EMPLOYMENT TRIBUNALS

Claimant: Miss A Donaghey

Respondent: Done Bros Cash Betting Ltd t/a Betfred

Heard at: Manchester **On:** 28 March to 1 April 2022

Before: Employment Judge Phil Allen
Ms V Worthington
Mr AG Barker

REPRESENTATION:

Claimant: In person
Respondent: Mr J Gilbert, consultant

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's iron deficiency anaemia was a disability at the relevant time within the meaning given by section 6 of the Equality Act 2010;

2. The claimant did not prove that her depression amounted to a disability at the relevant time within the meaning given by section 6 of the Equality Act 2010;

3. The Employment Tribunal did not have jurisdiction to determine the claim of harassment related to disability at the meeting(s) on 30 April 2019 as it was not brought within the time required by section 123 of the Equality Act 2010;

4. The claimant's other claims for harassment related to disability did not succeed and are dismissed;

5. The claimant's claims for direct discrimination because of disability did not succeed and are dismissed;

6. The claimant's claims for harassment related to sex did not succeed and are dismissed;

7. The claimant's claims for direct discrimination because of sex did not succeed and are dismissed; and

8. The claimant was not dismissed by the respondent as she did not terminate her contract in circumstances in which she was entitled to terminate it by reason of the respondent's conduct, as provided for by section 95(1)(c) of the Employment Rights Act 1996. She did not resign in response to a fundamental breach of contract by the respondent and/or she waived the fundamental breach by delaying too long before resigning. The claim for unfair (constructive) dismissal did not succeed and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 10 May 2001 until 20 December 2019. From 2012 she was an Area Manager. The claimant resigned on 22 November 2019. The claimant alleged that she was unlawfully discriminated against because of her disabilities and/or sex, harassed on grounds of sex and/or disability, and/or constructively dismissed. The respondent denied discrimination, harassment, or that the claimant was constructively dismissed.

Claims and Issues

2. A preliminary hearing (case management) was previously conducted in this case, on 10 November 2020. In the case management order following that hearing, Employment Judge Sharkett partly identified the issues (357). The claimant was ordered to provide further information in order for the issues to be identified. The claimant provided a document (42) which identified the matters relied upon for the constructive dismissal claim.

3. The claimant did not provide to the Tribunal a document which identified which matters were relied upon as sex discrimination or disability discrimination, or harassment on grounds of sex or disability. She also did not identify which types of disability discrimination she was alleging. The case management order had explained what was required (347). It was perhaps unfortunate in this case that the parties did not address with each other, or in the case of the respondent raise with the Tribunal, the absence of this information being provided.

4. It was understood that there had been some correspondence between the parties prior to the hearing about the issues. Clearly it would have been preferable if an agreed list of issues had been prepared earlier. The respondent's representative provided a list of issues at the start of the hearing which contained what he understood to be a list of the issues to be determined. The claimant was given the opportunity during the reading time on the first day to consider the list and indicate what, if anything, she disagreed with in it. She identified some limited issues, which are reflected in the list as produced below. The Tribunal identified two issues which are also recorded. As it was explained it would be, that list was considered by the Tribunal to be the list of those issues which it needed to determine. Some issues regarding the list of issues were raised with the parties at the end of the evidence on the fourth day, prior to submissions being finalised or presented.

5. One particular issue raised by the respondent in the list of issues, was that it contended that ten of the breaches which were relied upon in the further particulars document (42), were not in fact part of the pleaded case. It would have been preferable if that contention had been raised and addressed, prior to the start of the hearing. It was confirmed with the claimant by the Tribunal that, if the breaches were not contained in the claim form as contended, she was making an application to amend the claim to include those elements (for all of the alleged claims to which they related). As recorded below, when the claimant made her points about the list of issues following the time for reading, she accepted that alleged breaches 10 and 16 were not part of the pleaded case, but she contended that the others were. The Tribunal proposed that the issue of whether the allegations were in the claim and/or whether the application to amend would be granted, would be determined at the end of the hearing after all the evidence had been heard. Both parties agreed to that approach, the respondent confirming that it had approached the hearing ready to present evidence on all the matters raised. The Tribunal took this approach as it ensured that the case was heard within the time allocated and the evidence was heard on the days for which the parties had prepared.

6. The remedy issues were left to be determined later, only if the claimant succeeded in her claim.

7. The issues identified were as set out at paragraphs 8-28 below. The breaches referred to below are those using the numbering in the further particulars document (42). It was confirmed with the claimant that the matters listed as breaches 21 and 22 in that document were not allegations of discrimination and occurred after she handed in her notice (which meant that they could not be part of the reason why she resigned). The claimant alleged only that Mr Anderson unlawfully discriminated against her or harassed her, she did not allege that any other employees of the respondent unlawfully discriminated against her or harassed her.

The list of issues

Jurisdiction/time (section 123 of the Equality Act 2010)

8. When is the act or omission treated as having happened?

9. Is there a continuing act or omission over a period of time?

10. Are any of the claims out of time? The claims relying upon the dismissal itself were brought within time, as were any claims relying upon events/continuing acts which occurred/ceased after 19 December 2019. In the list of issues prepared by the respondent it put forward that the last act/omission claimed by the claimant was the conversation with Mr Anderson on 22 November 2019 which was therefore out of time. The Tribunal added to the list of issues, as allegations of direct discrimination, the constructive dismissal itself which, if found to be an act of discrimination, would have been entered in time.

11. Is it just and equitable to extend time in the circumstances?

Possible amendment

12. The respondent contended that the following alleged breaches did not form part of the case as pleaded in the claim form: 8; 9; 10; 12; 13; 16; 17; 18; 19 and 20. The claimant contended that they all did appear in the claim, except for allegations 10 and 16. It was agreed that, as part of its decision, the Tribunal would decide whether those matters appeared in the claim as pleaded and, if they did not, whether the claimant should be allowed to amend her claim to rely upon those alleged breaches/acts of discrimination/harassment.

Did the claimant have a disability at the relevant time for the purposes of section 6 of the Equality Act 2010?

13. The claimant relied upon the following as being disabilities at the relevant time:

a. Iron deficiency anaemia; and/or

b. Depression.

It was confirmed with the claimant at the start of the hearing that she was not relying upon either pernicious anaemia or cancer as being a disability at the relevant time.

14. Has the claimant established that the physical/mental impairment(s) asserted had a substantial and long term adverse effect on her ability to carry out normal day to day activities at the material time?

15. If so, did the respondent have knowledge of the claimant's disabilities at the material time?

The material time was between August 2017 and 22 November 2019.

Direct discrimination – sex and/or disability (section 13 of the Equality Act 2010)

16. Did the respondent treat the claimant less favourably than they would treat a person in materially the same position as the claimant, save that the person does not share the same protected characteristic as the claimant?

17. The alleged acts of direct sex discrimination relied upon are as follows:

a. 1 August 2019, being asked to complete the full financial year for the purpose of a compliance report compared to a male Area Manager, who was allegedly asked to carry out a quarter of the financial year (breach 12);

b. Mr Anderson emailing and calling the claimant in relation to a task that had to be completed (breach 13);

c. On 5 September 2019 – the claimant being asked by another Area Manager (Mr Sanders) if she was looking for alternative employment due to how females were treated at the regional meeting in Carlisle (breach 15);

d. Mr Anderson's refusal to allow all Area Managers to book holiday in March 2020 without good reason (breach 16); and/or

e. The alleged constructive dismissal of the claimant.

The list of issues recorded that the claimant relied on actual comparators, namely male Area Managers in the North team. When clarified with the claimant, she confirmed that she also relied upon a hypothetical comparator for these allegations.

18. The alleged acts of direct disability discrimination relied upon are as follows:

a. Mr Anderson persistently calling the claimant on days off (breach 1);

b. In April 2019, Mr Anderson saying to the claimant "you know what I think of people on tablets Alexis" (breach 17);

c. On 19 April 2019 by email, Mr Anderson questioning the claimant about an employee's return to work (breach 18);

d. On Monday 29 April 2019, Mr Anderson calling the claimant to attend a meeting at the respondent's Kendal branch (breach 2);

e. On Monday 29 April 2019, Mr Anderson failing to obtain a statement or undertake further investigation with shop manager, Shauni (breach 6);

f. On Tuesday 30 April 2019, Mr Anderson interrogating the claimant for arriving to the Kendal office at 10 am (breach 3);

g. On Tuesday 30 April 2019, Mr Anderson saying to the claimant "come on Alexis you've been on something for two years" (breach 4). Whilst defined in the list of issues with this brevity, in fact breach 4 (43) also raised more broadly the references to an off the record chat and the discussion of the claimant's health in that meeting;

h. On Tuesday 30 April 2019, Mr Anderson saying after an adjournment of their meeting: "that was head office, I don't know who you've upset in there, but they don't like you. They advise I should suspend but I'd only do that if I was looking for dismissal. Be a final at worst" (breach 5);

i. On Tuesday 30 April 2019, Mr Anderson saying to the claimant that she would be required to attend a disciplinary hearing (breach 7);

j. On 3 May 2019, Mr Anderson informing the claimant by telephone that she had to attend a disciplinary hearing (breach 8);

k. On 5 May 2019, the claimant not receiving a paper copy of the complaint raised by the shop manager until after the meeting (breach 9);

l. On 30 April 2019 – Area Supervisors believing Mr Anderson was trying to put words in their mouth (breach 10);

m. The claimant being treated differently to how others had been treated during investigation and disciplinary process (breach 11);

n. On 1 August 2019, being asked to complete the full financial year for the purpose of a compliance report compared to a male Area Manager, who was allegedly asked to carry out a quarter of the financial year (breach 12);

o. Mr Anderson emailing and calling the claimant in relation to a task that had to be completed (breach 13);

p. In May 2019, the claimant receiving one of the lowest scores in the region in her May 2019 appraisal (breach 14);

q. On 5 September 2019 – the claimant being asked by another Area Manager (Mr Sanders) if she was looking for alternative employment due to how females were treated at the regional meeting in Carlisle (breach 15);

r. Mr Anderson's refusal to allow all Area Managers to book holiday in March 2020 without good reason (breach 16);

s. An alleged failure by the respondent to conduct welfare meetings with the claimant (breach 19);

t. On 22 November 2019, the claimant having to break away from her conversation with Mr Anderson to submit her notice of resignation (breach 20); and/or

u. The alleged constructive dismissal.

The list of issues recorded that the claimant relied upon a hypothetical comparator for these allegations, and it was confirmed by the claimant that she did not rely upon an actual named comparator.

19. If so, was the treatment because of the claimant's sex and/or disability?

Harassment (section 26 Equality Act 2010) (sex and disability)

20. Did the following acts occur and if they did, do these acts amount to unwanted conduct and, if so, was such conduct related to the claimant's sex or disability?

21. The alleged acts of sexual harassment were:

a. August 2019, being asked to complete the full financial year for the purpose of a compliance report compared to a male Area Manager, who was allegedly asked to carry out a quarter of the financial year (breach 12);

b. Mr Anderson emailing and calling the claimant in relation to a task that had to be completed (breach 13);

c. On 5 September 2019 – the claimant being asked by another Area Manager (Mr Sanders) if she was looking for alternative employment due to how females were treated at the regional meeting in Carlisle (breach 15); and/or

d. Mr Anderson's refusal to allow all Area Managers to book holiday in March 2020 without good reason (breach 16).

22. The alleged acts of disability harassment were:

a. Mr Anderson persistently calling the claimant on days off (breach 1);

b. In April 2019, Mr Anderson saying to the claimant "you know what I think of people on tablets Alexis" (breach 17);

c. On 19 April 2019 by email, Mr Anderson questioning the claimant about an employee's return to work (breach 18);

d. On Monday 29 April 2019, Mr Anderson calling the claimant to attend a meeting at the respondent's Kendal branch (breach 2);

e. On Monday 29 April 2019, Mr Anderson failing to obtain a statement or undertake further investigation with shop manager, Shauni (breach 6);

f. On Tuesday 30 April 2019, Mr Anderson interrogating the claimant for arriving to the Kendal office at 10 am (breach 3);

g. On Tuesday 30 April 2019, Mr Anderson saying to the claimant "come on Alexis you've been on something for two years" (breach 4). Whilst defined in the list of issues with this brevity, in fact breach 4 (43) also raised more broadly the references to an off the record chat and the discussion of the claimant's health in that meeting;

h. On Tuesday 30 April 2019, Mr Anderson saying after an adjournment of their meeting: "that was head office, I don't know who you've upset in there, but they don't like you. They advise I should suspend but I'd only do that if I was looking for dismissal. Be a final at worst" (breach 5);

i. On Tuesday 30 April 2019, Mr Anderson saying to the claimant that she would be required to attend a disciplinary hearing (breach 7);

j. On 3 May 2019, Mr Anderson informing the claimant by telephone that she had to attend a disciplinary hearing (breach 8);

k. On 5 May 2019, the claimant not receiving a paper copy of the complaint raised by the shop manager until after the meeting (breach 9);

l. On 30 April 2019 – Area Supervisors believing Mr Anderson was trying to put words in their mouth (breach 10);

m. The claimant being treated differently to how others had been treated during investigation and disciplinary process (breach 11);

n. On 1 August 2019, being asked to complete the full financial year for the purpose of a compliance report compared to a male Area Manager, who was allegedly asked to carry out a quarter of the financial year (breach 12);

o. Mr Anderson emailing and calling the claimant in relation to a task that had to be completed (breach 13);

p. In May 2019, the claimant receiving one of the lowest scores in the region in her May 2019 appraisal (breach 14);

q. On 5 September 2019 – the claimant being asked by another Area Manager (Mr Sanders) if she was looking for alternative employment due to how females were treated at the regional meeting in Carlisle (breach 15);

r. Mr Anderson's refusal to allow all Area Managers to book holiday in March 2020 without good reason (breach 16);

s. An alleged failure by the respondent to conduct welfare meetings with the claimant (breach 19); and/or

t. On 22 November 2019, the claimant having to break away from her conversation with Mr Anderson to submit her notice of resignation (breach 20).

23. If so, was the conduct unwanted?

24. If so, did the conduct have the purpose or effect of: violating the claimant's dignity; or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant?

Unfair (constructive) dismissal – section 95 of the Employment Rights Act 1996

25. Which of the following allegations are established on the evidence?

a. Mr Anderson persistently calling the claimant on days off (breach 1);

b. In April 2019, Mr Anderson saying to the claimant "you know what I think of people on tablets Alexis" (breach 17);

c. On 19 April 2019 by email, Mr Anderson questioning the claimant about an employee's return to work (breach 18);

d. On Monday 29 April 2019, Mr Anderson calling the claimant to attend a meeting at the respondent's Kendal office (breach 2);

e. On Monday 29 April 2019, Mr Anderson failing to obtain a statement or undertake further investigation with shop manager, Shauni (breach 6);

f. On Tuesday 30 April 2019, Mr Anderson interrogating the claimant for arriving to the Kendal office at 10 am (breach 3);

g. On Tuesday 30 April 2019, Mr Anderson saying to the claimant "come on Alexis you've been on something for two years" (breach 4). Whilst defined in the list of issues with this brevity, in fact breach 4 (43) also raised more broadly the references to an off the record chat and the discussion of the claimant's health in that meeting;

h. On Tuesday 30 April 2019, Mr Anderson saying after an adjournment of their meeting: "that was head office, I don't know who you've upset in there, but they don't like you. They advise I should suspend but I'd only do that if I was looking for dismissal. Be a final at worst" (breach 5);

i. On Tuesday 30 April 2019, Mr Anderson saying to the claimant that she would be required to attend a disciplinary hearing (breach 7);

j. On 3 May 2019, Mr Anderson informing the claimant by telephone that she had to attend a disciplinary hearing (breach 8);

k. On 5 May 2019, the claimant not receiving a paper copy of the complaint raised by the shop manager until after the meeting (breach 9);

l. On 30 April 2019 – Area Supervisors believing Mr Anderson was trying to put words in their mouth (breach 10);

m. The claimant being treated differently to how others had been treated during investigation and disciplinary process (breach 11);

n. On 1 August 2019, being asked to complete the full financial year for the purpose of a compliance report compared to a male Area Manager, who was allegedly asked to carry out a quarter of the financial year (breach 12);

o. Mr Anderson emailing and calling the claimant in relation to a task that had to be completed (breach 13);

p. In May 2019, the claimant receiving one of the lowest scores in the region in her May 2019 appraisal (breach 14);

q. On 5 September 2019 – the claimant being asked by another Area Manager (Mr Sanders) if she was looking for alternative employment due to how females were treated at the regional meeting in Carlisle (breach 15);

r. Mr Anderson's refusal to allow all Area Managers to book holiday in March 2020 without good reason (breach 16);

s. An alleged failure by the respondent to conduct welfare meetings with the claimant (breach 19); and/or

t. On 22 November 2019, the claimant having to break away from her conversation with Mr Anderson to submit her notice of resignation (breach 20) – the final straw.

26. Do any of the proven matters, individually or cumulatively amount to a breach of the implied term of trust and confidence?

27. If so, did the claimant affirm the contract following the breach?

28. If not, did the claimant resign in response to the breach?

Procedure

29. The claimant represented herself at the hearing. Mr Gilbert represented the respondent.

30. The hearing was conducted almost entirely in-person, save that one of the members attended remotely for the first morning of the hearing (only) by CVP technology, for reasons that were explained to the parties at the time.

31. An agreed bundle of documents was prepared in advance of the hearing which ran to over 395 pages. Where a number is included in brackets in this Judgment, that is reference to a page number in the bundle. The Tribunal read the pages in the bundle to which it was referred.

32. The Tribunal read the witness statements provided and the documents in the bundle which were referred to in those statements or to which the Tribunal were directed by the parties.

33. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal. The claimant's disability impact statement (37) was read alongside the claimant's witness statement as her evidence (and its accuracy was confirmed under oath). Mr Jamie Slack (formerly Transition Support Manger with the respondent) also gave evidence for the claimant, was cross-examined, and asked questions.

34. The following witnesses each gave evidence for the respondent, were cross examined by the claimant and were asked questions by the Tribunal: Mr David Hasler, Head of UK Retail Operations and the person to whom the claimant communicated her resignation and who heard her grievance appeal; Mr Chris Anderson, Regional Manager; Mr Mark Hilton, Head of Customer Services and the person who heard the claimant's grievance; and Ms Susan Coy, Group Head of Security and the disciplinary manager in a hearing on 8 May 2019.

35. After the evidence was heard, each of the parties was given the opportunity to make submissions. The evidence finished early on the afternoon of the fourth day. It was agreed that the parties would each send their written submissions to each other and the Tribunal by 9 am on the fifth day, with oral submissions being limited to no more than forty five minutes for each party (to which both parties agreed, it being emphasised that they did not need to take all of the time allocated). Each of the parties provided a written submission and also made oral submissions.

36. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

Facts

37. The claimant started working for the respondent as a cashier in May 2001. As the claimant emphasised in her final submissions, at the time of leaving the respondent she had been employed by the company for her whole adult life. The claimant was promoted numerous times during her employment. She relocated to the West Midlands to become Area Manager in September 2012. She relocated to the North East in March 2014 as Area Manager.

38. Mr Anderson worked with the claimant for much of her time with the respondent. He joined the respondent as Area Manager in 2002 covering an area which included the shop in which the claimant worked. He described the claimant as ambitious at an early age. It was clear that there had historically been a good working relationship between the claimant and Mr Anderson. Mr Anderson himself thought that he was a major influence in progressing the claimant through the company, and he believed he had supported and guided her throughout her time.

39. The terms of the claimant's contract and the handbook that applied to her were only of limited importance during the Tribunal hearing. The Tribunal was shown a contractual amendment document dated 5 April 2017 (75) which recorded a change in Sunday working which said that the following was added to the claimant's contract:

> *"As part of your 5 days from 7, you will be expected to work a minimum of 1 Sunday in every 4 weeks."*

40. The Tribunal was also shown a handbook which the respondent operated (79). That included a disciplinary policy, a harassment policy, and a grievance policy. For both the disciplinary and grievance policies there was an emphasis on addressing matters informally, if possible. The list of unsatisfactory conduct in the disciplinary policy included reference to rudeness towards colleagues.

The impairments

41. The claimant has suffered from pernicious anaemia since approximately 2000, but she did not rely upon that as being a disability. In 2016 the claimant started to become ill. She had a week off work in September or October 2016. After that week and prior to her resignation, the claimant had no other time off work due to her health.

42. In 2017 the claimant commenced taking medication without it being prescribed. On 26 April 2017 the claimant saw her GP (53). The GP notes describe the claimant as feeling tired all the time. She had reduced concentration and memory. She lacked motivation to do anything. The GP notes describe that low mood was diagnosed. Fluoxetine was prescribed, as it was the drug the claimant was already taking.

43. Following a blood test, the claimant was identified as being very anaemic with very low iron. The claimant saw the Doctor again on 27 April 2017 regarding the iron

deficiency anaemia. She was told to take iron tablets. The claimant's evidence was that she took three iron tablets per day initially and later reduced the level. Her impact statement said that she continues to take 200 mg of Ferrous Sulphate (with occasional breaks as required with that type of medication). Her evidence was that, without the iron tablets, she would be unable to concentrate and would feel tired as she had previously. The claimant described other symptoms, such her hair breaking off and oral thrush, being symptoms she suffered when her iron levels were very low and which she believed would return if her iron levels dropped again (such as would occur if she ceased to take the Ferrous Sulphate).

44. In her impact statement, the claimant described how she felt extreme fatigue, and often could not get out of bed. She said she did not have the energy to do anything. It was, however, noted that save for the week of absence in autumn 2016, the claimant continued to work throughout this period.

45. In her GP notes, the claimant was described as slightly improved but with tiredness ongoing on 4 May 2017 (56). The diagnosis recorded at that date was major iron deficiency anaemia. The claimant also had suspected cancer at that time, which the claimant was not relying upon as a separate disability.

46. On 11 August 2017 the GP notes recorded that the claimant was taking Fluoxetine and stated that this had been started earlier in the year for depression (59). On 12 January 2018 the notes recorded that the claimant had stopped taking Fluoxetine in December, which had been gradually reduced with alternate days. Her mood was described, as being ok. The notes also said that it was wondered if actually the low mood was contributed to by anaemia the previous year (although it was not clear whether it was the claimant or the Doctor who wondered this). The claimant's evidence was that she wished to reduce the Fluoxetine prior to new year 2018. She emphasised that it had only been reduced initially and not stopped. The claimant accepted that she had ceased taking Fluoxetine by February 2018 and the medical records do not show the claimant returning to her GP for either of the conditions relied upon after January 2018. The GP notes of 14 February 2019 recorded the claimant as feeling fit and well (63).

47. Neither party provided the Tribunal with any medical report which clearly described the claimant's symptoms or the impact which the conditions had upon her. The claimant relied upon her impact statement and the GP records. The respondent contended that the records provided did not prove that the claimant had a disability at the material time (35). The only evidence available to the Tribunal about the impact which either of the claimant's conditions would have had on her if she had not taken medication, was the claimant's own answers to questions asked by the Tribunal. For the depression, the claimant very honestly confirmed that she could not tell the Tribunal what the effect would have been if she had not taken any medication. There was no evidence of the depression recurring, or of the likelihood of its recurrence at the material time.

Who the claimant told about her impairments

48. The claimant worked within an area team. The other members of the area team were managed by her. The team included Mr Slack, Mr Maughan and an administrator. In 2017, when the claimant faced the health issues outlined above,

she informed the members of her team about both the iron deficiency anaemia and her depression.

49. It was not in dispute that, around the time that the issue was identified in April 2017, the claimant informed Mr Anderson (her line manager) about her iron deficiency and the fact that she needed to take iron tablets to address the issue. The claimant's evidence was that she informed Mr Anderson of her anaemia. Mr Anderson's evidence was that the word "anaemia" was never used, but he was fully aware that the claimant had iron deficiency. At around the same time the claimant had a referral for suspected cancer and there was no dispute that the claimant and Mr Anderson discussed that issue.

50. With regards to the diagnosis of depression, the claimant's evidence was that she did not feel comfortable telling Mr Anderson about her depression. In explaining this in evidence, the claimant referred generally to having worked for Mr Anderson a long time and knowing how he would react, but she did not provide any specific evidence about any prior events or issues which caused her to feel uncomfortable informing him about her depression. The claimant's evidence was that the area team advised her to inform Mr Anderson about her depression for some time. Mr Slack's evidence was that the team tried, on several occasions, to persuade the claimant to inform Mr Anderson.

51. There was an issue in dispute between the parties as to whether the claimant did ever inform Mr Anderson about her depression. The claimant's evidence was that she did, following a regional team meeting in August 2017. She said she was tearful and he was blasé. Mr Slack's evidence was that the claimant had informed Mr Anderson about her depression, but this evidence was based upon what the claimant told him and not because he was present when the claimant did so. The Tribunal accepted Mr Slack's evidence that the claimant informed him at the time that she had told Mr Anderson about her depression, but Mr Slack was not able to confirm the claimant's evidence that she had actually done so. Mr Anderson's evidence was that the claimant did not do so, either in August 2017 or at any time during her employment. The Tribunal was not shown any document which genuinely evidenced Mr Anderson being made aware of the claimant's depression. In the light of the Tribunal's findings in relation to disability, it was not necessary for the Tribunal to determine this dispute of fact.

52. The Tribunal found Mr Slack to be a genuine and credible witness. It was his evidence that Mr Anderson would telephone Mr Slack and inform him that he had a duty of care to tell Mr Anderson if the claimant was not capable of doing her job, and that he must not inform the claimant of the call.

March 2019 holiday

53. There was an issue with regard to the booking of holiday in March 2019. The booking of holiday for Area Managers had been difficult during that March for three reasons: the Cheltenham horseracing festival was an extremely busy period when Area Managers were not allowed time off; the change to the law on betting terminals which came into force on the last day of March 2019 which was very significant for the respondent (and indeed the industry as a whole) and created a particular challenge; and it was the end of the leave year. Mr Anderson in his evidence

described the last week in March 2019 as having been a critical week for the entire business.

54. The claimant booked the last week of March 2019 as annual leave, as did one other Area Manager. The claimant's evidence was that she had booked the week before she knew that the law on betting terminals was due to change. Mr Anderson gave evidence about the fact that he permitted only two Area Managers at the same time to take annual leave. He emphasised the knock-on effect it had upon his own workload if any more Area Managers were off. There was no dispute that the claimant in fact booked and took the relevant week.

Budget sheets

55. The Tribunal heard evidence about the completion of budget sheets, which were clearly important to the respondent. The evidence was that all staff with an element of management in their responsibilities were required to complete the relevant sheets. Between 12 and 19 April 2019 there was an email exchange between the claimant and Mr Anderson in which the claimant confirmed that all GSMs had been asked to confirm with the shops (124) and, later, that they had done so. Later on 19 April 2019 Mr Anderson called the Barnard Castle shop to check in on the wellbeing of a member of staff. Mr Anderson had a conversation with a manager in which he was informed that the relevant budget sheets had not been printed off and weren't been filled in. Mr Anderson emailed the claimant about this (125). The claimant responded, explained what had been done, and suggested that there had been some confusion about what it was Mr Anderson had been referring to when he spoke to the relevant person (126). There was a further exchange of emails about it. The respondent's position was that Mr Anderson's email to the claimant was simply querying what had happened in a shop; where something which the claimant had stated had been done appeared not to have been done. There was no suggestion that any formal action was taken as a result or that there was any follow-up outside the emails exchanged.

The administrator

56. The administrator who also worked in the claimant's area team was someone who had a period of ill health absence. The Tribunal was shown some exchanges of emails in, or around, 19 April 2019 (126). The emails showed that Mr Anderson asked for copies of the return to work form and notes from the claimant after she conducted the return to work interview with that individual on 19 April (181). In his verbal evidence, Mr Anderson explained that he was particularly interested in the return to work interviews for this individual because the individual had lost a child, something which Mr Anderson was able to empathise with for reasons he explained in the hearing. He said that was why he particularly followed up the individual's return to work.

57. The claimant alleged that Mr Anderson said to her about the administrator, *"you know what I think of people on tablets, Alexis".* She contended that she replied by saying, *"yeah, maybe I thought something similar until I was on tablets myself".* Mr Anderson denied that he made such a comment.

Days off

58. The claimant alleged that Mr Anderson persistently called her on her days off. Mr Anderson denied this and emphasised the number of people who reported to him. He said that he did not keep track of people's days off. The claimant's days off each week would vary depending upon the shift pattern she was working. The Tribunal accepted that Mr Anderson would not immediately have been immediately aware of whether or not an Area Manager was off on a particular day. Mr Anderson's evidence was that an Area Manager could (and most of them would) leave a message on their mobile to say they were not working on the given day. There was no evidence before the Tribunal (save for the claimant's assertion) that Mr Anderson persistently or deliberately called the claimant on her days off. The claimant was not required to answer the phone. Mr Slack, in his evidence, confirmed that the claimant would speak to the area team on the days when she was not working.

The complaint

59. On Saturday 27 April 2019 the claimant was working in an office with Mr Slack and Mr Maughan. A machine tournament was taking place that day and the claimant acknowledged in her evidence that she was frustrated due to a number of issues they had been experiencing in the area at that time. A shop manager in the region, Ms Moore, was contacted by Mr Maughan and they had a telephone conversation that appeared to have included some pauses. The claimant in her evidence accepted that she said something along the lines of, *"this is the type of s**t I'm on about, it's a f**king joke"*. The claimant had a cold at the time, which she suggested meant she spoke more loudly than normal. Ms Moore overheard the comment, while on the call to Mr Maughan.

60. At 9.46pm on 27 April Ms Moore emailed Mr Maughan (136). She asked how long a notice period she would have to work, as she no longer wanted to work for the respondent. She said she had heard shouting and swearing during the call and she asserted that what she had heard in the background had been directed towards her. She made reference to having previously loved the job, said she could not tolerate it any longer, and referred to feeling disrespected and belittled. She also made reference to her own health. That email was forwarded to the claimant by Mr Maughan, but the claimant did not see it until Monday 29 April.

61. On Sunday 28 April 2019 at 5.00pm Ms Moore sent an email to Mr Anderson, stated to be an Area Manager complaint (138). In that email she said the incident had deeply upset her. She referred to the claimant shouting in the background and swearing, saying something similar to that which the claimant accepted she had said in her witness statement. Ms Moore explained that she had emailed Mr Maughan to say she would be applying for jobs elsewhere. She again referred to having been disrespected and belittled. She referred to the employee handbook and quoted it as saying that misconduct was "*rudeness towards colleagues, customer or members of the public involving objectionable or insulting behaviour or bad language*" and "*using grossly inappropriate insulting or offensive language or behaviour in the workplace*". She highlighted that such behaviour would not be accepted from any of the shop staff, and said it should not be tolerated by members of the area team.

62. Mr Anderson received Ms Moore's complaint. He emphasised in his evidence that it was a complaint that he felt he had to take seriously. In his verbal evidence to

the Tribunal he explained that he phoned Ms Moore on Monday 29 April and discussed the complaint with her. No record was made of that conversation, nor was it referred to at any stage in the respondent's internal procedures which followed.

63. The claimant herself also contacted Ms Moore on Monday 29 April. The claimant described herself as "*mortified*" that Ms Moore had felt that way. She explained to Ms Moore what had happened and apologised. In the conversation, Ms Moore accepted the claimant's apology and apologised herself. The claimant was keen to emphasise that what had been said had not been directed at Ms Moore, and she believed that Ms Moore accepted that, in the course of the conversation. Mr Maughan also telephoned Ms Moore shortly afterwards to confirm she was happy and accepted the apology. Mr Maughan's impression was that she had done so.

64. On the same morning Mr Anderson telephoned the claimant, but she was unable to talk as she was dealing with a different issue. The claimant telephoned Mr Anderson back in the afternoon of 29 April as had been arranged. Mr Anderson informed the claimant that there was something which had been brought to his attention which he needed to speak to her about. He told her it was not something to be discussed over the phone and the claimant was asked to visit Mr Anderson's office (which was in Kendal, some distance away) the following day. The claimant's evidence was that there was a discussion about when she needed to arrive, and she was told that she should arrive at whatever time she could get there. Mr Anderson did not recall a conversation about the time the claimant would arrive, as far as he could remember he said he would have stated a time for the meeting but it would not have been critical and he could not tell the Tribunal what time it was. There was no dispute that the claimant was not informed in this telephone call about why she had been called to a meeting.

The meeting(s) on 30 April 2019

65. On 30 April 2019 the claimant arrived at the Kendal office at approximately 10.00am. When the claimant arrived, Mr Anderson was on the phone and she had to wait. The claimant's evidence was that Mr Anderson had some pre-written papers and that he took notes during the meeting. There was a dispute about whether the time of the claimant's arrival was mentioned at the start of the meeting. Mr Anderson confirmed that he took notes and those notes were provided to the Tribunal (140). At the top of the notes was a section that Mr Anderson said he had pre-written and which he said he read out at the start of the meeting. The claimant denied that he had done so. That introduction was as follows:

> *"Reason I've asked you to come to see me is following an email I've received from a manager accusing you of 'using grossly inappropriate insulting or offensive language or behaviour in the workplace'. Are you aware of what I am referring to?".*

66. The claimant's evidence was that she was not told that this was an investigatory meeting. Nothing in the statement that Mr Anderson said he had read out stated that it was an investigatory meeting. There was no evidence that the claimant was told it was an investigatory meeting or that it was formal (prior to the off the record discussion explained below).

67. The notes taken by Mr Anderson recorded that he and the claimant discussed the complaint from Ms Moore and what had occurred. The claimant said that it had not crossed her mind that Ms Moore could hear her. The claimant stated that probably what had been overheard said was *"an effing joke and s**t word as well".* She explained that it was out of frustration and not directed at Ms Moore. She provided the explanation, for her speaking louder, of her cold. She referred to the email which had been sent to Mr Maughan and said that she had explained the situation, she had apologised, and that Mr Maughan had followed it up. The claimant said that it was not good. The claimant accepted that she was at fault, it should not have happened, and she should make sure that no-one was in earshot when she was swearing. The claimant emphasised that the comment was not aimed at Ms Moore, but did say that she could see why Mr Anderson might think that from the email that had been sent. The claimant said that she was sorry it had happened and would not let it happen again. The notes of the meeting were signed on each page by the claimant, however the claimant denied that that meant the notes were accurate, she just felt she needed to do so. The substance of what was said during that part of the meeting, save for the introduction and the discussion about the start time, was not genuinely in dispute.

68. What happened next was the area of some considerable dispute between the parties. The order of events, in particular, was not entirely clear from the evidence that the Tribunal heard. However, it was not (ultimately) in dispute that each of the following occurred during the remainder of the meeting or meetings. The evidence about the order in which they occurred differed.

a. There was reference made by Mr Anderson to an off the record chat.

b. There was reference made by Mr Anderson to HR and others having an issue with the claimant.

c. There was reference to the claimant's health.

d. The claimant was upset.

e. There was a break, during which the claimant left the meeting (and cried in the street outside).

f. The claimant was told she would not be suspended as the sanction would not be dismissal.

g. The claimant was told that there would be formal action, but was not told who would be responsible for it.

69. The claimant's evidence was that she first realised it was a formal investigation meeting when Mr Anderson asked her *"do you want an off the record chat before I adjourn?".* The claimant asked what was meant by that and, when Mr Anderson became unhappy, she agreed to an off the record chat. The claimant alleged that Mr Anderson started to talk about her health and said, *"come on Alexis, you've been on something for the last two years, is that making the pressure of the job too much for you?"*. The claimant also alleged that Mr Anderson went on to ask questions about energy levels. The claimant said she became upset and started crying, and when asked why she was crying, she said it was about her job and was

told that they were not talking about the job now it was her health. The claimant's account was that she then left the meeting and was crying in the street outside.

70. On the claimant's account, she returned to the meeting after a period of time and she was told by Mr Anderson, *"just to let you know, just giving you the heads up, you've upset a few people in HR, not sure what you've done but they don't like you".* He then went on to say that they thought he should suspend but he would only suspend the claimant if he was looking to dismiss and he was not looking to dismiss her. He was alleged to have said, *"final at worse"*. At this point the claimant was asked to sign the notes.

71. In his witness statement for the Tribunal hearing Mr Anderson clearly stated that he did not recall anything regarding an off the record chat. He said the reason that there was an adjournment was because the claimant had got upset and he had suggested she got a coffee and compose herself. He denied the comment regarding the claimant being on something, and said the only thing he was aware that she had been prescribed was iron tablets.

72. In his witness statement Mr Anderson said that he had recalled saying to the claimant *"at some point prior to this meeting", "that in the HR and other Departments, that it appeared that she had a reputation for coming across short, sharp and sometimes a bit rude with others".*

73. In his interview with Mr Hilton as part of the respondent's grievance investigation (255), Mr Anderson acknowledged that *"we did have the off the record chat"*. In that interview Mr Anderson was recorded as having emphasised that in his view when something was off the record it was supposed to be off the record. He acknowledged that he may have said *"Are you still on medication?"*. He said that he had asked the claimant about her health many times. Mr Anderson was also recorded as having said (256) that the off the record chat was not about the claimant's health it was about HR. He was recorded as having explained (in that meeting) that *"the off the record was regarding HR and was to cover her back to look after her and letting her know that HR aren't exactly impressed with her and wanted her suspended regarding this situation"*.

74. In his email to Mr Hasler as part of the grievance appeal investigation (297), Mr Anderson confirmed that he did tell the claimant that it was an off the record conversation and that she had upset someone in HR. In that email he said the explanation was because he thought the claimant's emails to them *"can be a bit snotty at times"*. In the same document (297), which he wrote, Mr Anderson stated that he had numerous conversations with the claimant on her health.

75. In his verbal evidence to the Tribunal Mr Anderson did remember the off the record chat and confirmed that he had used the words off the record. He said that the off the record conversation was a conversation regarding HR and others, and their view of the claimant, and he said it was prior to the break when the claimant became upset. His evidence in the hearing was that this conversation was in the meeting, rather than at some point prior to it.

76. Mr Anderson accepted during the hearing that there was some mention of the claimant's health, but said that was in the context of what was alleged and (in summary) in him trying to identify whether the claimant's health was a factor in what

occurred. It was Mr Anderson's evidence that he would not have known what the outcome of a formal process would be or who would conduct it, but he confirmed that he had formed the view that what was alleged was not sufficiently serious to be dismissible.

77. The claimant sent an email to a personal email address at 8.43pm on 30 April 2019 (145). That provided a record of what had occurred, made on the day. The email account did not address in detail the discussion of the allegations as recorded in Mr Anderson's notes. It did record the other parts of the meeting which Mr Anderson had not recorded. It said that, after questions, Mr Anderson had asked if the claimant wanted an off the record chat before he adjourned. It recorded that the claimant agreed to an off the record chat, if that is what he wanted. It said

> *"He then began to talk about my health and how I've been 'on something' for the past two years and is that making the pressure of the job too much for me".*

78. The email subsequently referred to Mr Anderson asking questions relating to the claimant's energy levels. The claimant was asked if she enjoyed her job. The email recorded the claimant as becoming upset at that point and the break took place

79. The email recorded that, after the claimant returned from the break, Mr Anderson said:

> *"just giving you the heads up, you've upset a few people in HR or Head Office, not sure which he stated but it was clear he was referring to HR, they think he should suspend me but he would only suspend if he wanted to dismiss and he's not looking to dismiss so doesn't feel that's necessary. He informed me that there would be formal action but he wasn't sure who he would get to do it."*

80. At 9.12pm on 30 April the claimant sent herself a further email recording some further points from the meeting (146).

81. At 8.06pm on 1 May 2019 the claimant sent herself a further email which recorded further points regarding the meeting. That email referred to Mr Anderson as not being happy with the time the claimant arrived at the meeting, and recorded that he said the he believed the claimant should have been there earlier (154). This had not been referred to in either of the claimant's previous two emails to herself.

The disciplinary process

82. As part of his investigation, Mr Anderson also spoke to Mr Slack and Mr Maughan on 30 April 2019. The Tribunal was provided with handwritten notes of each meeting (148). They were not signed by the interviewee. Mr Slack's evidence was that at no point in the conversation was he told it was being used as part of an investigation. He said that he believed it was like Mr Anderson was trying to put words in his mouth. The notes themselves record open questions being used. On the day after the interview Mr Maughan sent an email to his own personal email address recording the events of 27 and 30 April (which was ultimately forwarded on to the claimant) (151). That email account described Mr Anderson's tone in the 30 April call

as being "*aggressive*" and described his tone as becoming "*even more aggressive*", in the course of the conversation. It was not entirely clear why Mr Maughan had felt the need to email himself an account of what had occurred. In summary, Mr Slack and Mr Maughan confirmed that the claimant had not directed the comments made at Ms Moore, but that she had said something along the lines of that alleged (in the background during the call). Mr Anderson's notes of his conversation with Mr Maughan, recorded that Ms Moore had told Mr Maughan in a conversation on 29 April that she was happy with the claimant's apology.

83. On Friday 3 May 2019 Mr Anderson informed the claimant by telephone that she had to attend a disciplinary hearing. The claimant was concerned that she had not received an invite letter and would not do so over the Bank Holiday weekend. She asked for an invite letter. A disciplinary invite letter was sent by email that day (161). It confirmed that the disciplinary hearing would take place on Wednesday 8 May 2019 and would be heard by Ms Coy, the Group Head of Security. The allegation was, *"Alleged rudeness towards colleagues involving objectionable and insulting bad language over the phone on 27th April 2019".* The Tribunal was shown the respondent's standard template letter (361D) which included a paragraph which said that the documents which would be considered at the hearing should have their details listed. That paragraph had been removed in its entirety from the claimant's invite letter and no documents were listed.

84. On 5 May 2019 the claimant email Ms Coy asking her to email the investigation to her (165). On the morning of 6 May, Ms Coy sent the claimant the documents which had been obtained as part of the investigation. Those documents did not include either: the complaint emailed from Ms Moore to Mr Anderson; or the complaint emailed from Ms Moore to Mr Maughan.

85. In her witness statement, the claimant emphasised the new values that the respondent had recently introduced. Prior to the disciplinary meeting, the claimant's evidence was that she had a conversation with another Regional Manager who informed the claimant that he was annoyed about the way she was being treated, which he did not feel was consistent with the values.

86. The disciplinary meeting took place on 8 May 2019. Notes were taken (171) and signed. That meeting was conducted by Ms Coy. The claimant and a notetaker attended. At the start of the meeting Ms Coy told the claimant that she assumed she had read the complaint. The claimant stated *"briefly"*. When asked about this during the Tribunal hearing, the claimant said she had seen the complaint during the meeting with Mr Anderson, but had not been provided with a copy of it. Ms Coy then read aloud the email, which Ms Moore had sent to Mr Anderson, at the start of the meeting. The claimant provided her account of what had occurred; and emphasised that she had apologised to Ms Moore. She explained the conversation that had taken place with Ms Moore.

87. In her evidence to the Tribunal, Ms Coy stated that it was clear that the claimant had acted inappropriately and had used insulting and bad language in the workplace. She took the decision not to proceed with a formal warning. She decided that it would be noted the concerns had been discussed. Ms Coy was satisfied that the claimant had taken steps to try and repair the relationship with the shop manager who had raised the complaint, and that was the reason why she decided not to issue

a formal warning. A letter was sent to the claimant on 8 May 2019 (175) which explained the decision. The letter confirmed that Ms Coy had taken the decision not to proceed with formal disciplinary action and said the letter was to be treated as confirmation that they had discussed their concerns and the claimant had accepted responsibility. The letter said that Ms Coy had concerns that the claimant's conduct on this occasion was not what was expected of an Area Manager. It was stated that the letter drew a point in time at which Ms Coy had informed the claimant that an immediate and sustained improvement in the areas discussed was required. As this was not formal action, the claimant was not informed that she had a right of appeal and the claimant did not endeavour to appeal.

88. In her claim, the claimant compared what happened with herself to what had occurred with a male manager with whom issues had previously been addressed for speaking inappropriately. The Tribunal was not provided with any details of the matters from the claimant. Mr Anderson's evidence was that the other person's issues had been 12 years previously. The action taken had involved three separate meetings with the relevant Area Manager. Mr Anderson drew a distinction with the claimant's circumstances because in the other case it had been one person's word against the other, whereas the claimant had in fact accepted saying what was alleged in the course of her process. The other process had ended up with a file note, being a note of concern on record. The claimant's process had resulted in no formal action.

Financial reports

89. The Tribunal was provided with an exchange of emails between the claimant and another Area Manager, Chris Collier, on 1 August 2019 (185). In this exchange of emails, the claimant asked Mr Collier whether he had provided a report in a particular layout for each quarter since the start of the financial year. Mr Collier replied that this was the first time. The claimant responded that Mr Anderson had told her that he wanted them from the start of the financial year. The claimant's complaint was that she was asked to complete a report for a full financial year compared to Mr Collier who was asked to provide it for only one financial quarter. Mr Anderson's evidence was that he did not ask the claimant to complete this task with reference to the full financial year. That part of his evidence was not challenged or questioned.

Appraisals

90. The Tribunal heard evidence about the respondent's appraisal system. The respondent had not previously operated an appraisal system. Mr Anderson had no prior experience (before May 2019) of undertaking appraisals for those who reported to him. Mr Anderson's evidence was also that: he had had little or no training on the appraisal system; and he did not agree personally with the giving of grades as a result of an appraisal (but that his objections had been overruled).

91. In common with many appraisal systems, the respondent's procedure required that the person being appraised completed a form identifying how they perceived they had achieved against various matters. The appraiser would then meet with the individual to discuss those matters with them. The appraiser would complete the appraisal form with their views. The Tribunal was provided with a copy of the claimant's May 2019 appraisal (361E) incorporating the claimant's typed

comments and a handwritten version of the comments that Mr Anderson said in the meeting that took place.

92. The appraisal was scored by giving a grade for each of ten identified areas. For each identified area the grade was either A, B, C or D. The form described the criteria for each score (221 or last page of 361E). A was consistent performance above the level required. B was performance meets the requirements of the role. C was meets requirement of the role most of the time. The individual was then given a points total, with each "A" scoring 4, "B" scoring 3, etc. The upshot of the scoring exercise was that the individual appraisee was also given a total score in the range between 1 and 40. All scores between 21 and 30 resulted in an overall rating of "B", those above 30 resulted in an "A", and those below 21 resulted in a "C". Importantly, on the table provided which outlined the scores of each individual appraisee (340), the total rating was a combination of a letter and a number. The letter identified the appraisee's overall grade; but the number provided the total score across all the criteria. The grade recorded on the table for each Area Manager did not reflect only the overall letter graded.

93. The claimant's May 2019 appraisal, which she completed herself (361E at the last page), included a table showing ticks against the score for each criteria. For three of the criteria there were two ticks, in each case showing both a grade B and a C. It was not clear whether all of the ticks were the claimant's. It was not in dispute that at least some of the ticks showed the scores the claimant had given herself. The table records the claimant with 3 Bs, 5 Cs and 3 entries where both B and C had been ticked. Mr Anderson's evidence was that he had increased the score the claimant had given herself in one or two respects, but otherwise he had given her the scores which she had given herself. The claimant's evidence about the scoring was somewhat confusing. She explained that the appraisal meeting went better than she expected. She confirmed that she had scored herself, but could not recall precisely which ticks on the relevant page were her score. She contended that she had given herself a lower score than she actually thought because she felt under pressure, albeit it was not explained why she felt pressured in the context of the meeting which had gone better than expected. The claimant's evidence was that she had been told by Mr Anderson at the start of the meting that she would receive a "B", and she expected to receive a "B" for all areas, albeit she did not score herself that highly in a number of areas.

94. The final outcome was that the claimant received an overall rating of B24. All six Area Managers received a "B" (340). However, when the numeric score was also taken into account, the claimant's score was the lowest score of those given to the Area Managers, alongside one other employee who was female. The other Area Managers (three of whom were male and one female) were given scores ranging from B25 to B29.

95. The evidence was not consistent about when the Area Managers were informed of the outcome of the May/June appraisal. The claimant believed that the appraisal scores were provided at the regional meeting on 2 and 3 September 2019 in front of all the Area Managers. Mr Anderson did not entirely recall, but believed that the appraisal scores had been given on a one-to-one basis. The Tribunal was also provided with a typed version of the appraisal incorporating Mr Anderson's final

comments (306), but that version of the document was not provided to the claimant prior to her resignation and had not been seen by her at that time.

The regional team meeting

96. A regional team meeting was held early in September 2019 in Carlisle. It was attended by the Area Managers and Mr Anderson. Area Managers had to present their financial year strategies for the new year. In her evidence, the claimant asserted that it was noticeable how much the female Area Managers were questioned on their presentations compared to the men. There was no record of the claimant recording the matter at the time or raising the matter. The particular reason why the claimant asserted this, was because a male Area Manager, Paul Sanders, had spoken to her in a telephone call a couple of days later and the claimant said he informed her of this observation. In her evidence to the Tribunal, the claimant said only that it was noticeable how much the female managers were questioned on their presentations compared to the males, she provided no further evidence or information about the questions asked. Mr Anderson denied that anybody was treated differently in the meeting because of their sex.

97. In the course of the grievance appeal investigation, Mr Hilton spoke to eight individuals and asked them a question about the meeting. The answers provided were recorded in a single document. These were not witness statements nor did Mr Hilton appear to have asked any supplementary or exploratory questions. The page upon which these were recorded (294) did not record any of the attendees at the regional team meeting as having observed anything at the meeting which made them believe that the female Area Managers were treated differently. Notably, the two other female Area Managers were recorded as stating that they did not observe anything at all. Mr Sanders, the person who had spoken to the claimant, was recorded as saying that the only occasion he identified was when the claimant received *"a bit of a grilling"* about her presentation from Mr Anderson regarding her strategy. Mr Sanders recorded that he called the claimant afterwards to make sure she was ok, and she appeared to be ok. Mr Byrne was recorded as stating that some of the presentations were of a poor quality.

The appraisal in November

98. An appraisal was conducted for the claimant in November 2019. The process followed was the same as that for May 2019. The claimant's grade was increased to B27 (341). All of the Area Managers' grades increased in the November appraisals, meaning that the claimant remained the lowest scoring of the Area Managers (together with a female colleague). Three Area Managers achieved an A grade (two male and one female). The claimant did not know the grading that she received in November until after she resigned. Mr Anderson's evidence appeared to suggest that he had deliberately taken the approach of scoring the Area Managers in May in a way that meant he could increase their scores in November.

The grievance following a robbery

99. In July 2019 one of the respondent's stores in the claimant's area, was robbed. At the time of being robbed the store had one member of staff working. The claimant had shortly before the robbery confirmed to Mr Anderson that 90-95% of the stores in her area had ensured that they were always double-manned. Immediately

after the robbery, Mr Anderson queried that statistic in light of the fact that a single-manned store had been robbed. The claimant confirmed the statistic. Mr Anderson described it as *"sod's law"* (183).

100. On 14 October 2019 the employee who had been working at the relevant shop at the time of the robbery, emailed Mr Anderson (361A). Her email asked if she could speak to Mr Anderson. Her complaint was broadly about the lack of support she had received from the area team. This was particularly after the offender had been sentenced and footage of the employee had been released by the police and had been visible to the public. The employee stated that there had been no duty of care shown towards her and she felt like the management did not care.

101. Mr Anderson treated this email as a grievance. At the grievance meeting, Mr Anderson agreed with the employee that he would review the complaint with the area team and make them aware of how the employee felt at the lack of concern shown. Mr Anderson's view was that the aim of the meeting with the area team was for them to take on board how this individual felt and to ask them to do things differently in the future if a similar situation occurred again.

102. The claimant was informed by Mr Anderson in a telephone conversation that there was a grievance on 31 October 2019. She was only told the details of the grievance at the meeting on 14 November 2019. She felt that this was hanging over her head in the intervening period. The Tribunal heard some evidence about why the support as envisaged had not occurred. Mr Slack was unable to visit the store when he was supposed to do so. It did indeed appear to be the case that the support that would have been expected of a shopworker in these circumstances had not transpired. In any event, the issue was discussed on 14 November 2019 with the area team and no sanction was imposed as a result.

Sunday working

103. It was common ground between the parties that the claimant worked one in four Sundays as an Area Manager. Mr Anderson's evidence was that he believed his Area Managers should work one in three Sundays. His approach to this was dictated by the fact that the area management team was made up of three people, one of whom needed to cover each Sunday. Mr Anderson believed that the Area Managers should cover an equal share. The evidence heard by the Tribunal suggested that in all the other regions other than Mr Anderson's, the Area Managers worked one in four Sundays. It was clear that working additional Sundays was an issue for the claimant.

104. The Tribunal was shown an email from Mr Anderson to the claimant and another Area Manager of 17 August 2019 (361B) in which Mr Anderson prompted them that the number of Sundays they were working was out of line with all the other area team members.

105. The claimant's evidence was that the request to work one in three Sundays was something which she did not conform to, and she tried to stand her ground at a regional meeting about it. She described herself as being defiant. There was no evidence that the claimant ever actually worked one in three Sundays, or that she was sanctioned for not doing so.

Saturday working

106. Area Managers were also required (at least in Mr Anderson's area) to have no more than 13 Saturdays off in a calendar year. As at 22 November 2019, the claimant had taken 12 Saturdays off that year. In the conversation on 22 November the claimant stated that she informed Mr Anderson that she would need to take two more Saturdays off, meaning that she would have taken 14 instead of 13. That is, the claimant in that call sought to take more Saturdays off than she knew she was entitled to in the calendar year.

The claimant's resignation and the prior emails/telephone call

107. At 6.36pm on Thursday 21 November 2019 the claimant emailed Mr Anderson about business matters (226). In her email the claimant stated, *"I will be leaving at 2.00pm tomorrow but will still be taking calls as I will be in the car for a few hours. Hope that this is all ok".* Mr Anderson responded at 10.10pm on the same day, *"Leaving at 2.00pm?".* There appeared to be no dispute that Mr Anderson required his Area Managers to work all of their contractual hours and did not show any flexibility in terms of allowing them to leave early to make up for other hours they may have worked. Mr Anderson's evidence to the Tribunal was that he did this for reasons of consistency. Irrespective of the reasons for it, the claimant appeared to be aware that Mr Anderson would not necessarily be happy that she was leaving earlier than her contracted time, albeit that she may have been able to conduct calls from her car whilst travelling. The reason for the claimant's request was because she wished to meet with friends in Manchester.

108. On Friday 26 November 2019 Mr Anderson telephoned the claimant. His evidence was that he was seeking an explanation as to why certain things had not been done. The claimant stated that he asked in a condescending tone *"what makes you think it's ok to finish at 2.00pm?"*. The claimant replied that it was not a regular thing.

109. The claimant's account was that Mr Anderson contended that her priorities had changed. There was a discussion about the number of Saturdays the claimant had worked, including the claimant's request for more Saturdays that year than the number to which she was entitled. There was a discussion about Sunday working. The claimant asserted that she was asked whether she was going home every weekend because Mr Anderson had noticed that she had had a lot of Mondays off.

110. Mr Anderson made reference to a vacancy for the role of SSBT Product Manager. Mr Anderson's explanation for this role being mentioned, was that it was one of comparable seniority with national obligations which was located in a region closer to the claimant's original home and which required only 9.00am-5.00pm working. The claimant's account was that Mr Anderson informed her that it may be more suitable for her as it would not mean that she needed to work for Mr Anderson, and Mr Hasler (to whom that role reported) would be more flexible. The claimant perceived the role to be more junior to that of Area Manager, albeit there does not appear to have been any discussion about that in the course of the conversation.

111. It was common ground that part way through the conversation the claimant said she needed a break and she asked if she could call Mr Anderson back.

112. During the break, the claimant chose to resign. She emailed Mr Hasler at 11.58 am on 22 November (228). The resignation email was lengthy. In the email the claimant said that she was resigning on notice (four weeks) and her last working day would be 20 December. She said:

> *"Having worked for the company since 2001, I have never felt as undervalued and upset as I currently do. I have tried, for over several months now, to overcome these feelings but due to the reoccurrence of small issues I cannot move forward. In April this year I was subjected to formal disciplinary action and although, I was not issued with a disciplinary penalty, the process leading up to the disciplinary meeting was handled very badly and to be quite honest, it was wrong."*

113. The majority of the resignation email then provided the claimant's account of the events of 29 and 30 April 2019 and the disciplinary sanction which had been imposed. Towards the end of her email she referred to Mr Anderson and how the claimant felt demotivated after a phone call from him, describing how she was losing the respect she had for him due to his behaviour towards her. The claimant referenced the regional team meeting and how she said someone else had noted that Mr Anderson had treated females differently. She referred to a belief that her period of illness, in the eyes of Mr Anderson, had made her a weak person. She referred to how the robbery grievance had been handled. She concluded the email by providing an account of the telephone conversation which had immediately preceded the resignation. The email concluded by stating that the claimant understood that Mr Hasler would ask if she wished to raise a grievance, but she stated that she would decline. The resignation was sent to Mr Hasler not Mr Anderson.

114. Following the claimant emailing her resignation, the claimant's call with Mr Anderson resumed. The claimant informed Mr Anderson that she had resigned. This was a surprise to Mr Anderson. The claimant told him that the resignation was because of him.

Post-resignation

115. Following the claimant's resignation, she was contacted by Mr Hasler who arranged a meeting with her. That meeting took place on 27 November 2019. Mr Hasler explained that he did not wish to lose the claimant and options for remaining were discussed. A letter was sent following the meeting (231).

116. The claimant subsequently changed her mind and asked for the matters she had raised to be considered as a grievance. The claimant emailed Mr Hasler with a list of other points she wished to be addressed as part of her grievance (232). One point was that the claimant asserted that Mr Anderson's general attitude and behaviour towards her had changed since the claimant had informed him that she was ill in 2017.

The grievance

117. Mr Hilton was asked to investigate the claimant's grievance. He wrote to the claimant on 6 December 2019 (239). A grievance hearing took place on 12 December 2019 for which notes were provided (245). Mr Hilton interviewed Mr

Anderson on 16 December 2019 (253). Some of what Mr Anderson said in that meeting is recorded at paragraph 73. Mr Hilton did not interview anyone else as part of his grievance investigation.

118. A grievance outcome was sent to the claimant in a letter of 30 December 2019 (273), that is after the claimant's employment had ended. In that letter Mr Hilton stated, *"I do believe that you were not informed either by telephone conversation or written correspondence that your meeting in Kendal was for investigation purposes, and that no definite time was agreed".* It was accepted that the claimant was not informed prior to the meeting in Kendal on 30 April that it was an investigation meeting. The letter concluded with a reassurance that the company would have liked to have tried to resolve the situation if the claimant had not left the company. Mr Hilton said (278), *"I do fully accept that you genuinely feel aggrieved by Chris Anderson's management style which you perceive as controlling and 'micro-management', not only in your case but with other members of the North Regional Team"*.

The grievance appeal

119. On 7 January 2020 the claimant emailed Mr Hasler and stated that she would like to appeal (281). Following an exchange of emails, the claimant provided more extensive grounds for appeal on 14 January 2020 (279). An invite to a grievance appeal hearing was sent to the claimant on 24 January 2020 (283). A grievance appeal meeting, heard by Mr Hasler, took place on 12 February 2020. Notes were provided (284).

120. Following the meeting, as recorded at paragraph 97, Mr Hasler spoke to the attendees at the regional meeting. He also spoke to Mr Maughan. What was said was recorded on a single page (294). Mr Anderson's comments were also sought in an exchange of emails, with Mr Anderson's responses being provided on 7 March 2020 (296). Rather surprisingly, in the light of the allegations being made, Mr Hasler did not choose to speak to Mr Anderson, but rather he thought it appropriate to obtain his response to various questions asked by email. Mr Hasler explained to the Tribunal that this was because it gave the individual the opportunity to think about their response and it made sure that was recorded. Some of the content of Mr Anderson's email is referred to at paragraph 74. In his email, Mr Anderson also recorded (297), *"I had numerous conversations with Alexis on her health"* and (298) *"I also on occasions asked Ross to keep an eye on her and let me know if she felt she was struggling"*.

121. A grievance appeal outcome was provided in a letter of 13 March 2020 (299). The outcome letter ran through each of the points that the claimant had raised in her appeal and addressed them individually. In his decision Mr Hasler included the following:

a. he upheld the point in the claimant's grievance that she had not been informed that the 30 April meeting was an investigation meeting (point one);

b. he recorded (point four) that Ms Coy had confirmed that the claimant was emailed a copy of Ms Moore's statement in advance of the

disciplinary hearing, albeit he accepted in cross examination that this was not correct;

c. he said he was satisfied that there was no evidence to support the claimant's claim that females were treated any differently at the regional team meeting (point six);

d. he conceded that the paragraph which the claimant contended was missing from the template invite letter was missing from the invite letter sent to the claimant, but said that he was fully satisfied that this was not done intentionally to cover up anything (point seven);

e. he stated that he could confirm that Mr Anderson had graded the claimant higher than her self-appraisal rating in six of the 11 categories and the same for the remaining five, albeit this addressed the appraisal conducted in November 2019 for which the outcome was only provided after the claimant resigned (point eight);

f. he said that he upheld point eleven of the claimant's grievance, which was that the grievance outcome letter had stated that the claimant should have made clear to Ms Coy what information was missing, as in fact the claimant had done so in an email; and

g. the letter concluded by saying that, following a thorough review of the issues, he could find no evidence that would enable him to uphold any of the claimant's appeal points except that a paragraph from the invite to the disciplinary hearing meeting was not included (albeit in fact Mr Hasler had also upheld point eleven and part of point one, but he appears to have overlooked that when writing his conclusion).

The Tribunal claim

122. The claimant entered into ACAS early conciliation for the period between 18 March and 18 April 2020. She entered her claim at the Employment Tribunal on 17 May 2020. The claimant provided no evidence whatsoever which explained any delay in her entering her claim or provided any reason why a claim could not have been entered at an earlier date. In her final submissions, the claimant referred to the respondent's internal procedures and the time that they had taken, stating that she hoped that this was a just and equitable reason for an extension of time.

The Law

123. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) provides that an employee is dismissed by her 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."**

124. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat herself as constructively dismissed only if the employer is guilty of conduct which is 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.

125. Lord Denning said in that case (at 226B):

> "**the conduct must … be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded to have elected to affirm the contract.**"

126. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

127. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

128. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

129. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15** the EAT put the matter this way:

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**

> **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term."**

130. A part of the test to be applied is whether the actions of the employer fell outside the range of reasonable responses which a reasonable employer might consider to be appropriate What LJ Elias (as he now is) said in **Claridge v Daler Rowney Ltd [2008] IRLR 672** (when in the Employment Appeal Tribunal) is:

> "**It is necessary that the conduct must be calculated to destroy or seriously damage the employment relationship. The employee must be entitled to say "You have behaved so badly that I should not be expected to have to stay in your employment". It seems to us that there is no artificiality in saying that an employee should not be able to satisfy that test unless the behaviour is outwith the band of reasonable responses."**

131. If an individual delays too long in resigning, they will have affirmed the contract and waived the breach. In **W. E. Cox Toner (International) Ltd v Crook [1981] ICR 823** Browne-Wilkinson LJ in his Judgment emphasised that continued performance of the employment contract is evidence of affirmation. He summarised the position by saying:

> "**there must be some limit to the length of time during which an employee can continue to be employed and receive his salary at the same time as keeping open his right to say that the employer has repudiated the contract under which he is being paid**"

132. In some cases, the breach of trust and confidence may be established by a succession of events culminating in a "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] ICR 481** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that

when viewed cumulatively a repudiatory breach of contract is established. Dyson LJ said the following:

> **"The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.**
>
> **I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.**
>
> **If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. …. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle**
>
> **Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective"**

133. The claimant in her submission cited the case of **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1**. In his Judgment in that case Underhill LJ said:

> "**In the normal case where an employee claims to have been constructively dismissed 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 (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reasons given…)**
>
> **(5) Did the employee resign in response (or partly in response) to that breach?**"

134. In **Williams v The Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19** Auerbach HHJ said:

> "**If there has been conduct which crosses the Malik threshold, followed by affirmation, but there is then further conduct which does not, by itself, cross that threshold, but would be capable of contributing to a breach of the Malik term, can the employee treat that conduct, taken with earlier conduct as terminating the contract of employment? That question appeared to have received different answers from the EAT, but was tackled head on by the Court of Appeal in Kaur. Their decision confirms that the answer is "yes""**.

135. The respondent's representative also relied upon **Financial Techniques (Planning Services) Ltd v Hughes [1981] IRLR 32**, as authority that an employer is not in repudiatory breach of contract where there was a dispute over the terms and conditions of the employee's contract of employment.

Disability

136. Section 6 of the Equality Act 2010 provides that:

> **"A person (P) has a disability if:**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."**

137. Section 212 of the Equality Act 2010 provides that "substantial" means more than minor or trivial.

138. Schedule 1 Part 1 of the Equality Act 2010 includes further provisions regarding determination of disability. Paragraph 2 provides that:

> **"The effect of an impairment is long-term if:**
>
> **(a) It has lasted for at least 12 months;**
>
> **(b) It is likely to last for at least 12 months; or**

> **(c) It is likely to last for the rest of the life of the person affected.**
>
> **If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur"**

139. Schedule 1 Part 1 of the Equality Act 2010 also includes provisions which relate to the effect of medical treatment and to progressive conditions. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat and correct it, and, but for that, the impairment would be likely to have that effect. Measures include medical treatment.

140. The guidance on matters to be taken into account in determining questions relating to the definition of disability, issued by the Secretary of State, confirms that "likely" should be interpreted as meaning that it could well happen. It also says that medical treatment includes treatment with drugs (B12). That guidance also says that account should be taken of whether the effects of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have the substantial adverse effect. Pneumonia is given as an example of a condition where a course of antibiotics may permanently resolve the condition and, therefore, in which the consideration of whether it would be a disability does not require the impact of the condition without antibiotics to need to be considered.

141. The onus is on the claimant to prove that the relevant condition was a disability at the relevant time.

142. The respondent's representative submitted that an impairment must have a long-term effect at the time that the alleged acts of discrimination were committed relying upon **Tesco Stores Ltd v Tennant UKEAT/01617/19**. He accepted that an impairment could also be a disability if it was likely to have a long-term adverse effect on the individual's ability to undertake day to day activities at the relevant time.

143. It was also submitted on the respondent's behalf that in **Woodrup v London Borough of Southwark [2003] IRLR 111** the Court of Appeal held that a Tribunal should assess how an impairment would affect the claimant's day-to day activities if the medical treatment were stopped. That case involved a determination of how psychotherapy treatment should be taken into account when considering deduced effects, particularly in the absence of any medical evidence about the issue.

144. Section 6(3) of the Equality Act 2010 provides, in relation to disability, that:

> "**a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability; a reference to persons who share a protected characteristic is a reference to persons who have the same disability**"

Direct discrimination

145. The claim relies on section 13 of the Equality Act 2010 which provides that:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

146. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment and dismissal. The characteristics protected by these provisions include disability and/or sex.

147. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

148. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

149. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that she has been treated less favourably than her comparator and there was a difference of a protected characteristic between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

150. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

151. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes the Tribunal may

appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

152. There is usually a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

153. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare and that Tribunals frequently have to infer discrimination from all the material facts. Few employers would be prepared to admit such discrimination even to themselves.

154. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

155. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee with any difference of a protected characteristic, would have been treated reasonably

156. The way in which the burden of proof should be considered has been explained in many authorities, including: **Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332**; **Shamoon v Chief Constable of the RUC [2003] IRLR 285; Hewage v Grampian Health Board [2012] ICR 1054; Igen Limited v Wong [2005] ICR 931; Madarassy v Nomura International PLC [2007] ICR 867;** and **Royal Mail v Efobi [2021] UKSC 33**.

Harassment

157. Section 26 of the Equality Act 2010 says:

> **"A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of – (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."**
>
> **"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."**

158. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i)

violating the claimant's dignity; or (ii) creating an adverse environment for her; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

159. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa). It is important that the Tribunal states whether it is considering purpose or effect.

160. Even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

161. The respondent's representative cited from the Judgment in **Richmond Pharmacology v Dhaliwal** to emphasise that it was important not to encourage a culture of hypersensitivity or the imposition of legal liability for every unfortunate phrase.

162. Harassment which is not on the grounds of a protected characteristic is not unlawful (albeit it may still be a breach of the duty of trust and confidence). When considering whether facts have been proved from which a Tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic.

163. Section 212 of the Equality Act 2010 provides that the definition of detriment in that Act does not include conduct which amounts to harassment. That means that an employee cannot be found to have both been unlawfully harassed by an employer and to have been directly discriminated against in a way which amounts to some other detriment under section 39, for the same conduct.

Time limits/jurisdiction

164. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

165. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** makes it clear that the focus of inquiry must be not on whether there is

something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible in which the claimant was treated less favourably. Tribunals should look at the substance of the complaints in question as opposed to the existence of a policy or regime and determine whether they can be said to be part of one continuing act by the employer. One relevant factor is whether the same or different individuals were involved in the incidents, however this is not a conclusive factor.

166. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*

167. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble [1997] IRLR 336**. Those factors are:

- the length of, and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the relevant respondent has cooperated with any request for information;
- the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action; and
- the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action.

168. Subsequent case law has said that those are factors which illuminate the task of reaching a decision but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. This has recently been reinforced by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23** where it was emphasised that the best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent.

169. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. It says, of the discretion, *"A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception*

rather than the rule". The onus to establish that the time limit should be extended lies with the claimant.

Amendment

170. For the application to amend, the Tribunal considered the factors outlined in the case of **Selkent Bus Company v Moore [1996] IRLR 661** and in the Presidential Guidance on general case management (2018) in relation to amendment of the claim. The respondent's representative referred to **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650** and the need to have regard to all the circumstances in the case. The matters to be taken into account include: the balance of injustice and hardship between the parties; the nature of the amendment; the applicability of time limits (including the relevant test which applied and the elements of that test – here the just and equitable test in section 123 of the Equality Act 2010 for the discrimination claims, but the more stringent test of reasonable practicability for the constructive dismissal claim); and the timing and manner of the application. Whilst time limits are relevant to this exercise of discretion, the Employment Appeal Tribunal in **Galilee v Commissioner of Police of the Metropolis [2018] ICR 634** said that it was not always necessary to determine time points as part of the amendment determination, amendment can be allowed subject to the time limit/jurisdiction points.

171. In deciding whether or not to grant leave to amend, the Tribunal has a discretion. The Tribunal must have regard to all the circumstances and, in particular, balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

Conclusions – applying the Law to the Facts

172. The first four issues outlined in the List of Issues (see paragraphs 8-11) related to the jurisdiction of the Tribunal to hear the claims and the potential need for an extension of time. As those decisions could only really be reached in the light of any findings made by the Tribunal, it was determined to leave those issues to be dealt with only after the other issues had been determined.

Potential amendment

173. The Tribunal first considered the issue included at paragraph 12. The respondent contended that the matters alleged as breaches 8, 9, 10, 12, 13, 16, 17, 18, 19 and 20 as set out in the further particulars document prepared by the claimant (42) were not part of the claimant's pleaded case. As recorded at paragraph 12, the claimant at the start of the hearing accepted that breaches 10 and 16 were not pleaded in the claim, but she contended that the other paragraphs were. An application to amend had also been made and needed to be determined, for any of the breaches which had not been pleaded in the original claim.

174. In the afternoon prior to submissions being given, it was explained to the claimant that she needed to explain in her submissions where exactly it was she said that the breaches raised were contained in the claim form. In her final submission document the claimant identified where in the claim form (18 and 19) she contended she had raised each of the relevant the breaches.

175. The Tribunal found that the following breaches were matters which were alleged in the original claim form: breach 19 (there only ever having been one meeting to discuss health issues, which was the investigation meeting); and breach 20 (that is the claimant's conversation with Mr Anderson on 22 November). In the first paragraph at the top of the second page of the detailed grounds of response (18) the claimant asserted that the investigation meeting was turned into a meeting regarding the claimant's health and explained why the claimant was dissatisfied with Mr Anderson doing so. The final page of the detailed grounds of response (19) contained an entire paragraph which addressed the conversation on 22 November, albeit that that specific date was not actually included in the details. As with all of the claimant's claims, the claim form did not contain a breakdown of what was alleged in respect of each element of the content, but nonetheless for the claims which arose from those two breaches the Tribunal found what the claimant had provided in the further and better particulars of claim (47) were genuinely further particulars of claims which had already been included in the original claim.

176. For the other breaches which the respondent had highlighted, that is breaches 8, 9, 12, 13, 17 and 18, the Tribunal could not find the matters asserted in the claimant's particulars of claim.

177. Accordingly, the Tribunal went on to consider the claimant's application to amend her claim to include the claims in the List of Issues arising from breaches 8, 9, 10, 12, 13, 16, 17 and 18. The Tribunal considered the law on amendment as explained above. The details of the breaches relied upon had been provided by the claimant in late 2020 shortly after the preliminary hearing when the claimant had been ordered to provide further particulars (albeit that the actual application to amend had only been made at the hearing). The claimant was not represented and had not appreciated the difference between further particulars of the existing claim and amendments, prior to this hearing.

178. The injustice and hardship for the claimant if the application was refused would be that she would be unable to have potentially meritorious claims determined by the Tribunal. She would be able to have her other claims determined in any event.

179. The injustice and hardship to the respondent in allowing the amendment was virtually non-existent, save for the need to have the claims determined which might of course (if they were found) have adverse consequences. The respondent had been able to defend the claims and had called evidence in response to those claims as part of the hearing. They had been aware of the issues since 2020.

180. Account was taken of the time limits which applied to the claims, the application to amend having been made a very significant time outside the primary time limit. However, as the decision in **Galilee** enabled the Tribunal to allow the amendment to be made but leave the time/jurisdiction issues to be determined alongside those for the other claims, it was not considered that the time limits meant that the application to amend should not otherwise be granted.

181. Accordingly, the Tribunal exercised its discretion to grant leave to amend for all of the claims brought by the claimant as recorded in the List of Issues for all of the breaches relied upon in her further particulars document provided in late 2020 (for breaches 8, 9, 10, 12, 13, 16, 17 and 18), particularly as a result of applying the

balance of hardship and injustice as described (and with the time issues left to be determined alongside the other issues)

Disability

182. The issues described at paragraphs 13 and 14 required the Tribunal to determine whether the claimant had a disability (as defined in section 6 of the Equality Act 2010) at the material time (August 2017 to 22 November 2019) in respect of the two impairments relied upon: iron deficiency anaemia; and/or depression.

Disability – iron deficiency anaemia (without deduced effects)

183. The Tribunal considered first whether the iron deficiency anaemia was a disability at the relevant time. Based upon the claimant's impact statement it was clear that the claimant's iron deficiency anaemia did have a substantial adverse effect on her ability to carry out normal day-to-day activities because of the extreme fatigue, lack of energy, and tiredness which she evidenced. In addition, there was evidence from the claimant's colleagues that they had seen an adverse impact upon her of her conditions for a period. The medical records also recorded the claimant as being tired all the time and having reduced concentration and memory on 26 April 2017.

184. The period during which the claimant's iron deficiency anaemia had had a particular impact upon her ability to undertake day-to-day activities appeared to be from shortly before the claimant saw her GP in April 2017 until approximately late 2017. Whilst the claimant had attributed her period of illness in 2016 to anaemia, there was no medical evidence to support that assertion. The medical records recorded the claimant as being tired all the time and having reduced concentration and memory on 26 April 2017 and those adverse impacts of the impairment must have been present for a period prior to the claimant visiting the GP. Whilst not entirely clear, on balance the diagnosis on 27 April 2017 showed that those adverse effects on day to day activities were as a result of the iron deficiency anaemia. The absence of any further visits by the claimant to the GP about that condition after (at the latest) January 2018 showed that the condition had ceased to have the adverse effect evidenced by that date (or at least there was no medical evidence that it did so). Whilst the claimant's evidence was that she had further issues with tiredness and getting out of bed in the morning, the fact that the claimant did not have any further absence from work did not support an argument that there continued to be a substantial adverse effect on her day to day activities (even when it was taken into account that substantial means more than minor or trivial, and focussing upon what the claimant could not do because of her disability rather than what she could), or at least the Tribunal did not find that the claimant had evidenced that her iron deficiency anaemia as a matter of fact did so.

185. Accordingly, based on the evidence available to the Tribunal, the Tribunal did not find that the claimant had proved that the substantial adverse effect of the impairment of the iron deficiency anaemia on the claimant's ability to carry out normal day-to-day activities had lasted for at least 12 months. There was also no evidence available to the Tribunal to enable it to conclude that the actual impact of the condition had been likely to last for at least 12 months at the relevant time. There was no evidence provided of the likelihood of recurrence. The Tribunal's

finding was that (before considering deduced effects) the claimant had not proved that her iron deficiency anaemia had a long term required impact (as required by the Act).

Disability – iron deficiency anaemia (with deduced effects)

186. For the iron deficiency anaemia, the Tribunal went on to consider the provisions regarding the effect of medical treatment. The claimant has taken ferrous sulphate since April 2017 (with occasional breaks) and continues to take such medication to ensure that her iron levels do not drop. It was the claimant's evidence that she will always need to take such medication. That is, the need to take medication is a permanent and not a temporary requirement. In the event that the claimant ceased to take the medication her evidence, which the Tribunal accepted, is that her iron levels would drop significantly and her lack of energy and tiredness would return, coupled with the other symptoms the claimant evidenced (and potentially more significant issues).

187. Based upon that evidence, the Tribunal found that the impairment (iron deficiency anaemia) must be treated as having a substantial and long term adverse effect on the claimant's ability to carry out normal day-to-day activities because if the measures taken (that is the ongoing medication/medical treatment) were not taken, the condition would be likely to have that effect (and would have been likely to have had that effect if this was considered as it applied at the relevant time). The Tribunal decided that the lifelong requirement to take ferrous sulphate meant that the medical treatment was not treatment which created a permanent improvement and it was not analogous to antibiotics for pneumonia. The medication was of exactly the type that should be considered when determining what the deduced effects of the claimant's condition would be, if the treatment was not taken. Accordingly, the Tribunal found that the claimant's iron deficiency anaemia was a disability at the relevant time when the deduced effects (without medication/treatment) were taken into account.

Disability – depression

188. The Tribunal then considered separately the question of whether the claimant's depression amounted to a disability. Whilst it was not entirely clear from the medical records, the Tribunal accepted that the extreme fatigue, lack of energy, and tiredness which the claimant had evidenced and which had been recorded in her medical records, was a substantial adverse effect on her ability to undertake day to day activities which resulted from the low mood or depression recorded in the GP notes as having been diagnosed in April 2017.

189. The diagnosis of low mood and depression was made in late April or early May 2017, but the impacts appeared to have ceased by (at the very latest) February 2018. The claimant decided to reduce her medication in December 2017. The medication had ceased by February 2018. There was no evidence of any ongoing impact of the condition. The medical records did not record an ongoing impact of the condition on the claimant's ability to undertake day to day activities. Accordingly, the substantial adverse impact of the claimant's depression on her ability to undertake day to day activities, did not last for 12 months or more at the time of the claimant's period of depression during 2017.

190. It was for the claimant to prove that she had a disability at the relevant time. The claimant did not provide any medical evidence about this impairment, save for the GP records themselves. Based upon the evidence available, the Tribunal found that the claimant had not proved that the substantial adverse effects of the depression on her ability to undertake day to day activities lasted more than 12 months. She also had not proved that (at the relevant time) the condition was likely to last more than 12 months or was likely to reoccur. Unlike the position with the iron deficiency anaemia, there was also no evidence that the claimant's depression would have the requisite effect upon her if medication had not been taken. The medication was taken for a period of less than a year, was temporary, and in any event there was no evidence available to the Tribunal that without such medication the claimant's condition would have a substantial long-term adverse effect on her ability to carry out normal day-to-day activities (that is, beyond the period identified).

Disability - summary

191. The Tribunal therefore found that the claimant had proved that her iron deficiency anaemia was a disability as defined in the Equality Act 2010 (at the relevant time and when the deduced effects were taken into account). The Tribunal did not find that the claimant had proved that her depression was a disability as defined in the Act at the relevant time.

Knowledge of disability

192. In the List of Issues the respondent's knowledge was also raised (paragraph 15). Employees of the respondent were aware of both of the impairments relied upon by the claimant because she informed her area management team about both of them in (or around) April 2017.

193. As many of the disability discrimination claims were direct discrimination claims, a key question was whether Mr Anderson (the alleged discriminator) was aware of the claimant's disability? As the Tribunal has found that the depression was not a disability, the Tribunal did not need to determine whether Mr Anderson was informed about it as the claimant alleged.

194. The respondent's written submissions did not state that the respondent did not know about the claimant's condition of iron deficiency anaemia, but in his oral submissions the respondent's counsel did assert that the issue needed to be determined. For the iron deficiency anaemia, there was no dispute that Mr Anderson was informed: that the condition was iron deficiency; about the impact it had on the claimant; and the fact that she was taking tablets for it on an ongoing basis. There was a dispute of evidence about whether he was ever told that the claimant's condition was iron deficiency anaemia, but it is not necessary for the Tribunal to determine that dispute. Mr Anderson did not need to know the precise medical definition or categorisation of the claimant's impairment in order for him to be aware that she had the impairment and/or for him to treat her less favourably because of the condition about which he was aware. It was sufficient that Mr Anderson knew about the claimant's impairment, and that she was taking medication as a result. It was not in dispute that he did. He was aware of the claimant's disability (even if he was not aware of the exact medical label attached to it). He was aware that she took medication for it. The fact that he may or may not have known about the label of

anaemia, does not alter the fact that he was aware of the claimant's disability at the material time.

Breaches

195. The Tribunal then went on to consider each of the breaches individually, in relation to all of the allegations which related to it. That is, that each of the breaches was considered, together with all of the allegations made which applied to that breach. The Tribunal endeavoured, as far as possible, to consider the breaches in chronological order, being approximately (but not entirely) how they were ordered in the List of Issues for the constructive dismissal claim (paragraph 25).

Breach 1 – calling on days off

196. The first allegation was that Mr Anderson persistently called the claimant on her days off. The evidence in relation to this is addressed at paragraph 58. Mr Anderson did call the claimant on her days off, as he did other Area Managers. He did not pay detailed attention to when each of the Area Managers was off. The claimant was free to ignore his calls or not accept them if she wished to do so. The Tribunal did not find that Mr Anderson deliberately phoned the claimant when he knew she was on a day off or that he persistently did so.

197. The Tribunal did not find Mr Anderson's calls to be a breach of the duty of trust and confidence, nor did it find that his calls were capable of being such a breach even when considered collectively with other allegations.

198. The Tribunal also found that the claimant was treated in the same way as the other Area Managers and in exactly the same way as a hypothetical comparator without her disability would have been. Anyone reporting to Mr Anderson would have been called on their days off (to the same extent).

199. The Tribunal did not find that any calls made were related to the claimant's disability (iron deficiency anaemia). Having made that finding, it was not necessary to determine whether the calls had the requisite effect for the claim of harassment.

Breach 16 – holidays in March

200. What was alleged as breach 16 was that it was Mr Anderson's refusal to allow all Area Managers to book holiday in March without good reason (the list recorded this as March 2020, the further particulars as 2021 (46), but in fact it related to March 2019). The evidence regarding this allegation is at paragraphs 53 and 54. The Tribunal heard evidence about: why annual leave was particularly difficult in the last week of March 2019; and Mr Anderson's reasons for restricting the number of Area Managers who took annual leave at any one time.

201. The respondent, quite correctly, submitted that it was unclear how Mr Anderson's refusal to allow all Area Managers to book holidays during a busy period amounted to a breach of the claimant's contract personally. Many employers restrict the number of employees in a role who can be absent at any time, and to do so is not usually a breach of the duty of trust and confidence, nor is it less favourable treatment because of a protected characteristic where a limit on absence is imposed.

The evidence which the Tribunal heard was that the claimant did, in fact, book and take annual leave in the last week in March 2019.

202. As she took leave, the Tribunal finds that the claimant was not treated less favourably at all, and she was not treated less favourably because of her sex or disability. Having a limit on the number of Area Managers who could take leave was also not less favourable treatment of the claimant, nor was it because of her sex or disability. The Tribunal found that the policy and/or how it was applied to the claimant: did not have the requisite effect to amount to harassment and it was not the purpose; was not related to sex or disability; and was not a fundamental breach of the duty of trust and confidence (individually or collectively with other allegations).

Breach 17 – the alleged comment re a colleague and tablets

203. Breach 17 was the allegation that in April 2019 Mr Anderson said to the claimant *"you know what I think of people on tablets, Alexis"* during a conversation about the area team's administrator. Whether or not the comment was said came down to the claimant's word against Mr Anderson's. For the same reasons as are explained below in relation to the breaches arising from 30 April 2019 meeting(s), the Tribunal preferred the claimant's evidence about what was said to that of Mr Anderson. Accordingly, the Tribunal found that the comment was made as alleged. The Tribunal finds that the comment was made in relation to the administrator, not the claimant.

204. Breach 17 was alleged to have been: direct disability discrimination; harassment related to disability; and a breach of the duty of trust and confidence. The Tribunal did not find that the comment was made because of the claimant's disability: a hypothetical comparator who was Area Manager without the claimant's iron deficiency anaemia, would also have had the same comment made to them by Mr Anderson. The comment was also not less favourable treatment of the claimant. It was not addressed to the claimant about her, it was a comment made by a senior manager to a more junior manager about one of her reports. The claimant did not record the comment at the time (such as in an email to herself), nor did she raise the issue with Mr Anderson (save for the brief verbal response) or anyone else at the respondent.

205. The Tribunal did not find that the comment was a fundamental breach of the duty of trust and confidence, nor was it capable of amounting to such a breach even if collectively considered with other matters.

206. The Tribunal did not find that the comment was related to disability. The Tribunal did not know whether or not the other employee about whom the comment was made had a disability, but it had not been proven that he did. The comment was not related to iron deficiency anaemia. Accordingly, the comment was not unlawful harassment related to disability.

Breach 18 – questioning about an employee's return to work

207. In the List of Issues, it was recorded that breach 18 was an allegation that on 19 April 2019 by email Mr Anderson had questioned the claimant about an employee's return to work. That employee was the person about whom the comment

had been made in breach 17. What was alleged was: direct disability discrimination; harassment related to disability; and a breach of the duty of trust and confidence.

208. When the claimant confirmed that the List of Issues was complete on the first day, she did not suggest anything different to what was recorded. In the course of responding to questioning, the claimant made reference to an email of 1 May 2019 (155) and 3 May 2019 (339). When the claimant was asked during her submissions whether she was relying on these latter two documents for this allegation, she asserted that she was. The respondent's representative in his reply to the claimant's submissions objected to this issue being considered other than as drafted in the agreed list. He highlighted that the respondent had proceeded with the hearing and undertaken cross examination on the basis that what was recorded in the List of Issues was the case which the respondent needed to meet. The respondent's representative was right. The Tribunal needed to determine the issues as confirmed in the List of Issues and has limited itself to doing so for this allegation.

209. The facts about this email are contained in paragraph 56 of this Judgment. The email of 19 April 2019 (181) did show Mr Anderson asking for the return to work notes from the claimant for the individual in question. The claimant's evidence was that this was not something Mr Anderson usually did. Mr Anderson's evidence was that he requested them on this occasion due to the particular life event which had led to, or preceded, the employee's absence. In answering questions, Mr Anderson explained the reasons for this. The Tribunal accepted Mr Anderson's evidence as to why he was interested in the assistant's return to work and why he took a particular personal interest in it. It is accepted that is why he wanted to see the return to work notes.

210. The Tribunal found that the reason for the request related to the trigger for the assistant's absence and was not the claimant's disability. The same request would have been made to a hypothetical comparator without the claimant's disability.

211. The Tribunal found that the request was not related to disability at all. The purpose of the request was not to have the requisite effect to amount to unlawful harassment. It was not reasonable for it to do so, if the request had the requisite effect on the claimant.

212. The Tribunal does not find that the comment was a fundamental breach of the duty of trust and confidence, nor was it capable of amounting to such a breach even if collectively considered with other matters. A Regional Manager questioning an Area Manager about another employee's return to work interview or requesting copies of the notes, was not a breach of contract; it was part of a reasonable approach to management.

Breach 13 - the email about a task to be completed

213. Alleged breach 13 was that Mr Anderson emailed and called the claimant in relation to a task that had to be completed. This allegation related to budget sheets and the emails about them, for which the evidence is addressed at paragraph 55. In particular the heart of the complaint was an email to the claimant of 19 April 2019 (125) in which Mr Anderson questioned why someone at the Barnard Castle shop had not been aware of the budget sheets when the claimant had previously informed him that everyone required had been asked to complete them.

214. This was alleged to be sex discrimination and/or harassment related to sex, as well as direct disability discrimination, harassment related to disability, and a breach of the duty of trust and confidence.

215. The Tribunal accepted the respondent's position about what the emails showed, which was that Mr Anderson was simply querying what had happened in a shop; where something which the claimant had stated to have done appeared not to have been. No formal action was taken as a result (nor did the claimant raise any concerns besides responding to the email).

216. As a result of that finding, the Tribunal did not find that the claimant was treated less favourably than a hypothetical male comparator, or a hypothetical comparator without the claimant's disability, would have been. There was no evidence that the request ether had the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant (and it would not have been reasonable had the email had that effect). The Tribunal did not find the query to be related to either sex or disability. The email/call was not a breach of the duty of trust and confidence (either on its own or when considered collectively with other breaches).

Breach 2 – the call of 29 April 2019

217. Breach 2 was the first of the allegations which related to the issues in late April and early May 2019. Breach 2 was the allegation that on Monday 29 April 2019 Mr Anderson had called the claimant and asked her to attend a meeting at the respondent's Kendal office. This is something about which there was no factual dispute: Mr Anderson did call the claimant on that date and ask her to attend a meeting in Kendal the following day. The facts about the call are recorded at paragraph 64.

218. Irrespective of the claimant's view of the complaint and/or the fact that she thought she had resolved it by ringing Ms Moore directly, the complaint as emailed to Mr Anderson on 28 April 2019 (138) was a serious matter which required investigation. The person raising the complaint (Ms Moore) stated that she had felt disrespected and belittled and stated that she was looking for work elsewhere. It was entirely appropriate for the matter to be investigated. That remained the case even if Ms Moore had accepted the claimant's apology. A reasonable employer was perfectly able to investigate the matter, and inviting the claimant to a meeting about it was within the range of reasonable responses that a reasonable employer could take. It was not unreasonable for Mr Anderson to call the claimant and to ask her to attend a face to face meeting to discuss the matter; rather than to discuss it with her in a telephone call.

219. What was alleged was that this call was: direct disability discrimination; harassment related to disability; and a breach of the duty of trust and confidence.

220. There was no evidence before the Tribunal that a hypothetical comparator without the claimant's iron deficiency anaemia would have been treated differently and/or that the requirement to attend a meeting was connected to the claimant's disability. The Tribunal found that Mr Anderson would have treated anyone else who was an Area Manager about whom such a complaint had been made, in the same way.

221. The Tribunal found that the request was not related to disability at all. The purpose of the request was not to have the requisite effect to amount to unlawful harassment. It was not reasonable for it to do so, if the request had the requisite effect on the claimant.

222. The Tribunal found that the approach taken was one which a reasonable employer could reasonably have taken, and accordingly (applying **Claridge**, see paragraph 130 above) the call was not a fundamental breach of the duty of trust and confidence, nor was it capable of amounting to such a breach even if collectively considered with other matters.

Breach 6 – failing to obtain a statement from Ms Moore

223. Breach 6, as recorded in the List of Issues, was that on Monday 29 April 2019 Mr Anderson failed to obtain a statement or undertake further investigation with the shop manager. The claimant's further particulars (44) complained that Mr Anderson failed to obtain a statement from Ms Moore and did not ask any investigatory questions of her regarding the matter.

224. Mr Anderson in effect used the email he had received from Ms Moore as her statement (138). Unbeknown to the claimant, as he only mentioned this for the first time at the Tribunal hearing, Mr Anderson had spoken to Ms Moore following receipt of the complaint on 29 April, albeit that he had neither recorded that conversation in any document nor had he informed the claimant (or anyone else) about it.

225. The Tribunal found that the complaint sent to Mr Anderson was a serious one which merited investigation. Whilst it might have been advisable for the respondent to obtain a statement from Ms Moore, and it certainly could have done so, the content of the email provided sufficient information about what she said for an investigation to be undertaken.

226. What was alleged was that this failure was: direct disability discrimination; harassment related to disability; and a breach of the duty of trust and confidence.

227. There was no evidence that a hypothetical comparator without the claimant's disability would have been treated differently and/or that not obtaining a statement was because of the claimant's disability. As with breach 2, the Tribunal found that the way Mr Anderson approached the complaint would have been the same for any Area Manager.

228. The Tribunal found that not obtaining a statement was unrelated to disability. The purpose of not doing so was not to have the requisite effect to amount to unlawful harassment. It was not reasonable for it to do so, if not doing so had the requisite effect on the claimant.

229. The failure to take a statement was not a fundamental breach of the duty of trust and confidence, nor was it capable of amounting to such a breach even if collectively considered with other matters.

Breach 3 – interrogation about arrival time on 30 April

230. Breach 3 alleged that Mr Anderson interrogated the claimant for arriving at the Kendal office at 10.00am on Tuesday 30 April. The evidence about this allegation was relatively limited. Mr Hilton in his grievance decision accepted that no definite time for the meeting was agreed (274). Mr Anderson denied that there was any conversation about the claimant's arrival time at the meeting. The claimant asserted that there was.

231. In the emails the claimant sent to herself on the evening of the meeting, in which she recording what had occurred (145 and 146) the claimant made no reference to Mr Anderson raising the arrival time at the start of the meeting. It was only in a later email to herself sent on 1 May 2019 (154) when the claimant recorded arrival time being an issue. That email recorded Mr Anderson as not being happy about her arrival time, rather than there being an interrogation.

232. What was clear from the claimant's emails to herself was that the claimant did not consider any discussion around arrival time to be a significant issue at the time as, if she had, she would have recorded it in her emails to herself on 30 April 2019. Even what was said in the email to herself written on 1 May did not suggest that this was as serious as was alleged in the List of Issues or the further particulars (43). The Tribunal found that, even if there was a discussion about arrival time, such a discussion was not one which the claimant considered significant at the time.

233. What was alleged was that this failure was: direct disability discrimination; harassment related to disability; and a breach of the duty of trust and confidence.

234. Even if there was a brief discussion about arrival times, the Tribunal did not find this to have been because of the claimant's disability. A hypothetical comparator without the claimant's disability would have been spoken to in the same way.

235. The Tribunal found that any such discussion was unrelated to disability. The discussion did not in fact have the requisite effect on the claimant (and that was not the purpose of any comments made).

236. The Tribunal did not find that any comments about arrival times made, were a fundamental breach of the duty of trust and confidence, nor were they capable of amounting to such a breach even if collectively considered with other matters.

Breaches 4 & 5 – the meeting of 30 April

237. The Tribunal considered what was recorded as beaches 4 and 5 together. They both related to the conduct of the meeting on 30 April 2019. Breach 4 was recorded with brevity in the List of Issues as being Mr Anderson saying to the claimant, *"Come on Alexis, you've been on something for two years"*. In fact, breach 4 (43) raised more broadly the claimant's allegations that Mr Anderson had asked for an off the record chart and the discussion of the claimant's health in the meeting, including mention of her energy levels. Breach 5 was that Mr Anderson had said after an adjournment in the meeting, *"That was Head Office, I don't know who you've upset in there, but they don't like you. They advise I should suspend but I'd only do that if I was looking for dismissal"*.

238. The evidence heard about the 30 April meeting is addressed at paragraphs 65 to 81 above. As is recorded, there was ultimately some broad agreement between the parties about what in general terms was said. There was a difference in evidence about the manner in which parts of the meeting were conducted, exactly what was said, and the order in which things were said.

239. During Mr Anderson's evidence to the Tribunal it was clear that the evidence he gave in his statement could not be relied upon as being true and accurate. This was shown by the following:

a. In paragraph 37 of his statement he said, *"I don't recall anything regards the off the record chat that Alexis refers to"*. His statement contained no other reference to the off the record chat on 30 April 2019. Some of the documents from the respondent's internal investigations into the claimant's grievance made clear that there had been an off the record conversation which Mr Anderson had recalled: the notes of his conversation with Mr Hilton (255); and his email to Mr Hasler in responding to questions asked as part of the grievance appeal (297). When cross-examined, Mr Anderson clearly recalled such a conversation and provided evidence about what he contended was said;

b. In paragraph 36 of his witness statement, Mr Anderson expressly told the Tribunal that he had seen the emails the claimant sent to herself on 30 April 2019. When he was taken to one of those emails during the hearing (145) and asked about it, he was very clear that he had never read it and he took some time to do so; and

c. In paragraph 49 of his statement, Mr Anderson recalled saying to the claimant at some point prior to this meeting that in the HR and other departments the claimant had a reputation, whereas his evidence to the Tribunal was that this was something he said during the meeting (indeed he said that was why he had said they needed to speak off the record).

240. When he gave evidence, Mr Anderson confirmed under oath that the evidence he had given in his statement was true. It was not. In the Tribunal's view, that undermined his credibility. The Tribunal also found his answers to questions generally to be evasive. Throughout his evidence the way in which he responded to questions lacked transparency or clarity and was, on occasion, disingenuous. The Tribunal found that the evidence which Mr Anderson gave was thoroughly untruthful. In particular, the Tribunal found the evidence that he gave about the 30 April meeting(s) to be completely unreliable.

241. As recorded at paragraphs 77 to 81, on 30 April and 1 May 2019 the claimant emailed her own personal email address to record her account of the events which had occurred. The most significant of these was the email she sent to herself at 8.43 pm on 30 April 2019 (145), that is on the evening of her meeting with Mr Anderson. That provided a record of the meeting made very shortly after it occurred, including details of what the claimant recorded as being said in the parts of the meeting which were not recorded by Mr Anderson in his own notes. The Tribunal accepted that account as accurate. Wherever there was any inconsistency between that account

and the evidence of Mr Anderson, the Tribunal preferred the claimant's account of what occurred as recorded in the email of 30 April (145).

242. The Tribunal accepted that Mr Anderson used the words recorded in his notes as being the introduction to the meeting as recorded at paragraph 65 (140). The Tribunal accepted Mr Anderson's evidence that he wrote those notes down for his own benefit in advance of the meeting and would have read them. The explanation did not include any reference to the meeting being an investigatory meeting or to it being formal in any way, but it did explain the subject about which the claimant was about to be asked.

243. It was common ground that the claimant provided an explanation for what had occurred, denied that the comments had been directed at Ms Moore, and explained that the claimant perceived the matter to have been resolved with Ms Moore. After the questions had finished and for the reasons given, the Tribunal found that what was said and what occurred was as recorded in the claimant's email of 30 April 2019 (145). Mr Anderson asked for an off the record chat before he adjourned. The claimant did not understand what that meant, but agreed to it in the light of Mr Anderson's manner. Mr Anderson talked about the claimant's health, referred to the fact that she had been on something for the past two years, and referred to her energy levels. The Tribunal also found that Mr Anderson raised with the claimant the fact that he said she had upset people in HR or Head Office. The claimant became upset. There was a break in the meeting. Mr Anderson referred to HR wanting to suspend the claimant, referenced both suspension and dismissal (which he did not feel was necessary), and told the claimant that there would be formal action.

244. The failure to formally introduce the meeting or to outline what was going to occur, had the effect that the claimant was blindsided by the meeting which took place. The subsequent comments made by Mr Anderson about part of the meeting being off the record, heightened the claimant's concern, particularly as it had not been explained to her that it was a formal meeting (or indeed what type of meeting it was) before the reference to off the record was made. The claimant was upset in the meeting.

245. Mr Anderson referred to the claimant's health. The way he did so was pejorative. The Tribunal did not accept Mr Anderson's assertion that he was being supportive when he referenced the claimant's health. This was a meeting which (on Mr Anderson's own evidence) was to investigate a potentially serious disciplinary issue. In that context, referring to the claimant's health and in particular referring to her being on something (as the Tribunal found that he did), could only have had a negative effect on her. What was said created a hostile, offensive and intimidating environment.

246. The Tribunal found that the comments made by Mr Anderson about those in HR and Head Office, exacerbated the situation for the claimant. The effect of what was said on the claimant was that it closed off the opportunity for the claimant to approach those within the business who might normally be her first port of call after a difficult meeting. The effect of what Mr Anderson said, was to leave the claimant isolated, without any avenue for support or assistance outside Mr Anderson himself (and aside from those who reported to her). Mr Anderson effectively closed down the claimant's opportunity to speak to anyone else. The impact of raising those matters,

and essentially suggesting that the claimant had no support in either HR or Head Office, was to undermine her further during a difficult meeting. The Tribunal found Mr Anderson to be manipulative in what he said during this meeting.

247. Mr Anderson was correct that the allegations he was investigating were never going to amount to gross misconduct. The Tribunal found that there was no need for Mr Anderson to reference suspension or dismissal in the meeting at all. The Tribunal found that the fact that he did and the way that he did so, was a deliberate attempt by Mr Anderson to undermine the claimant and to divert the claimant away from seeking HR support or assistance. The Tribunal entirely accepted the claimant's evidence that, after what was said to her in the meeting, she felt that the respondent's HR department had allowed Mr Anderson to treat her in the way that he had done.

248. The Tribunal found that the way in which Mr Anderson conducted this meeting, and in particular his references to the claimant's health, to matters being off the record, and to the fact that the claimant had upset people in HR or in Head Office, were a fundamental breach of the duty of trust and confidence. No reasonable employer would have conducted themselves in the way that Mr Anderson did in the investigatory meeting. The Tribunal has reminded itself of the relevant test and has found that the actions of Mr Anderson in the meeting were calculated to destroy or seriously damage the relationship and that it was conduct which the claimant could not be expected to put up with.

249. In terms of the disability harassment claim, the Tribunal found that the conduct of Mr Anderson had the purpose of creating a hostile, offensive and intimidating environment for the claimant. The Tribunal found that he set out to create a hostile and intimidating environment, in the way in which he conducted the meeting and in his references to off the record and the alleged issues that HR and other departments had with the claimant. Even had the Tribunal not found that those were Mr Anderson's purpose in his conduct, the Tribunal would have found that the way the meeting was conducted had the effect for the claimant of creating a hostile, offensive and intimidating environment for her, in the context of the meeting and what was discussed. It was reasonable for it to do so.

250. The Tribunal has considered carefully whether the harassment found and the way in which Mr Anderson conducted the meeting, was related to disability. The Tribunal has found that the claimant has proved that the conduct was related to her disability, because of the reference to the claimant's health within the meeting, and in particular, Mr Anderson's statement addressed to the claimant that she had been on something for the previous two years. The medication which she had been taking was due to her disability. Accordingly, the Tribunal found that the conduct was related to disability.

251. The Tribunal found that the claimant did suffer unlawful harassment on the grounds of disability in the way that the 30 April meeting was conducted. The Tribunal did not find that having an investigatory meeting was unlawful harassment. It did find that the way the meeting was conducted and, in particular, the elements of the meeting which Mr Anderson omitted from his meeting notes, were unlawful harassment related to disability.

252. Having found that the conduct of the meeting amounted to unlawful harassment, because of the definition of detriment in section 212 of the Equality Act and the fact that what was alleged would otherwise have come under some other detriment under section 39, the same conduct could not also be found to have been direct discrimination. In any event, the Tribunal also considered whether it would otherwise have found the conduct to have been direct disability discrimination, had that not been the case. The Tribunal did not find that the claimant had proved that a hypothetical comparator without her disability would have been treated differently. The claimant has not proved that the reason for the conduct of Mr Anderson in this meeting was the claimant's disability. The claimant has not identified for the Tribunal the “something more” required to reverse the burden of proof. The Tribunal has carefully considered the burden of proof and whether Mr Anderson’s references to the claimant’s health of themselves were sufficient to show that a hypothetical comparator in materially the same circumstances but without iron deficiency anaemia would have been treated differently. The Tribunal has concluded that they were not. Unfair and unreasonable treatment does not prove discrimination. The Tribunal finds that Mr Anderson would have treated a hypothetical comparator without iron deficiency anaemia (but otherwise in materially the same circumstances as the claimant), as unfairly and unreasonably as he treated the claimant.

Breach 7 – the claimant being told she would be required to attend a disciplinary meeting

253. Breach 7 also related to the 30 April 2019 and was contended to be that Mr Anderson said to the claimant that she would be required to attend a disciplinary hearing. Whilst there could have been other ways of addressing the matters identified, particularly in the light of the claimant's explanation that the person who had raised the complaint had accepted an apology, the Tribunal did not find that the requirement for the claimant to attend a disciplinary hearing was outside the range of reasonable responses that a reasonable employer could take. It was appropriate for the claimant to be informed of this in this meeting in the light of the claimant's acceptance that she had said what she did (albeit that she denied directing the words at the person who had raised the complaint). The Tribunal drew a distinction between: the reference to suspension which was entirely unnecessary in the meeting (it having been concluded that dismissal was not a potential outcome); and the decision to proceed to a hearing. Having the issue considered and determined at a disciplinary hearing was not, in the Tribunal’s view, one that was inappropriate or outside the range of reasonable responses. The decision to invite the claimant to a disciplinary hearing to be heard by someone else, at which the allegations would be considered, was not a fundamental breach of contract.

254. The Tribunal did not find that the claimant was told that she would be required to attend a disciplinary meeting because of her disability. A hypothetical comparator without the claimant's disability would have been told the same thing.

255. The Tribunal found that what the claimant was told was unrelated to disability. The purpose of what the claimant was told was not the requisite effects for unlawful harassment, albeit clearly being told that a disciplinary hearing is to take place may have an upsetting effect on an individual.

Breach 10 – putting words in the area supervisor's mouths

256. Breach 10 arose from the investigation undertaken by Mr Anderson. What was alleged was that on 30 April 2019 the area supervisors believed that Mr Anderson was trying to put words in their mouths. The evidence about this is at paragraph 82 above. In contrast to Mr Anderson, the Tribunal found Mr Slack to be a genuine and truthful witness. The Tribunal accepts Mr Slack's evidence that he believed it was like Mr Anderson was trying to put words in his mouth. Whilst the Tribunal has not heard from Mr Maughan, the Tribunal also accepts Mr Maughan's written account in the email to himself as being truthful (152). Mr Maughan is still employed by the respondent and therefore the respondent could have called him to contradict the email had they wished to, had the content been untrue.

257. The Tribunal found that Mr Anderson's approach to his conversations with the area supervisors on 30 April, did result in them believing that he was trying to put words in their mouths. However, the statements taken from the interviews with Mr Slack and Mr Maughan were accurate in as much as they recounted what it is accepted occurred.

258. The Tribunal did not find that this element of Mr Anderson's questioning of the area managers was, of itself, a fundamental breach of the duty of trust and confidence. It was not conduct which, of itself, met the requirements of the stringency of the test (as explained in the law section above). However, it was capable of being part of such a breach when considered collectively with other allegations, including those which have been reached about the conduct of the meeting on 30 April 2019. The Tribunal did find this to be part of a collective fundamental breach alongside breaches 4 and 5.

259. The Tribunal did not find that Mr Anderson's approach to questioning the area supervisors was because of the claimant's disability. The claimant did not show the something more required to show that it was. Questioning about a hypothetical comparator without the claimant's disability would have been the same. Unreasonable conduct by Mr Anderson did not prove that he would not have also acted unreasonably towards somebody facing the same allegation without iron deficiency anaemia.

260. The Tribunal found the questioning to be unrelated to disability.

Breach 8 – the claimant being told by telephone to attend a disciplinary hearing

261. Alleged breach 8 was that on 3 May 2019 Mr Anderson informed the claimant by telephone that she had to attend a disciplinary hearing. The evidence about this is at paragraph 83. On the evidence heard by the Tribunal, when the claimant raised the lack of a letter and the limited time available before the hearing in the light of the Bank Holiday, the claimant was sent an invite letter on the same day with the details for the hearing (161). In terms of the decision to require a disciplinary hearing, that has already been addressed in relation to breach 7. With regard to the process, it would clearly have been preferable if the claimant's invite letter had been prepared and sent to her at the time she was told about the hearing. It would have been better if it had listed and appended the investigatory materials, as the respondent's standard template letter suggested it should. However, the claimant being told about

the hearing in a telephone conversation was not, of itself, a significant deviation from a fair procedure (if it was one at all).

262. Informing the claimant about the need to attend the disciplinary hearing was not a fundamental breach of contract, nor was it one when considered alongside other matters.

263. There was no evidence that the claimant was told about the hearing in this way because of the claimant's disability. The Tribunal found that a hypothetical comparator without the claimant's disability would have also have been told in the same way.

264. The Tribunal found that the way in which the claimant was told about the hearing was not related to her disability. The way she was told neither had the purpose nor effect required for it to be unlawful harassment (and if it did have such an effect it would not have been reasonable for it to have done so).

Breach 9 – not receiving a paper copy of the complaint

265. Breach 9 was the claimant's contention that she did not receive a paper copy of the complaint raised by the shop manager until after the meeting on 5 May 2019. Ms Coy conducted the disciplinary hearing. What was alleged in this breach was factually correct. The claimant had seen the complaint during the meeting with Mr Anderson on 30 April, which is why she told Ms Coy that she had seen it “briefly” at the start of the disciplinary hearing on 5 May. The complaint was read in full to the claimant by Ms Coy at the start of the 5 May meeting. The claimant had the opportunity in the meeting with Ms Coy to ask for an adjournment if she wished to have time to consider the complaint, but she did not do so. The claimant was therefore given the opportunity to respond to what was alleged. In any event the claimant knew substantially what had been said, as she had been forwarded the email which had been sent to Mr Maughan which contained similar detail. There did appear within the respondent’s internal proceedings to have been some confusion about the existence of two emails containing Ms Moore’s complaint.

266. It clearly would have been preferable for the claimant to have been given a copy of Ms Moore’s email complaint in advance of the disciplinary hearing, if not in advance of the investigation meeting. However, in circumstances where the complaint was read in full at the start of the disciplinary hearing and therefore the claimant was able to respond in full before any disciplinary determination was reached, the failure to do so was not a fundamental breach of contract and was not capable of amounting to such a breach when considered cumulatively with other matters.

267. The Tribunal did not find that the non-provision of the statement to the claimant was because of the claimant's disability. The Tribunal found that a hypothetical comparator without the claimant's disability would also not have been provided with it. The claimant was very clear in her evidence that she did not allege that anyone else had discriminated against her other than Mr Anderson and therefore she did not allege that Ms Coy discriminated against her because of her disability (or harassed her).

268. The non-provision was not related to the claimant's disability and did not have the requisite effect required for it to be unlawful harassment.

Breach 11

269. Breach 11 was the allegation that the claimant was treated differently to how others had been treated during investigation and disciplinary processes.

270. In her evidence to the Tribunal the claimant asserted that she was treated differently to another employee in the process being followed and the sanction imposed (see paragraph 88). The claimant's evidence about what exactly had occurred in the other case was extremely weak and somewhat limited. This made meaningful comparisons about the detailed process effectively impossible. In any event, the Tribunal accepted Mr Anderson's evidence about when the other investigation was and what occurred; the outcome in the other case was ultimately more serious than that for the claimant. The claimant did not prove that the identified comparator was in materially the same circumstances, nor that she was treated less favourably than him in any specific way.

271. As the nature of this alleged breach was to contend that the claimant was treated differently to others during disciplinary and grievance processes, the fact that the claimant did not prove that anyone else in materially the same circumstances was treated differently meant that the alleged breach was not proved.

272. Nonetheless the Tribunal considered more generally the claimant's complaints that the complaint by Ms Moore should not have resulted in an investigation and disciplinary hearing. The Tribunal does not agree that a reasonable employer could not have taken the approach of investigating the matter and holding a disciplinary hearing. The seriousness of the complaint raised, meant that an investigation was entirely appropriate. The fact that someone about whom a complaint has been made has apologised and addressed the complaint with the complainant, does not mean that a reasonable employer cannot still address the complaint (even where the complainant has accepted the apology). After the claimant had admitted saying what she did within the hearing of the complainant, it was not unreasonable or inappropriate for a disciplinary hearing to be arranged. The claimant did not receive any disciplinary sanction at the end of the process, Ms Coy reaching the entirely sensible conclusion that a disciplinary sanction was not merited.

273. As a result, the Tribunal did not find that this alleged breach was proved, but in any event the decision to investigate and hold a disciplinary hearing following Ms Moore's complaint was: not a breach of the duty of trust and confidence (either on its own or collectively with other allegations); not proved as a prima facie case of discrimination because of disability; or related to the claimant's disability.

Breach 12 – the financial information

274. Breach 12 was the allegation that on 1 August 2019, the claimant was asked to complete the full financial year for the purpose of a compliance report compared to a male Area Manager, who was allegedly asked to carry out a quarter of the financial year. The evidence which related to this allegation is recorded at paragraph 89.

275. This was alleged to be sex discrimination and/or harassment related to sex, as well as direct disability discrimination, harassment related to disability, and a breach of the duty of trust and confidence.

276. The Tribunal accepted Mr Anderson's evidence that he did not ask the claimant to complete the task with reference to the full financial year. The issue appeared to have arisen as a result of a confusion on the part of the claimant, albeit the evidence available to the Tribunal was somewhat limited. Nonetheless, based upon Mr Anderson's evidence, what the claimant was asked to do was the same as that asked of Mr Collier.

277. As a result of that finding, the Tribunal did not find that the claimant was treated less favourably than Mr Collier, nor that she was treated less favourably than a hypothetical male comparator, or a hypothetical comparator without the claimant's disability, would have been. There was no evidence that the request either had the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The Tribunal did not find the request to be related to either sex or disability. The request was a perfectly reasonable request for a manager to make, it was not a breach of the duty of trust and confidence (either on its own or when considered collectively with other breaches).

Breach 14 – the appraisal score

278. Breach 14 was that the claimant receiving one of the lowest scores in the region in her May 2019 appraisal. The facts about this appraisal are recorded in paragraphs 90-95 above. The appraisal score was provided to the claimant in September 2019.

279. The respondent submitted that as the claimant received a B, as did all the other Area Managers, this allegation was not correct. However that did not take account of how the appraisal scores were recorded and provided to the individuals. As recorded in the comparative table, the claimant did receive the lowest appraisal score when the numeric score was taken into account.

280. The Tribunal did not find that the claimant had shown the something more required to show that her appraisal score was because of her disability. She was treated less favourably than all Area Managers but one without her disability, as she received a lower score. However, without the claimant providing the evidence which showed a prima facie case that this was because of disability, her claim for direct discrimination could not succeed. As a result, it was not necessary for the Tribunal to go on and decide whether the respondent had proved that the reason for the score was in no sense whatsoever due to disability.

281. For the harassment claim, the Tribunal found there was no evidence that the grade given was related to the claimant's disability.

282. The Tribunal also did not find that the claimant being given an appraisal score of B was, or could have been, a breach of the duty of the trust and confidence, or was capable of collectively being part of such a breach. The evidence which the Tribunal heard was that the score given to the claimant was higher than the score which she gave herself.

Breach 15 – the regional meeting

283. Breach 15 was the allegation that, on 5 September 2019, the claimant was asked by another Area Manager (Mr Sanders) if she was looking for alternative employment due to how females were treated at the regional meeting in Carlisle. Something that was notable about this allegation was that the claimant did not allege that initially she had identified any difference in treatment at the meeting, but rather her allegation was based upon what another area manager had said to her a few days after about what he had perceived.

284. The evidence about this allegation is recorded at paragraphs 96 and 97. Mr Anderson denied that anybody was treated differently because of their sex. Mr Sanders is recorded as part of the grievance appeal investigation as having said that the claimant received a bit of a grilling, but neither he nor any of the attendees identified that female area managers were treated differently.

285. Even if Mr Saunders did tell the claimant that he believed that sex was a factor in how female area managers were responded to in the meeting, for the Tribunal to reach a finding that the claimant was treated less favourably because of her sex would require something more to prove that it was. He did not give evidence to the Tribunal about his suggestion and the reason for it, nor was that recorded by him when he was asked during the grievance appeal investigation. The claimant's own evidence was insufficient to amount to anything more than a vague assertion about the quantity of questions asked, without providing any genuine evidence that would establish a prima facie case of less favourable treatment. The Tribunal did not find that the claimant had shown the something more required to show that the additional questioning was because of her sex.

286. The Tribunal found there was no evidence that any questions asked either had the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. There was no evidence that any questions asked or the quantity of questions asked of the claimant were related to sex or disability.

287. Whilst recorded in the list of issues as also being an allegation of direct disability discrimination, this was not genuinely the claimant's case. As she asserted that what was noticeable about the amount of questions asked was whether the presenter was female or male, it cannot have been because of the claimant's disability and the Tribunal does not find that it was.

288. As a result of what has been found, the allegation is also not found to have been a breach of the duty of trust and confidence (either individually or collectively). In any event, the fact that the claimant only appeared to have identified an issue after her conversation with Mr Collier, does not support a contention that the quantity of questions asked about her presentation did amount to such a breach.

Breach 19 – welfare meetings

289. Breach 19 was an alleged failure by the respondent to conduct welfare meetings with the claimant.

290. An employer does not, generally, have an obligation to conduct welfare meetings with an employee. The claimant did not identify any particular reason why the respondent was obliged to conduct meetings about her health with her. As the claimant recorded in her further particulars (47), the only formal meeting at which the respondent discussed the claimant's health with her about which the Tribunal heard evidence was the meeting of 30 April 2019, which has already been addressed. The respondent in its submissions identified emails from Mr Anderson asking if the claimant was ok, and asking her to let him know if she had any problems. There were no emails identified by the claimant in which she sought help or requested a welfare meeting. Not arranging such a meeting was not a breach of contract by the respondent. There was no evidence whatsoever that the reason why no such meeting was offered was because of the claimant's disability or was related to the claimant's disability. Not arranging a meeting, was not harassment of the claimant as not doing so did not have the proscribed purpose or effect required to establish harassment.

Breach 20 – the telephone call on 22 November 2019

291. Breach 20 was the conversation which the claimant had with Mr Anderson on 22 November 2019, being the conversation which the claimant broke away from to submit her notice of resignation. This was also alleged to be the final straw. The evidence about this call is at paragraphs 107-111.

292. What was discussed in this conversation was: the claimant's email of 21 November in which she had said that she was leaving at 2 pm on 22 November; the issue of the holiday taken in March (breach 16); Sunday working; and the SSBT Product Manager role.

293. As the respondent's representative submitted:

a. The background to the conversation was that the claimant had said she was finishing at 2 pm;

b. The claimant accepted in cross-examination that it was not for her to tell Mr Anderson that she was leaving work early, and this needed to be agreed with Mr Anderson beforehand;

c. In those circumstances it was perfectly reasonable for Mr Anderson to contact the claimant to discuss this further;

d. Whereas the Tribunal might be tempted to take the view that the claimant was a senior manager and should be able to manage her own time, this was not Mr Anderson's custom and practice;

e. Mr Anderson's evidence was that he did not like to relax the rules; and

f. Whilst the claimant might have viewed this as unfair and the Tribunal might take the view it was a stringent approach, it did not make the approach an unreasonable one.

294. Neither the holiday in March nor the issue of Sunday working was new. Sunday working had been raised in an email in August 2019. The claimant's contract

(75) defined a minimum number of Sundays when the claimant would be expected to work, so asking her to work more was not a breach of contract. In any event, Mr Anderson was entitled to discuss with her working more.

295. In the context of a discussion about leaving early and not being willing to work the hours/days that were now being requested, the fact that Mr Anderson raised a potential vacancy with the claimant which he believed to be of comparable seniority and which had 9-5 working and a location which might suit the claimant, was also not unreasonable. Whilst, clearly, the claimant was able to say that she was not interested in it, the very fact it was discussed was not a breach of contract.

296. The Tribunal did not find that this call, or what was said in it, was because of the claimant's disability (or the claimant's sex) or was related to it. The call and the issues discussed, followed the claimant's email about leaving early.

297. The Tribunal found that the discussion did not either have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant (and if it did have such an effect it was not reasonable that it did so). What was said was not related to disability.

298. The conversation was not one which breached the duty of trust and confidence or was part of such a breach when considered cumulatively with other breaches. The Tribunal considered the guidance in **Omilaju** and found that nothing about the call on 22 November 2019 contributed anything to an earlier breach. It did not contribute, even slightly, to the breaches found of the implied term of trust and confidence.

299. One other matter which the claimant raised in her resignation letter and which she was clearly unhappy about at the time of her resignation, was the way Mr Anderson had approached her and the area team following the grievance about the robbery. The evidence about this is recorded at paragraphs 99-102. The Tribunal found the grievance raised by the employee within the claimant's area to be a serious one, which clearly merited some response. A reasonable employer was able to address it with the area team in the way that Mr Anderson did, as a reasonable response to the grievance meeting. To the extent that the meeting was part of the reasons for the claimant's resignation, the Tribunal did not find the approach taken to be unreasonable nor did it find that the approach breached the duty of trust and confidence (nor would it have cumulatively contributed to such a breach), even had that been alleged.

Applying the breaches found to the issues

300. As a result of the findings detailed when considering the individual breaches, the Tribunal did not find that the claimant was treated less favourably than any of the Area Managers because of her sex. The Tribunal found that there was no evidence that proved the something more required to reverse the burden of proof and show that any treatment alleged was less favourable treatment because of the claimant's sex.

301. For the allegations of direct disability discrimination, the Tribunal did not find that the claimant was treated less favourably than a hypothetical comparator without

her disability would have been in any of the ways alleged. In addition, for alleged breaches 4 and 5, as harassment related to disability was found, direct disability discrimination could not also be found.

302. For the allegations of sexual harassment, none of the matters alleged had the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. What was alleged was not related to sex and the claimant had not shown the something more required to establish the prima facie case that it was.

303. For the allegations of harassment related to disability, the Tribunal found that breaches 4 and 5, that is the conduct of the meeting(s) on 30 April, were unlawful harassment. It found that the purpose of Mr Anderson in the way that the meeting was conducted was to create a hostile, offensive and intimidating environment for the claimant. It also found that the way the meeting was conducted had the effect of creating a hostile, offensive and intimidating environment for the claimant (and it was reasonable for it to do so). The Tribunal found that conduct to be related to the claimant's disability as it included the comment made about medication, being medication which the claimant took for the condition found to be a disability. Harassment does not require a comparator to be identified or for treatment to be because of a protected characteristic, it just needs to be related to it.

304. The Tribunal did not find that the claimant was unlawfully harassed related to her disability, in any of the other ways alleged. The Tribunal did not find that any of the other matters alleged related to the claimant's disability (being iron deficiency anaemia). The Tribunal did not find that any of the things alleged had the purpose of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Some of the things alleged did have the prescribed effect or may have done so, as has more specifically been set out in relation to each allegation.

Constructive dismissal

305. As the claimant entirely correctly submitted, the approach which the Tribunal must take to the constructive dismissal claim, was that outlined in **Kaur** (see paragraph 133). When the Tribunal applied that approach to the findings in this case, it identified the position as follows:

a. The most recent matter which the claimant said caused or triggered her resignation, was what was said in the telephone conversation on 22 November 2019 (breach 20);

b. The claimant did not affirm the contract following that act, she broke off the call and resigned immediately following it, prior to resuming the call;

c. As recorded above in relation to breach 20, what was said in the call was not found by the Tribunal to have been a repudiatory breach of contract;

d. Also as recorded in relation to breach 20, the Tribunal did not find (applying the approach explained in **Omilaju**) that what was said in the conversation was part of a course of conduct comprising several acts

and omissions which, viewed cumulatively, amounted to a repudiatory breach of the **Malik** term. The Tribunal did not find that anything said in the call contributed anything to an earlier breach; and

e. The claimant resigned partly in response to the call, but as that had not been found to have been a breach of contract, or to have contributed anything to an earlier breach, she did not resign in response to a breach of contract.

306. As a result of those findings and in particular the findings explained at paragraphs 298 and 305(d), the claimant's claim for constructive dismissal did not succeed. The last straw upon which she relied was not part of (nor did it add anything to) a cumulative breach of contract. Nonetheless the Tribunal went on to consider the matters which it did find to have been a fundamental breach of contract which occurred on 30 April 2019 (being the conduct of the meeting on that date, breaches 4 and 5, and (cumulatively) also putting words in the area supervisor's mouths on the same date, breach 10). The Tribunal found that the claimant continued in employment for a significant length of time without leaving following those events, and therefore she had waived the breach and/or affirmed the contract of employment by doing so. As was clear from what the claimant said in her resignation letter as quoted at paragraph 112 and the extent to which that letter was dedicated to recounting the claimant's view of the events on 29 and 30 April 2019, the real reason why the claimant chose to resign was her continued unhappiness with the events of those dates and the investigation and disciplinary process at that time. However, the Tribunal found that by remaining in employment for almost seven months before resigning, the claimant had waived the breaches of contract which occurred as part of that process and affirmed the contract.

307. As the Tribunal found that the claimant was not constructively dismissed, the claims for constructive dismissal as direct sex and/or disability discrimination also could not succeed, as the claimant was not constructively dismissed.

Jurisdiction/time

308. The final issues which the Tribunal considered, in the light of the findings made, were the jurisdictional/time issues which are detailed at paragraphs 8-11 above as they appeared in the List of Issues.

309. The discriminatory harassment which the Tribunal found (breaches 4 and 5) occurred on 30 April 2019. As the Tribunal did not find any other unlawful harassment or discrimination to have occurred, the unlawful harassment cannot have been an act or omission which continued over time. The date by which a claim should have been entered (or ACAS early conciliation commenced) in accordance with section 123 of the Equality Act 2010 (if time were not extended) was 29 July 2019. The claim was not in fact entered at the Tribunal until 17 May 2020, nine and a half months late. ACAS early conciliation commenced on 18 March 2020, seven and a half months after the primary time limit had expired. The claim was entered outside the time required.

310. The Tribunal considered whether the claim was brought within such other period as it thought just and equitable, and considered the law as detailed at

paragraphs 165-168. Applying that law to this case, the position was found to be as follows:

a. The delay was a lengthy one, being nine and a half months from the expiry of the primary time limit;

b. The claimant emphasised the time taken by the respondent to complete its internal processes as being what she believed made it just and equitable to extend time. Awaiting the conclusion of an internal process can be a relevant factor in the exercise of the discretion. The claimant raised issues at the time of her resignation on 22 November 2019 and the grievance appeal outcome was not provided until 13 March 2019, very shortly before the claimant commenced ACAS early conciliation. However, even if this were accepted as explaining that period of delay and providing a reason why time should be extended for that period, the grievance process did not commence until 22 November 2019 (or as a formal grievance slightly later), being approximately four months after the primary time limit had already expired;

c. Save for the grievance process, the claimant provided no other reason for her delay in entering her claim. The claimant started emailing herself evidence/notes from 30 April 2019. There was no evidence that she sought advice. The claimant was an intelligent and able individual who was employed in a senior role, as an Area Manager. She would have been able to research and identify the time limits which applied to claims in the same way as anyone can do (such resources being widely available). She ultimately identified how she should enter a claim at the Tribunal. The Tribunal could not see any reason why she did not bring a claim earlier, or why she could not have done so had she looked into doing so (at least prior to the period when she awaited the conclusion of the internal process);

d. There was no prejudice and hardship identified by the respondent, save for the normal reduction in recollection over time and the fact that the claims themselves could be found against it. The respondent was able to defend the claims brought;

e. The prejudice and hardship of not extending time was a very significant factor for the claimant, as she would not be able to obtain a Judgment and remedy in claims which the Tribunal have otherwise found; and

f. Time limits are there for a good reason. The exercise of the discretion is the exception rather than the rule. The onus lies with the claimant to establish that the time limit should be extended.

311. The Tribunal balanced all of the factors outlined when deciding whether it should exercise its discretion to extend time on a just and equitable basis. The prejudice to the claimant was a significant factor. However, taking account of what was said in **Robertson v Bexley** and particularly in the light of the length of the delay and the absence of any genuine reason for that delay (at least prior to 22 November 2019, four and a half months after the primary time limit expired) the

Tribunal found that the claim was not brought within such other period as the Tribunal thought just and equitable and the time for bringing the claim should, accordingly, not be extended on a just and equitable basis.

Summary

312. For the reasons explained above, the Tribunal did find that there was unlawful harassment of the claimant related to her disability in the way the meeting was conducted on 30 April 2019, but as the claim was not entered within the time required and it was not just and equitable to extend time, the Tribunal did not have jurisdiction to determine that claim. The claimant's other claims did not succeed for the reasons given.

Employment Judge Phil Allen
Date: 28 April 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
29 April 2022

FOR THE TRIBUNAL OFFICE