final outcome reached conclusions which C would have wished to contradict in re-interview*

264. Re-interviewing the Claimant was expressed to be a mandatory element of the policy and Mr Benfield did not follow it because he had not read it and HR did not advise him to do so. Moreover, the failure to follow the policy led to unfairness for the Claimant as she did not have an opportunity to respond to what her managers had said to Mr Benfield. This was therefore unjustified conduct that was capable of contributing to a breach of the implied term of trust and confidence, albeit that it was not serious enough to amount to a breach by itself.

*(xi) The dismissal of her grievance on 4/9/2019 (this is the claimed last straw)*

265. In broad terms, Mr Benfield's conclusions in the grievance were reasonable ones that were open to him on the facts. It is unlikely (though not impossible) that if he had re-interviewed the Claimant he would have reached different conclusions. In any event, the mere fact that a grievance is rejected will rarely amount to a breach of the implied term of trust and confidence because an employer is bound to deal with a grievance and if it is dealt with reasonably and in good faith, the mere fact that it is not upheld will not breach the implied term. However, in this case the rejection of the Claimant's grievance did in our judgment add something to the breach of the implied term that we have identified above: this is because in rejecting the Claimant's complaint about Mr Lainez's use of the CCTV, Mr Benfield in effect gave Mr Lainez's use of the CCTV an official 'seal of approval' by the Respondent. The grievance outcome elevated that from being the actions of a single manager in breach of policy to the Respondent's official position. As such, the grievance outcome was in our judgment capable of materially contributing to a breach of the implied term of trust and confidence.

*Overall conclusion*

266. Putting all the above together, we are satisfied that the Respondent's conduct in using CCTV for surveillance of the Claimant was sufficient in and of itself to breach the implied term of trust and confidence. When combined with the other elements that we have identified above as capable of contributing to a breach of the implied term, the position is even clearer. The Claimant resigned

in response to all the matters that she relied on above as they feature in her resignation email and we are satisfied that those were genuinely the reasons that were uppermost in her mind when she resigned. The Claimant's desire to avoid formal performance/disciplinary processes was only a subsidiary element of her reasons for resigning. The Claimant did not affirm the contract. She resigned promptly following the grievance outcome, and very shortly after discovering the extent of the Respondent's misuse of CCTV as a result of the DSAR. It follows that the Claimant was constructively dismissed. The Respondent has advanced no reason for the dismissal of the Claimant and the dismissal was therefore unfair.

**Overall conclusion**

267. The unanimous judgment of the Tribunal is:-

    a. The Claimant's claim of constructive unfair dismissal under Part X of the ERA 1996 is well-founded. That claim is upheld.
    b. The Respondent contravened ss 20 and 39 of the EA 2010 by failing to make reasonable adjustments for the Claimant when it scheduled her for late shifts on Monday 20 May, Saturday 25 May, Tuesday 28 May, and Thursday 30 May 2019. That claim is upheld in those respects, but otherwise dismissed.
    c. The Respondent did not contravene EA 2010, ss 13 and 39 of the EA 2010 by directly discriminating against the Claimant because of her disability. That claim is dismissed.
    d. The Respondent did not contravene EA 2010, ss 26 and 39 of the EA 2010 by harassing the Claimant for a reason related to her disability. That claim is dismissed.
    e. The Respondent contravened ss 15 and 39 of the Equality Act 2010 (EA 2010) when it scheduled the Claimant for late shifts on Monday 20 May, Saturday 25 May, Tuesday 28 May, and Thursday 30 May 2019. That claim is upheld in those respects, but otherwise dismissed.
    f. The Respondent did not contravene EA 2010, ss 27 and 39 of the EA 2010 by victimising the Claimant. That claim is dismissed.

**Remedy Hearing**

268. The case is listed for a Remedy Hearing on 13-15 July 2022. The parties must liaise to agree directions as necessary to ensure they are ready for that hearing. If case management is required, they must write to the Tribunal marking their correspondence for the attention of Employment Judge Stout. If they consider that, in the light of the judgment, three days is no longer required, they should notify the Tribunal accordingly.

Employment Judge Stout

~~24 March 2022~~

9 May 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

09/05/2022.

FOR THE TRIBUNAL OFFICE