EMPLOYMENT TRIBUNALS

Claimant: Rita Gupta

Respondent: Santander UK PLC

JUDGMENT OF THE EMPLOYMENT TRIBUNAL WITH WRITTEN REASONS

Heard at: Birmingham via CVP

On: 13,14,15,16,17 March 2023
20, 21, 22, 25, 26 (In Chambers) September 2023
5 October 2023

Before: **Employment Judge Algazy KC**

Panel: **Ms S. Bannister**

Mr P. Wilkinson

Appearances

For the Claimant: **in Person assisted by R. Gupta (Brother)**

For the Respondent: **Mr A. Mathur (Counsel)**

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim for constructive unfair dismissal is unfounded and is dismissed.

2. The claim for failure to make reasonable adjustments is unfounded and is dismissed.

3. The claim for harassment related to disability is unfounded and is dismissed.

4. The claim for breach of contract is unfounded and is dismissed.

Oral reasons having been given, the parties were reminded of Rule 62(3) of Schedule 1 of the 2013 Rules regarding written reasons not being produced unless requested and/or subsequently requested in accordance with Rule 62(3) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Rules').

Judgment was handed down on 5 October 2023 with Oral Reasons. The Claimant requested Written Reasons pursuant to Rule 62(3) and these are provided below.

WRITTEN REASONS

INTRODUCTION

1. The Claimant, Miss Rita Kumari Gupta was employed by the Respondent, Santander UK Plc, latterly as a Personal Banker, from 11 February 2008 until 12 June 2016 having resigned on 4 May 2016. The Claimant claims that she was constructively unfairly dismissed, that she suffered disability discrimination (harassment and a failure to make reasonable adjustments) and that she is owed notice pay.

2. The Respondent accepts that from February 2016 the Claimant was disabled

within the meaning of the Equality Act 2010 and that it had appropriate knowledge of that fact at all material times The Respondent denies all the claims and also takes time jurisdiction points.

3. The Hearing was held via CVP. As was noted in the case management order of Employment Judge Gaskell of 22nd December 2022 [2:934], this was done to accommodate the Claimant's health condition. The Claimant was not legally represented but was assisted by her brother, Mr. R. Gupta who initially presented the Claimant's case. In fact, and as a reasonable adjustment, the Claimant and her brother took it in turns to present and represent the Claimant as proved most expedient and efficient to the Claimant at different stages of the proceedings. In accordance with the Court of Appeal guidance in **Mensah v East Hertfordshire NHS Trust [1998] IRLR 531**, the Tribunal sought to assist the Claimant, a litigant in person, with the Tribunal process throughout the proceedings. This included explaining the purpose and importance of cross-examination and even suggesting questions that might be put and the manner of putting them. On a number of occasions, during cross- examination, the Respondent's witnesses were taken to a whole series of documents as well as extracts from witness statements with no actual question being asked of the witness. On other occasions, the witness was simply asked to confirm a statement plainly made in their own witness statement whilst obviously significant challenges were not made despite the fact that the importance of so doing had been highlighted. In addition, the Claimant was allowed a significant degree of latitude by expanding on answers in respect of matters that would ordinarily be the subject of re-examination. All this was explained to the Claimant, and it was agreed that her brother would conduct her re-examination to capture anything missed during cross-examination. The Tribunal also made a number of adjustments to assist both the Claimant and her brother. Despite the practice of regular breaks being built into the Tribunal process that was adopted, additional and significant further breaks were afforded. The Claimant's cross-examination was taken at a considerably reduced pace and there was also an arrangement in place whereby certain questions being put to the Claimant in cross-examination could be reduced to writing in the "chat" section on screen. There was also a second round of written closing submissions from the Claimant as a result of a request from the Claimant's brother after Closing

submissions had been completed and after the Tribunal had begun its deliberations.

4. The Claimant gave evidence on her own behalf and submitted witness statements from some 5 other witnesses. The Tribunal admitted those statements into evidence and gave them such weight as was appropriate.

5. The Respondent was represented by Mr A. Mathur of Counsel and called 3 witnesses. They were Claire Butler, Regional Manager; Harry Saggu, Branch Manager and Agnieszka Symonowicz, HR consultant. 2 other witnesses (Abigail Down and Andrea Grant) for whom witness summonses had originally been issued and whose statements were in the witness bundle were no longer relied on by the Respondent and, insofar as was necessary, the witness summonses were revoked. There was some reference made to those statements by the Claimant and the Tribunal considered those witness statements and gave them such weight as was considered appropriate in all the circumstances.

6. There were a number of bundles running to some 2000 odd pages. Whilst there had been some bundle issues on day 1, these were largely resolved by the commencement of evidence on day 2 of the Hearing. Both sides produced helpful written submissions. Numbers in square brackets refer to the Trial bundles followed by page number.

THE ISSUES

7. The issues in this case were largely identified and reduced to a List of Issues ('LOI') as long ago as 16 January 2017 following a Case Management Hearing before EJ Broughton [1:42]. These were augmented as foreshadowed in the Original Order to add a few specific additional matters in respect of the constructive unfair dismissal claim in §1.1.1 of the LOI. Those further matters were agreed by the parties and finalised by around midday on day 2 of the hearing. Reference to the Issues in these reasons are references to the Issues and numbering in the final consolidated LOI. A copy is annexed hereto.

THE FACTS

8. On the evidence presented to the Tribunal, we found the following material facts and such additional facts as are referred to in the Conclusions section of these reasons.

CREDIT

9. The issue of witness credibility loomed large in this case and the Respondent made some trenchant criticisms of the reliability of the Claimant as an accurate historian of events going back over a number of years to 2013. Reference was made to the oft-repeated remarks of Leggatt J (as he then was) on the preferability of basing factual findings on inferences drawn from documentary evidence and known or probable facts as the utility of memory fades – See **Gestmin SGPS SA v Credit Suisse (UK) Ltd** [2013] EWHC 3560 (Comm).

10. The criticism of the Claimant as a witness was carefully articulated and identified under 5 separate headings:

- Internal inconsistency;
- Confused evidence, generally followed by admission and resiling;
- External inconsistency with contemporaneous documents;
- Unreasonable narration, often based on an unjustified sense of grievance or unarticulated wishes;
- Accepting all prior steps in a chain but rejecting the logical corollary.

11. Regrettably, we find considerable force in those submissions which coincided with the Tribunal's own unanimous assessment of the reliance that could be placed on the evidence of the Claimant where it was unsupported by contemporaneous documentation.

12. In contrast, we found that the Respondent's witnesses gave their evidence in a plain and straightforward manner and were unshaken by cross-examination or questions from the panel, when asked.

13. We therefore treated the evidence of the Claimant with some caution. However, we considered each conflict of evidence on its own merits and did not

mechanistically simply prefer the evidence of the Respondent.

RELEVANT CHRONLOGY

14. On 11 February 2008 the Claimant commenced employment as a 'sales consultant' with Santander, previously known as Abbey. In April/May 2009 the Claimant was re-deployed to the role of Personal Banking Adviser and then on 28 June 2010 was given the new job role of 'Personal Banking Adviser (Authorised)'. After a variety of posts, the Claimant moved to the Respondent's 'Dudley 43' Branch in early December 2012**.** The manager of this branch was Sarah Caffull, and the Area Manager for the Region was Spencer Greaves.

15. On 28 March 2013, the Claimant was requested by her manager to work on the cashier counter to service and carry out cash transactions for customers on the till. An incident occurred whereby the Claimant came under suspicion of causing a till difference**.** The Claimant raised a grievance in respect of this on 3 April 2013 in line with Santander's Bullying and Harassment and Grievance Policy. A Grievance Meeting was held on 3 July 2013 and by a letter dated 1 July 2013 the grievance was not upheld [1:117].

16. The Claimant was absent from work for a period and underwent a work-related stress risk assessment. This was carried out by assessor Terry Mainwaring at her home on 19th July 2013 [2:690-693].

17. The Claimant appealed the Grievance outcome. Following an appeal meeting on 18 September 2013, the Claimant was sent a Grievance Appeal Outcome on 7 October 2013 that upheld part of her grievance [1:128] but which rejected the allegation that her manager bullied her. The recommendations made were as follows and in these specific terms:

Following our meeting and my decision the following recommendations have been made and agreed to:

- **A written apology from Sarah Caffull is to be given to you.**
- **A move to Dudley 235 branch has been agreed on your return to work.**

- **An informal meeting with the Regional Manager, Spencer Greaves.**
- **Your current period of absence from work to be managed by myself, any home visits etc. to be conducted by myself.**
- **We have also agreed your annual leave dates (21 Oct - 25th Nov) and a potential return to the business on/or after the 25th November, following your GP's agreement.**

18. The Claimant spoke to her Union, Advance, in December 2013 about an allegation that Sarah Caffull had falsified the Claimant's signature on a feedback form for March 2013. The union note [2:707] recorded that the Claimant would speak to her Regional Manager, Spencer Greaves **"about it but to also inform him that she is not going to do anything about it".** In answer to a question from the Tribunal, the Claimant accepted that she understood that the email she sent to Spencer Greaves on 31 December 2013 would not alert the reader to know that she was alleging that her signature had been falsified. The email also made it plain that the Claimant did not want to pursue this any further. She also accepted that, on re-reading the relevant associated emails, she would not have any expectation of the Respondent coming back to her and involving her in any investigation on the matter.

19. It was the Claimant's case (paragraph 21 of her witness statement) that no informal meeting was held with Spencer Greaves despite her chasing this up. However, she accepted in cross-examination that she did not, in fact, follow up on this by email after 3 January 2014 when Spencer Greaves visited the bank branch the Claimant worked at. She had attempted to speak to Mr Greaves, but he was otherwise engaged. She also accepted that he is a busy person, and a busy senior manager should be reminded if he has forgotten to do something.

20. Following an incident on 13 June 2014 in which the Claimant was assaulted by a customer, she complains that she was not given any support by the respondent or her manager Kam Sohi (Issue 1.1.1.3). Paragraph 25 of the Claimant's witness statement refers to her manager

doubting her version of events. In cross-examination, but not before, the Claimant explained that this related to a remark that she was told had been made by Kam Sohi. The Claimant had not witnessed this and there was no record of any such remark having been made or any doubts expressed by Kam Sohi. Further the Claimant accepted in cross-examination that it was not unreasonable for the Respondent to pass personal data regarding the customer directly to the police, rather than to the Claimant.

21. One of the matters complained of by the Claimant (Issue 1.1.1.4) is that no discussion took place with her prior to the merger of the two Dudley Branches which took place around December 2014, despite a recommendation of the 2013 grievance incident being that the Claimant move branch to the 235 Dudley Branch. In fact, in the autumn of 2014, the Claimant spoke to Claire Butler about certain concerns to do with the merger. As the Claimant puts it in paragraph 25 of her witness statement

"I did raise my concerns with my Regional Manager, Claire Butler, in November/ December 2014 who gave me reassurance at the time that I had nothing to be concerned about and to 'carry the olive branch' which I felt was a positive approach and embraced it."

Claire Butler noted the exchange at paragraph 5 of her witness statement:

"Rita introduced herself to me and asked if she could speak to me in confidence. Rita told me that she was worried about how I and others would perceive her (or words to that effect) in the branch regarding a grievance that she had raised historically. Rita seemed troubled about what I knew about the grievance and that other people in the branch knew about the grievance. I was taken aback by what Rita said. I knew nothing about the grievance, and told Rita that. I said that unless it was something that Rita felt she needed me to know about or if there was something that she needed me to action regarding it moving forward, that the grievance was in the past. I also told her to work with her new colleagues as she ordinarily would and if she did have any concerns she was to highlight them to me. I reassured Rita that I had enjoyed meeting her and that I looked forward to working with her. Rita did not raise this issue with me again, so I assumed that whatever had worried her had not materialised."

22. There was initially a suggestion that in February 2015 (see paragraph 26 of the Claimant's witness statement) that the Claimant's Manager, Abigail Down had unfairly provided her with feedback in a session witnessed by

Claire Butler. In cross examination, the Claimant withdrew that suggestion in terms:

"In hindsight I don't criticize Abigail Down – had that been explained clearly – the situation wouldn't have occurred"

23. Another matter of concern raised by the Claimant concerned the number of observations between January and April 2015 which she regarded as excessive (Issue 1.1.1.5.). However, we accept that the need for these observations was, at least in part, because this aspect of the Claimant's role was Financial Conduct Authority ("FCA") regulated. Certain observations were regulatory requirements and needed to be conducted to permit the Claimant to conduct certain business e.g. a live General Insurance ("GI") opportunity with a customer culminating in a sale. The Claimant was far from unique in this regard as the general email sent by Abigail Down to the Claimant and others on 19 March 2015 demonstrates [1:164].

24. The Claimant unfortunately suffered a fire at her house in mid-March 2015.

24.1 Issue 1.1.1.6 raises this complaint:

"The Respondent's alleged lack of support of the Claimant after she suffered a house fire in March 2015, by failing to give her further time off following an initial period of leave."

24.2 Abigail Down, who was away on an academy course, initially refused the Claimant's request for emergency/annual leave in an email dated 18 March 2015 on grounds of resourcing within the branch. Two other Private Bankers were on annual leave [1:164].

24.3 Ms Gupta's union representative contacted Claire Butler, who granted the leave request and explained that Abigail Down was away and may not have understood the urgency of the Claimant's request [see Claire Butler's witness statement at paragraph 17]. Further complaint is made that Claire Butler reacted badly to the issue being raised with the Claimant's Union (Issue 1.1.1.7 and paragraph 27 of the Claimant's

witness statement) Having heard Claire Butler's evidence we accept that at no point did she get angry at the Claimant or verbally berate her for having involved her union. We note that no contemporaneous complaint was made about Claire Butler's behaviour.

24.4 Further leave was sought by the Claimant in an email dated 27 March 2015 to Abigail Down [1:168]. The Claimant did not receive a response from Abigail Down but neither did she follow up the request with her. The Claimant's email acknowledged that she understood that it was a very important and busy time for the business and that there were a number of colleague absences.

25. The second part of Issue 1.1.1.7 relates to an alleged incident on 7th April 2015:

"The Claimant alleges she was verbally berated by Claire Butler and Abigail Down: ……and ii) in a meeting on around 7 April 2015 following her de-authorisation without her knowledge."

25.1 There was a degree of equivocation in the Claimant's testimony as to whether she knew that she was, in fact, de-authorised. The Tribunal noted the Claimant's initial evidence in these terms:

> "
> - **To my knowledge I was never de-authorised**
> - **I was told after – I have no documentary evidence that I was told nor was I told verbally by my manager**
> - **That is my position"**

25.2 Following a question from one of the Members and having been taken to her email of the same date to Claire Butler and Abigail Down at 16.46 [1:204/5] the Claimant accepted that she knew she was de-authorised after she had seen a customer and had had a meeting with Claire Butler and Abigail Down on 7 April 2015 but not before.

25.3 The email contains these words:

> **" Further to our meeting today, I would first of all like to apologise for the misunderstanding of not seeing customers without supervision since Saturday 5th April, 2015 after my observation on a 123 upgrade."**
>
> We accept that the 5th of April reference is obviously a typo and should read Saturday 4th April.

25.4 In her evidence to the Tribunal, the Claimant initially said that she wrote this email under duress and that she wanted to be polite to Claire Butler. The Claimant then suggested that rather than "duress "the better way of describing the situation was that she felt compelled to write the email. She accepted that the email seemed to confirm that the mistake was her responsibility and that Claire Butler's reply was positive and supportive and not berating However, the Claimant did not accept that that was what Claire Butler had said in the meeting earlier.

25.5 Claire Butler deals with this in her witness statement at paragraph 12:

"**The second instance which Rita complained about happened on 7 April 2015. On 7 April, Rita had been observed by Abigail dealing with a bank account application when she was de-authorised (this means she could only complete such applications whilst being supervised). Abigail had invited Rita to meet with us both to discuss what had happened. Neither Abigail nor I were angry or aggressive to Rita , we simply explained the situation and the seriousness of it in a professional manner as we would with any employee. It is possible that either one or both expressed the seriousness of the situation, but nothing more than that – it is not professional."**

On balance, we prefer the evidence of Claire Butler as to the content of the discussions on 7 April 2015, including Claire Butler's denial of the exchanges referred to in the 3rd subparagraph of paragraph 28 of the Claimant's witness statement – See paragraph 14 of Claire Butler's witness statement.

26. The Claimant was signed off as unfit to attend work from 10 April 2015 with "Workplace stress". This was initially for 2 weeks and was extended for some 10 months until her return to work on 11 February 2016.

27. Various meetings were held with the Claimant in the time that she was signed off sick with Claire Butler, Abigail Down and then Irzan Bashir who was to take over as contact point from Abigail Down in late June 2015. Irzan Bashir was the manager of the Halesowen branch which had been mooted as a possible branch to which the Claimant might return.

28. On 1 October 2015, the Claimant attended a wellbeing meeting with Irzan Bashir. After the meeting, he called Claire Butler to update her. The Claimant had raised concerns regarding travelling to the Halesowen branch. She was not keen to travel for 2 hours on the bus and raised the possibility of returning to the Dudley branch. It was accordingly agreed that Abigail Down would resume communicating with the Claimant with a view to supporting her return to work at the Dudley branch.

29. On 18 November 2015, the Claimant was invited to a sickness absence wellbeing meeting [1:239] which took place on 9 December 2015 [1:246]. The minutes of this meeting [1:246-249] record that inquiries were made about the course of action and adjustments that would assist the Claimant with her return to work.

30. Of particular note are the Claimant's responses in respect of which branch she would wish to return to. After acknowledging that it was a **"hard one**" the Claimant said in response to a question from Abigail Down "**Yes am happy to go to any branch Dudley is preference "** [1:248]. Nor did the Claimant raise any concern about the possibility that the Respondent might need to move to a stage 3 absence hearing if she did not return to work in accordance with the plan. As an alleged instance of harassment, Issue 3.1.2 refers to the Claimant. being sent a letter in April 2016 by her Regional Manager that she would be invited to a stage 3 meeting if things didn't work out.

31. By 31 December 2015 the Claimant had made it known to Abigail Down that, in fact, she now wanted to return to a quieter branch than Dudley.

Efforts were made to understand and accommodate the Claimant's plans. By now, the threshold for a Stage 3 Hearing had been reached.

32. In an email dated 14 January 2016 [1:282-4], the Claimant said that she had thought about her phased return to work but had not requested a 12-week phased return.

33. Abigail Down wrote to the Claimant on 30 January 2016 [1:293] setting out her understanding of the reasonable adjustments agreed. Namely, but not limited to:

    - Allowing the Claimant a period of annual leave to enable a further delay in her return to work;
    - Allowing the Claimant to move to Merry Hill to conduct her phased return to work;
    - Providing for an 8-week phased return.

    Further, in respect of the Claimant's wish to permanently reduce her hours to two days a week, this could be accommodated at Dudley, following the phased return.

34. The Claimant responded on 8 February 2016 and confirmed that she would return to work on 11 February. She expressed the desire to be transferred to a quieter branch, Merry Hill, Kingwinsford on a permanent basis [1:301]. The Claimant did not gainsay the suggestion that she had asked for a permanent reduction in hours to two days a week. Abigail Down replied that she had raised the issue internally and that they would consider **"…how we can support a permanent move to a quieter branch after the phased return"** [1:301].

35. Harry Saggu became the Claimants Manager and, on her return, concentrated on a training programme to fully authorise her for all product areas [1:308-9]. Harry Saggu invited the Claimant to attend a Personal Banking Academy. However, after initially accepting the invitation on 4 March

2016, she emailed Harry Saggu to say that she no longer wished to attend the academy on 9 March 2016 and apologised for any inconvenience caused [1:328].

36. The same email contained this sentence:

"I would also like to confirm the hours I would like to do after my phased return to be 18 hours and when I'm in better health to increase these and approach my Branch Manager/Claire at that time."

37. By reference to the timing of the email and her evidence in cross-examination, the Claimant alleged that Harry Saggu applied duress on her to send that email by walking into her office, standing over her, shouting at her and forcing her to write the email. We accept the Respondent's submission that no such very serious duress in fact occurred. There is no record of any contemporaneous allegation of the kind being made.

38. At Merry Hill under Harry Saggu, the Claimant was not authorised to do customer-facing interview activities, such as personal banking sales work, on her own. The Claimant herself accepted this at her Well Being Meeting on 18 April 2016 - **"were you customer facing?" – "no".** [1:385].

39. In respect of breaks, Harry Saggu said this at paragraph 15 of his witness statement, which evidence we accept:

"I suggested that Rita take a break in the middle of her shift simply to break up her day. If Rita had said to me that she wanted to take a break at a different time, or if she had wanted to take multiple breaks, it would have been fine. It did not matter to me when or how many breaks Rita took as she was not customer facing at that time and, therefore, when she took her breaks did not impact the running of the branch."

There is no contemporaneous evidence demonstrating denial of additional breaks and at paragraph 36, Harry Saggu confirms that he told the Claimant that she could take more than 1 break if needed.

40. The Claimant also alleges that Harry Saggu harassed her as follows:

Issue 3.1.1.1. Isolating the Claimant from her colleagues:

Issue 3.1.1.2. Making derogatory comments such as "if it were me I would show you the door"

Harry Saggu denies isolating the Claimant and told the Tribunal that the only task that the Claimant had to undertake on her own was the mandatory testing required for authorisation. Further the Claimant spent time sitting with and observing other personal bankers and also worked on the welcome desk to help build her confidence with customers- See paragraphs 28 & 29 of Harry Saggu's witness statement.

41. There is no contemporaneous evidence supporting the suggestion that Harry Saggu made derogatory comments about the Claimant. Indeed, contemporaneous documentary records of communications between the Claimant and Harry Saggu suggest that he adopted a supportive role. Harry Saggu denies making the derogatory comments attributed to him by the Claimant and we accept his evidence- See paragraph 35 of Harry Saggu's witness statement.

42. The Claimant's Well Being Meeting of 18 April 2016 was attended by Claire Butler and is relied on by the Respondent as demonstrating just how much Claire Butler was prepared to do to support the Claimant. The Respondent also makes the following observations by reference to the following pertinent extracts from the Minutes [1:381-388]

- The Claimant accepted there had been performance issues in her time with Abigail Down [1:381].
- Claire Butler mentioned to the Clamant that she had expressed a wish to reduce her hours on a permanent basis. The Claimant did not challenge this

- The Claimant stated she had had a **"misunderstanding"** about the move to Merry Hill being a permanent move [1:382].
- When discussing problems at Merry Hill, and why she wanted to move, the Claimant never alleged that Harry Saggu either made derogatory comments or stood over her, shouted at her, and forced her to write an email.
- Claire Butler told the Claimant to *"pick a branch"* and we will *"have a look at what we can do"*; as well as asking *"what style of branch suits you,"* and that the Respondent could *"shift a budget"* to facilitate this [1:383].
- The Claimant asked for and was given a tailored approach to lunch breaks (of 2 x 30 minutes) [1:384].
- After being asked to carefully consider her choice about what she wanted [1:384-5], the Claimant decided to go to the Kingswinford branch.
- Claire Butler initially offered for the continued phase return to be for a further four weeks, given the Claimant had reached week 5 of the programme before going off sick again. The Claimant's union representative suggested 7 further weeks. Claire Butler suggested 6 further weeks and the Claimant, via her union representative, immediately agreed to this without any pushback [1:386]. The total phased return period agreed was therefore 11 weeks.
- After the phased return it was agreed that the Claimant's preference was to reduce her permanent hours to 25 hours per week [1:383, 384, 387].
- In addition, Claire Butler warned the Claimant that if the return to work could not proceed per the plan, the next stage would be to invite her to a Stage 3 Hearing. The Claimant did not object to this, or suggest there was anything inappropriate, belittling, or humiliating in this [1:387].

The Tribunal agrees with the submission that this demonstrates that the minutes show an exceptionally supportive employer. A matter that one panel member particularly wished to emphasise in these reasons as characterizing the

Respondent's approach, not only on this occasion, but throughout its dealings with the Claimant.

43. Issue 3.1.2. alleges harassment in April 2016 as a result of being sent a letter by Claire Butler saying that if things didn't work out, she would be invited to a stage 3 meeting. The letter dated 24 April 2016 [1:406-7] reflects the Minutes of the Well Being Meeting held on 18 April 2016. However, the Claimant's complaint is that the letter says a stage 3 meeting *"***will"** be convened, rather than **"may"** be convened. The Minutes actually say **"…next stage <u>will</u> be to invite you to Stage 3 Hearing"** (underlining added).

44. This letter also makes reference to the fact that the type of activity excluded under the Claimant's phased return to work was **"customer interview facing activities".** The Claimant, at various points, appeared to have a more restrictive view of what the expression "customer facing" meant. However, in cross-examination, she accepted that working in a branch would inevitably involve some interaction with customers. The Claimant also confirmed that the activities objected to were those selling products to customers alone.

45. The Claimant also sought to demonstrate in her cross examination of Claire Butler that she was doing customer facing work by reference to some largely illegible logs at [1:81-86]. Even if the Claimant is correct to assert, and it was not evidentially established, that she did some 'Chip and Pin" tasks for customers, we accept the evidence of Claire Butler that that would not be customer facing in the sense that it should properly be understood. Banking Hall work included simple interactions with customers including Chip and Pin. Moreover, this is reflected in the discussions of the Well Being Meeting of 18 April 2016 [1:185 &187].

46. The Claimant returned to work at Kingswinford on 25 April 2016 and resigned on 4 May 2016 having completed 3 working days. There were no issues regarding breaks at Kingswinford. There was no attempt to extend the phased return period at Kingswinford from the further 6 weeks

previously agreed to 7 weeks.

47. Issue 1.1.4. is relied on in respect of the constructive dismissal claim and relates to discussions with Andrea Grant about her working pattern and phased return in April 2016. Andrea Grant was the manager at Kingswinford. In cross-examination, the Claimant accepted Andrea Grant, as her line manager, ought to be able to do so, and needed to do so:

"It was unfair to criticise the Branch Manager discussing work pattern with you?

- **I agree – she had to discuss"**

48. Issue 1.1.5. is the alleged "final straw" relied on by the Claimant in respect of her constructive dismissal claim. This concerns the alleged failure to provide her with a fixed room in Kingswinford which she alleges was setting her up to fail and the alleged threat of dismissal procedures if she did not hit targets. The evidence before the Tribunal was that there was an office space she could regularly use which was shared between the Claimant and two other individuals, one of whom did not work full time like the Claimant. In answer to a question from the Tribunal as to what the Respondent should have done, the Claimant said:

"They couldn't create another office - but I could have been made aware as I wouldn't have made decision to go to that branch – I might not be able to see clients – and meet targets"

49. Issue 3.1.3.1 alleges harassment by excluding the Claimant from a team evening meal. However, notices were put up in the branch regarding the meal. The Claimant accepted that it was possible she did not see those notices if they were posted in the staff toilet or on a generic notice board and she also agreed that notices would not have been put up if the Respondent was trying to exclude her.

50. The Claimant resigned in a letter dated 4 May 2016 to Andrea Grant, indicating

that her last day would be 29 June 2016, but also that she would be happy to use any accrued annual leave to leave sooner, if able to do so. [1:421]. She also thanked the Respondent for the opportunities and support afforded to her over the last 8 years.

51. In her response on 4 May 2016 [1:423], Claire Butler said this:

> **"Rita - Can you please provide Debi with the information in regards to your preferred notice period; can I stress this must be a decision that [sic] make and confirm – thank you"**

52. The Claimant wrote again the next day [1:425] updating the position in these terms:

> **"I am writing to formally inform you of my resignation from my position as Personal Banker at Santander. My last day of employment will be 12th June 2016 in accordance to the terms in my contract. (I am happy to use any accrued annual leave to leave sooner, if able to do so).**
> **I would like to thank you and the company for the opportunities and support given to me over the last 8 years. I have worked alongside with some excellent colleagues and gained a lot of valuable skills and experience to develop in my career.**
> **I wish you and the company the best of success in the future. If I can help with the transition, please do let me know and I do hope our paths cross again in the future.**

53. The Claimant chased confirmation that her last date would be 12 June 2016 in an email dated 17 May 2016 to Andrea Grant and Agnieszka Symonowicz [1:465]. In cross-examination, the Claimant accepted that it did appear from the email that she wanted to leave on 12 June. Further, the Claimant accepted that she chose to resign after having received a job offer that she had decided to accept. [1:733 is the contract with the new employer, Learn Direct].

> **"So, the offer came to you in the previous week- before 4 May – the day you resigned**
>
> - **Yes**
>
> **You chose to resign after this other job offer?**

- **Yes**

……

So truncating notice means can now do a start date of 27 June

- **It appears that way"**

54. The Claimant signed her new contract on 26 May 2016 [1:740]. Nonetheless, the Claimant steadfastly disagreed that she had shortened her notice so as to be able to comply with the start date of 27 June 2016 with her new employer. We reject the Claimant's denial in this regard, and we find that she chose to shorten her notice for her own understandable reasons.

55. The Claimant was desirous of having a face-to-face exit interview. In answer to a question from a Tribunal Member as to what she understood to be the purpose of an exit interview, she said that she thought an exit interview was something that should be done before a final decision was taken in respect of a resignation.

56. Although such interviews were not usually carried out by the Respondent, it was nonetheless prepared to hold one if the Claimant so wished. Andrea Grant had indicated a willingness to conduct such an interview in an e-mail dated 7 June 2016 responding to a request from Agnieszka Symonowicz in HR[1:496]. Andrea Grant sought to arrange a suitable date with the Claimant in an email dated 11June 2016. On 17 June 2016, the Claimant replied stating:

"**I would like to put my exit interview on hold for now and will get back to you in the future with regards to it…. I will get back in touch when I am available to attend one".**

In the event, this was not followed up by the Claimant.

57. A further matter of complaint relied on as harassment concerns the

selection of the Claimant's reason for leaving on their systems without her input- Issue 3.1.3.3. This is dealt with in Agnieszka Symonowicz' witness statement at paragraph 35:

"I am aware that Rita has alleged that inputting the reason for leaving on the HR system was an act of harassment. As Rita's exit interview did not take place, she did not provide her input and Debi Smith recorded her reason for leaving as "Resignation –Change. However, I am also aware that Debi sent Rita an email asking her to let her know if she wanted the option to be changed and telling Rita that she did not know why she was leaving, as she had not been told exactly. I was copied into this email chain and a copy of this email can be found at page 432 in TB1. The bottom line to this point is that if Rita had asked for the reason to be changed, it would have been, it was a relatively straightforward change to make."

The Claimant accepted in cross-examination that 'resignation and career change' was, in fact an accurate description of what she actually did.

58. After the Claimant had left the Respondent's employment, she had occasion to go back in June 2016 to print off some documents including her badge and pay slips. An employee, Rachel Bromley, was in the shared office used by the Claimant to carry out her printing. This is advanced as an act of harassment - Issue 3.1.4. It was suggested to the Claimant in cross-examination that there was nothing wrong with her being accompanied whilst she was accessing the Respondents confidential systems given that she was no longer an employee. Her response was '**If you put it that way – yes but it hadn't been explained as the Respondent's Counsel had."** Nonetheless, it made her feel uncomfortable even though Ms Bromley was not necessarily reading any of the Claimant's documents.

59. The Claimant first raised the issue of constructive dismissal in an email dated 12 June 2016 [1:516] in these terms:

"I have felt forced to leave constructively dismissed myself giving the

required notice) as I no longer accept the breaches to my contract carried out by Santander and had major concerns about my job security with the company going forwards as did not want to be dismissed at a later stage in the near future on grounds of ill health as detailed in my letter below"

60. The Claimant issued her Claim on 7 October 2016 after a period of ACAS conciliation which ended on 24 September 2016. The Respondent accepts that from February 2016 the Claimant was a disabled person (Stress, anxiety and depression) and that it had actual or constructive knowledge of that fact. The Claimant was later diagnosed with Breast Cancer (5 January 2017- Claimant's witness statement at paragraph 44). By reason of the Cancer diagnosis, the Claimant is a disabled person. But this is unrelated to her claim.

THE LAW

Constructive Dismissal

61. The statutory definition of what is known as constructive dismissal is contained in Section 95(1)(c) of the Employment Rights Act 1996 ("ERA").
"(1) For the purposes of this Part an employee is dismissed if (and, subject to subsection (2) … only if) –

(c) 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".

62. The law in this area is well-established. Lord Denning in **Western Excavating v. Sharp [1978] ICR 221** said this:-

"**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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

Sharp also decided that post breach affirmation is not consistent with a constructive dismissal claim. An employee:

"….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".

63. The test is an objective one:

"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."

Per Lord Nicholls in **Malik v Bank of Credit and Commerce International S.A [1998] AC 20 @35C**

64. The resignation needs to be, at least in part, in response to the employer's fundamental breaches - See **Meikle v Nottinghamshire CC [2005] ICR.**

65. **Omilaju v. Waltham Forest London Borough Council** [2005] ICR 481 provides guidance on so called "Final Straw" cases:

- The final straw may be relatively insignificant, but should not be utterly trivial

- It should contribute something to the cumulative breach

- If the final straw is unreasonable, but unrelated to the cumulative breach, then it may not be relied upon

- If the final straw does not contribute to an earlier breach, then the Tribunal need conduct no further examination of the claim; the claim will fail.

- An entirely innocuous act on the part of an 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.

66. Underhill L.J. suggested the following approach in **Kaur v Leeds Teaching Hospital NHS Trust** [2019] ICR 1

"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 [2005] ICR 481) 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 reason given at the end of para 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?"

Time and just and equitable extension in discrimination claims

67. The time limit for a discrimination claim to be presented to a Tribunal is normally at the end of "the period of three months starting with the date of the act to which the complaint relates" (**section 123(1), EqA 2010).**

68. 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. The key date is when the act of discrimination occurred. The Tribunal needs to determine whether the discrimination alleged is a continuing act and if so when the continuing act ceased. The question is whether the conduct can be categorised as a one-off act of discrimination or a continuing scheme. **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 categorised 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.

69. **Lyfar v Brighton & Sussex University Hospitals Trust (2006) EWCA Civ 1548** emphasises that what Tribunals should look at is the substance of the complaints in question as opposed to the existence of a policy or regime. Can the complaints be said to be part of one continuing act by the employer. In **Aziz v FDA (2010) EWCA Civ 304,** it was held that a relevant, but not conclusive, factor is whether the same or different individuals were involved in the incidents in question.

70. The Tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable **(section 123(1)(b), EqA 2010).** In deciding whether it is just and equitable to extend time to permit an out-of-time discrimination claim to proceed. The Tribunal is entitled to take into account anything that it deems to be relevant - **Hutchinson v Westward Television Ltd [1977] IRLR 69.**

71. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the **Limitation Act 1980** (LA 1980) (**British Coal Corporation v Keeble [1997] IRLR 336** and **DPP v Marshall [1998] IRLR 494**). Courts are required to consider

factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- 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 party sued had co-operated with any requests for information.
- The promptness with which the Claimant acted once they knew of the possibility of taking action.
- The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

(Section 33, LA 1980.)

The emphasis should be on whether the delay has affected the ability of the tribunal to conduct a fair hearing **(Marshall).**

72. In **Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576), the court held that time limits are applied strictly in employment cases, and there is no presumption in favour of extending time. In fact, tribunals should not extend time unless the Claimant convinces them that it is just and equitable to do so. The burden is on the Claimant, and the exercise of discretion to extend time should be the exception, not the rule.

73. In **Rathakrishnan v Pizza Express (Restaurants) Ltd UKEAT/0073/15**, the EAT was unable to accept the proposition that a failure to provide a good excuse for the delay in bringing a relevant claim would inevitably result in an extension of time being refused. Rather, a multi-factorial approach is to be preferred, with no single factor being determinative.

74. The Tribunal also considered **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR**. The case is instructive, and the Tribunal paid particular regard to paragraphs 18 and 19 of the judgment of Leggat L.J. :

“18. First, it is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen

to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980 , section 123(1) of the Equality Act 2010 does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corpn v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] ICR 800 , para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998 : see Dunn v Parole Board [2009] 1 WLR 728 , paras 30–32, 43, 48 and Rabone v Pennine Care NHS Trust (INQUEST intervening) [2012] 2 AC 72 , para 75.

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”

75. Further, the case of **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA 21** reinforced the caution against over-reliance on the **Keeble** factors at paragraph 37:

“37.The first concerns the continuing influence in this field of the decision in Keeble. This originated in a short concluding observation at the end of Holland J's judgment in the first of the two Keeble appeals, in which the limitation issue was remitted to the industrial tribunal. He said, at para. 10:

"We add observations with respect to the discretion that is yet to be exercised. Such requires findings of fact which must be based on evidence. The task of the Tribunal may be illuminated by perusal of Section 33 Limitation Act 1980 wherein a check list is provided (specifically not exclusive) for the exercise of a not dissimilar discretion by common law courts which starts by inviting consideration of all the circumstances including the length of, and the reasons for, the delay. Here is, we suggest, a prompt as to the crucial findings of fact upon which the discretion is exercised."

The industrial tribunal followed that suggestion and, as we have seen, when there was a further appeal Smith J as part of her analysis of its reasoning helpfully summarised the requirements of section 33 (so far as applicable). It will be seen, therefore, that Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the

task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

76. It also serves as a reminder that time limits are applied strictly in ETs at paragraph 24

"24. At para. 35 she says that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals. The former point is unexceptionable. The latter reflects a statement made by Auld LJ at para. 25 of his judgment in Robertson. That statement was the subject of some discussion in the later decision of this Court in Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327 (per Wall LJ at paras. 24-25 and Sedley LJ at para. 31), but it is not a ground of appeal that the Judge's reference to that statement constituted a misdirection, and in any event I do not think that it did."

Burden of proof and the "reason why"

77. Following the guidance given by the EAT in **Barton v. Investec Henderson Crossthwaite Securities Ltd [2003] IRLR 352,** as developed and refined by the Court of Appeal in **Igen Ltd v. Wong and others [2005] IRLR 258** & **Madarassy v. Nomura International plc [2007] IRLR 246**, the burden of proof in a discrimination claim falls into two parts.

Stage One

78. Firstly, it is for C to prove on the balance of probabilities facts from which a reasonable tribunal could properly conclude, on the assumption that there is no adequate explanation, that R has committed an act of discrimination which is unlawful. (The outcome of the analysis by the tribunal at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.)

79. If C does not prove such facts, he/she must fail.

Stage Two

80. Secondly, where C has proved facts from which it could be inferred that R has treated C less favourably on proscribed grounds, then the burden of proof moves to R.

81. It is then for R to prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

82. To discharge that burden it is necessary for the R to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the proscribed grounds of which complaint is made.

83. That requires a tribunal to assess not merely whether R has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not any part of the reasons for the treatment in question. If R can do this, the claim fails.

84. Since the facts necessary to prove an explanation would normally be in the possession of R, a tribunal would normally expect cogent evidence to discharge that burden of proof.

85. If the burden is not discharged, the tribunal is bound to find that discrimination has taken place.

86. As observed by Langstaff J. (EAT President, as he then was) when considering whether "stage one" has been satisfied by a Claimant in a discrimination claim:

"**It has been so well-established as to be trite that the bare facts of a different status and a difference in treatment are insufficient to achieve this; they only indicate a possibility of discrimination". – Millin v. Capsticks Solicitors LLP - UKEAT-0093/14 and UKEAT/0094/14.**

87. Underhill J. (as he then was) said this in **A Gay v Sophos plc UKEAT/0452/10/LA:**

"27. It is now very well-established that a tribunal is not obliged to follow the two-stage approach: see Laing v Manchester City Council [2007] ICR 1519 , at paras. 71-77 (pp. 1532–3) (approved in Madarassy). If it makes a positive finding that the acts complained of were motivated by other considerations to the exclusion of the proscribed factor, that necessarily means that the burden of proof, even if it had transferred, has been discharged."

88. The then President of the EAT, Simler J. opined in **Pnaiser v. NHS England and another [2016] IRLR 170:**

"38. Although it can be helpful in some cases for tribunals to go through the two stages suggested in Igen v Wong, as the authorities demonstrate, it is not necessarily an error of law not to do so, and in many cases, moving straight to the second stage is sensible"

Reasonable adjustments- SS 20 & 21 EqA

89. Section 20 EqA 2010 provides insofar as is material:

"Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

90. Paragraph 20 of Schedule 8 of the EqA 2010 provides:

"20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a)in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

91. According to Section 212(1) EqA, 'substantial' means more than trivial. This is a question of fact to be assessed on an objective basis and is not a high threshold to satisfy.

92. The Claimant is required to establish a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has not been complied with.

93. An employer has a defence to a claim for breach of the statutory duty (and, in fact, is relieved of any legal obligation to make reasonable adjustments) if it does not

know and could not reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP.

94. That proposition has to considered against the backdrop of paragraph 6.19 of the EHRC Employment Code:

"**For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment."**

95. It is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment - **Royal Bank of Scotland v Ashton UKEAT/0542/09/LA & 0306/10/LA** per Mr. Justice Langstaff at paragraph 24.

96. In **Ishola v Transport for London [2020] EWCA Civ 112,** the Court of Appeal decided that a "provision, criterion or practice" under the Equality Act 2010 can only be established where there is some form of continuum in the sense of how things generally are or will be done by the employer. Though this will apply to some one-off acts in the course of dealings with an individual employee, it will not apply to one-off acts where there is no indication that the same decision would apply in future.

97. The court held that if an employee is unable to make out a claim for direct discrimination or discrimination arising from disability related to an act or decision of the employer, it would be artificial and wrong to convert the employer's act or decision into the application of a discriminatory PCP. This was not the aim of the reasonable adjustments or indirect discrimination legislation.

98. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. Though the Equality Act 2010 Statutory Code of Practice issued by the Equality and Human Rights Commission (which courts and tribunals are obliged to take into account in any case in which it appears to be relevant) confirms that these words should be construed widely, it is nevertheless significant that

Parliament chose these words specifically and did not choose "act" or "decision" instead.

99. **Project Management Institute v Latif** [2007] IRLR 579 §54 is authority for the proposition that an employee must also raise facts from which it could be reasonably inferred the duty has been breached and "**there must be evidence of some apparently reasonable adjustment which could be made**"

Harassment related to disability

100. Insofar as is material section 26 EqA provides:

"26 Harassment

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
….

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

101. There are three essential elements of a harassment claim under S.26(1):

•unwanted conduct

•that has the proscribed purpose or effect, and

•which relates to a relevant protected characteristic.

See **Richmond Pharmacology v Dhaliwal** [2009]ICR 724, EAT

102. The following propositions emerge from the Authorities and commentary in this area:

102.1 Decisions relating to work can amount to 'unwanted conduct'- **Prospects for People with Learning Difficulties v Harris UKEAT/0612/11.**

102.2 'Unwanted conduct' can take place even when the Claimant is not present - IDS Employment Law Handbooks, Volume 5, Chapter 18 notes 3 first instance examples**: Mussilhy v Currie Motors UK Ltd ET Case No.2375566/11, Gardner v Tenon Engineering Ltd ET Case No.2374878/11, Dawkins v Benham Publishing Ltd and ors ET Case No.2401159/12.**

102.3 Unwanted conduct can include 'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour'. Unwanted is essentially the same as 'unwelcome' or 'uninvited' – See paragraphs 7.7 and 7.8 of the Equality and Human Rights Commission's Code of Practice on Employment.

102.4 The context in which a remark is given is always highly material. **See Grant v H. M. Land Registry [2011] EWCA 769** & **Heafield v Times Newspaper Ltd. UKEATPA/1305/12/BA.**

102.5 The EAT in **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor** [2020] IRLR 495 held at paragraph 25:

"Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and

have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

CONCLUSIONS

TIME/LIMITATION – DISCRIMINATION CLAIMS

103. The Tribunal approached the task of determining the claims by considering the discrimination claims and the linked issue of time limits and jurisdiction first. Issues 1.1.2 and 1.1.3 in respect of constructive dismissal expressly rely on pre-resignation harassment and a failure to make reasonable adjustments as breaches of the implied term of trust and confidence. It is therefore necessary to know which, if any, of the discrimination claims are in time and, if in time, successful.

104. Issue 7.1 correctly identifies 25 May 2016 as the cut-off date for the discrimination claims so that any act or omission before that date is potentially out of time There is no dispute that the unfair dismissal and breach of contract claims are in time.

Harassment

105. The Respondent accepts that 2 of the harassment allegations are potentially in time. Those 2 issues are:

3.1.3.4. Not providing an exit interview

3.1.4. In June 2016 being made to sit with Assistant Manager whilst printing personal data

106. All the other harassment allegations pre-date 25 May 2016 and so are out of time unless they fall to be considered as part of a continuing act (**section 123(3), EqA 2010)** or the Tribunal extends time on just and equitable grounds (**section 123(1)(b), EqA 2010).**

107. The Tribunal does not find that the harassment allegations can properly be considered to be part of a continuing act. We bear in mind the guidance referred to above in **Hendricks** and in **Lyfar** as well as the relevant, but not conclusive, factor that different individuals were involved over the range of complaints – **Aziz.** Looking at the substance of the allegations, there is no unifying thread much less a policy or practice.

108. In respect of the possibility of extending time on just and equitable grounds, this was not a matter that was formally addressed in the Claimant's witness statement. In oral closing submissions, the Claimant made particular reference to 2 matters. Firstly, that she was pursuing a grievance and wanted to save costs and see that through to a conclusion before commencing proceedings. Secondly, the Claimant prayed in aid her ill health in general terms – she was suffering from anxiety and depression and had been diagnosed with cancer around this time.

109. The Claimant's witness statement at paragraph 40 says this:

"As already known my post leaving grievance formed the basis of my ETl claims and these claims are for constructive unfair dismissal, breach of contract (concerning matters relating to my notice period and unfair treatment received), disability discrimination with claims for harassment and a failure to make reasonable adjustments."

Paragraph 38 also refers to the fact that the post leaving grievance which was submitted on 12 June 2016 forms the basis of her ET1.

110. The mere fact that there was an on-going grievance is not, without more, sufficient to displace the strict time limits applicable to discrimination claims.

111. Furthermore, there was no, or no detailed, evidence led as to what impact the Claimant's health had on her ability to at least launch Tribunal proceedings. Once again, a bare assertion, without more, that the

Claimant's ill health played a significant role in the delay in initiating proceedings does not, in our judgment, provide any proper basis for the Tribunal to exercise its discretion to extend time on a just and equitable basis and we decline to do so.

112. In arriving at our decision on this issue, we also take into account that the Claimant was apparently able to initiate and participate in a grievance process that, on her case, formed the very basis of her eventual claim in the Tribunal and which she also says was a reason for the delay in bringing her case.

113. We briefly leave consideration of limitation and turn to deal with the 2 timeous harassment allegations, these claims fail on the merits.

112.1 **Issue 3.1.3.4. Not providing an exit interview**

On the facts as found, this did not happen because the Claimant did not pursue it – see paragraph 56 above. The Claimant did not go back to the Respondent after her email of 17 June 2016 putting the exit interview "on hold". It does not provide any basis for an allegation of harassment.

112.2 **Issue 3.1.4. In June 2016 being made to sit with Assistant Manager whilst printing personal data**

This claim fails as we can see no factual basis for the assertion that the conduct complained of related to the Claimant's disability. The reverse burden does not come into play and the 'reason why' the Assistant Manager sat in was that the Claimant was no longer an employee and was accessing the Respondent's confidential systems and data. Even if it had been so related, we do not find that the conduct had the effect referred to in subsection 26(1) (b) EqA, not least because it was not reasonable for the conduct to have that effect. See our findings at paragraph 58 above.

114. For the reasons expressed above, the harassment claim fails in its entirety. In order not to overburden this judgment we do not consider those claims further in these written reasons although some of those matters are addressed in our findings of fact. For the sake of completeness and for the avoidance of doubt, the remaining harassment claims would all have failed on their substantive merits if they had been in time.

115. We now turn to consider the failure to make reasonable adjustments claim and limitation issues in respect of those allegations at paragraph 4 of the LOI.

Reasonable adjustments

116. The Respondent accepts that 2 of the reasonable adjustment allegations are potentially in time. Those 2 issues relate to the following PCPs:

4.1.4. Requiring customer facing activities including during phased return

4.1.5. Not providing a designated fixed office for her in Kingswinford

117. The remaining PCPs are all out of time and for the reasons given in respect of the harassment claims, we decline to exercise our discretion to extend time on just and equitable grounds.

118. We now consider the 2 timeous reasonable adjustments allegations. These claims also fail on the merits.

117.1: **Issue 4.1.4. - Requiring customer facing activities including during phased return**

On the facts as we have found them- see paragraphs 38, 44 & 45, this PCP is not made out on the evidence. The correct approach to the meaning of “Customer facing” in this context is as Claire Butler explained in her evidence which we have accepted. It did

not preclude any interaction with customers in the Banking Hall, which the Claimant herself acknowledged. Moreover, Banking Hall work included simple interactions with customers including Chip and Pin.

117.2: **Issue 4.1.5. - Not providing a designated fixed office for her in Kingswinford**

We refer again to our findings of fact. Even assuming that all the other necessary elements of a claim for a failure to make reasonable adjustments have been established, and it is far from clear that they are, the provision of a designated fixed office for the Claimant in Kingswinford was not, in our assessment, a reasonable adjustment. It simply could not be accommodated given the business demands on the limited space available. A fact that the Claimant seemed to acknowledge in answer to a question from the Tribunal as noted above – paragraph 48. Rather the Claimant seems to be of the view that she may not have elected to go to that branch at all had she realized the position. In any event, the Claimant's insistence on the need for an office at all is predicated on a misunderstanding that a Stage 3 Absence Meeting would ensue if she failed to meet targets as opposed to simply being absent on long term sickness. This fundamental distinction was not appreciated by the Claimant who confused and conflated absence with not hitting certain targets.

119. Accordingly, and for the reasons expressed above, the reasonable adjustments claim fails in its entirety. As with the harassment claims and in order not to overburden this judgment, we do not consider those claims further in these written reasons although some of those matters are addressed in our findings of fact. For the sake of completeness and for the avoidance of doubt, the remaining reasonable adjustments claims would all have failed on their substantive merits if they had been in time.

CONSTRUCTIVE UNFAIR DISMISSAL

120. We determine this claim by adopting the approach suggested in **Kaur** and also **Omilaju** as the case is advanced as a "last straw" case. The last straw being:

Issue 1.1.5. The alleged "final straw" is the alleged failure to provide her with a fixed room in Kingswinford which she alleges was setting her up to fail and the alleged threat of dismissal procedures if she did not hit targets.

121. For the reasons articulated in respect of the rejection of the claim that this allegation was a failure to make a reasonable adjustment and in reliance on our findings on this issue, we consider that this act falls squarely into the category identified by the Court of Appeal at paragraph 22 of the Judgment in **Omilaju**:

"22. 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."

As the Court of Appeal confirmed, the test of whether the employee's trust and confidence has been undermined is objective.

122. Paragraph 21 of the judgment in **Omilaju** also explains that if the final straw does not contribute to an earlier breach, then the Tribunal need conduct no further examination of the claim; the claim will fail.

"21. 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. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. 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"

123. Nonetheless and in recognition of the time and industry spent on the other matters relied on by the Claimant we deal with each of the issues identified at Issues 1.1.1.1 to 1.1.5. We say at the outset that we accept the Respondent's submission, at paragraph 70 of the closing submissions, that none of those matters amount to a breach let alone a repudiatory breach, whether considered individually and/or cumulatively.

1.1.1.1. Following the accusation of making a till difference by Sarah Caffull around April 2013 and the grievance process surrounding this, the Claimant complains that Spencer Greaves did not meet with her on 3 January 2014 and instead ignored her

124. Based on the Claimant's own evidence we do not accept that Spencer Greaves ignored the Claimant on the 3rd January 2013. The informal meeting that was to take place did not have to be undertaken that day and he indicated that he was otherwise engaged on that particular day when she knocked on his door. The Claimant never followed it up. See paragraph 19 above.

1.1.1.2 Following an incident in which the Claimant alleges Sarah Caffull forged the Claimant's signature on a document, discovered by the Claimant in December 2013, Spencer Greaves failed to respond to an email sent to him from the Claimant regarding the forged document and not being part of investigation

125. We again refer to the Claimant's answers in cross-examination on this topic. There was simply nothing that required a response from the Respondent, much less an investigation. See paragraph 18 above

1.1.1.3. The Respondent's response to an incident in June 2014 in which the Claimant was assaulted by a customer at work

126. In our findings in relation to this issue, we are unable to discern anything that can conceivably be considered to be a breach of contract or conduct that was unreasonable or damaged the relationship of trust and confidence between the parties.

1.1.1.4. The Claimant alleges no discussion took place with her prior to the merger of the two Dudley Branches around October 2014, despite a recommendation of the 2013 grievance incident being that the Claimant move branch to the 235 Dudley Branch

127. On the facts as found (paragraph 21 above), the Claimant chose to embrace the merger following a discussion with Claire Butler – see paragraph 25 of her witness statement. Leaving that aside, we do not see why the business decision to merge the 2 branches should have been an appropriate matter for discussion with the Claimant or that she could have any legitimate expectation that she would be consulted on that commercial decision prior to it being taken.

1.1.1.5. An increase in observations between January and April 2015

128. There was little, if any, specific comparative evidence on this topic. Insofar as it was established that there had, in fact, been an increase in observations, we entirely accept that the observations carried were out necessary and, at the very least in part, a function of FCA regulation. See paragraph 23 above.

1.1.1.6. The Respondent's alleged lack of support of the Claimant after she suffered a house fire in March 2015, by failing to give her further time off following an initial period of leave

129. This dealt with in our findings above (paragraph 24). The granting of emergency leave is a matter of managerial discretion [1:160]. It would not have been a breach of contract to have refused it. In fact, Abigail Down simply didn't reply to the request and the Claimant did not pursue the matter. We do not consider this to be a breach of contract or conduct that objectively damaged the relationship of trust and confidence between the parties in all the circumstances.

1.1.1.7. The Claimant alleges she was verbally berated by Claire Butler and Abigail Down: i) in March 2015 after speaking to her union about time off following the fire, and ii) in a meeting on around 7 April 2015 following her de-authorisation without her knowledge

130. This is dealt with in some detail in our findings on this issue (paragraphs 24 & 25 above). We do not accept that the Claimant was berated as alleged.

1.1.2. Those matters complained of as amounting to harassment (that pre-date her resignation)

1.1.3. The alleged failure to make reasonable adjustments

131. We have already decided that the harassment and reasonable adjustments claim have failed in their entirety. Insofar as may be necessary and in respect of the specific matters underpinning those claims, we refer to our findings of fact and conclusions above.

1.1.4. Discussions with Andrea Grant about her working pattern and phased return in April 2016

132. Once again, it is the Claimant's own evidence that wholly undermines

this as an allegation of breach of contract or conduct that damaged the implied term of trust and confidence (see paragraph 47above). She agreed that her manager had to discuss these matters with her in cross-examination.

1.1.5 The alleged "final straw" is the alleged failure to provide her with a fixed room in Kingswinford which she alleges was setting her up to fail and the alleged threat of dismissal procedures if she did not hit targets.

133. This allegation has already been addressed and we refer to our findings and conclusion above.

134. Lastly, had it been necessary, we would have found that the reason the Claimant resigned was, as she accepted in cross examination, career change. We accept the Respondent's submission in that regard at paragraph 71 of the closing submissions.

135. That disposes of the claim for constructive dismissal which fails and is dismissed, and we now turn to consider the breach of contract claim.

BREACH OF CONTRACT

Issues 5.1 – 5.4

136. We have set out the relevant chronology and referred to the contemporaneous correspondence above (paragraphs 50 – 54) and we have made a finding that the shortened notice period was agreed to at the behest of the Claimant.

137. The Claimant's witness statement contains this bare assertion at paragraph 36:

"On 5th May 2016, under duress, I was forced to change my resignation letter, giving a shorter notice period. (A copy this letter

can be found in Trial Bundle 1, page 425).”

The content of that letter is set above (paragraph 52). It makes no reference to, nor makes any suggestion that, she was shortening her notice under duress or protest.

138. There was no credible evidence before us that the Claimant acted under duress or compulsion of any sort in this regard and this claim fails accordingly.

FINAL

139. The unanimous decision of the Tribunal is that the claims are not well founded and are dismissed.

Jacques Algazy K.C.

Electronically Signed by EJ Algazy K.C.

On 26 November 2023

ANNEXE

CASE NUMBER: 1302550/2016

IN THE WEST MIDLANDS EMPLOYMENT TRIBUNAL
BETWEEN:

MS RITA GUPTA

Claimant

- and –

SANTANDER UK PLC

Respondent

LIST OF ISSUES

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*This document reproduces the List of Issues found at **[TB1/46-9]** from the order of EJ Broughton 17 January 2017, with the addition (per the Judge's request) of the agreed issues under §1.1.1 which are now set out as §1.1.1.1 – 1.1.1.7.*

1. Constructive unfair dismissal claim

1.1. What was the reason for the resignation? The claimant asserts that it was: -

1.1.1. Two or three background matters prior to her absence in 2015 that the parties should largely be able to address by way of agreed facts, namely:

1.1.1.1. *Following the accusation of making a till difference by Sarah Caffull around April 2013 and the grievance process surrounding this, the Claimant complains that Spencer Greaves did not meet with her on 3 January 2014 and instead ignored her.*

1.1.1.2. *Following an incident in which the Claimant alleges Sarah Caffull forged the Claimant's signature on a document, discovered by the Claimant in December 2013, Spencer Greaves failed to respond to an email sent to him from the Claimant regarding the forged document **AND NOT BEING PART OF iNVESTIGATION**[1]*

1.1.1.3. *The Respondent's response to an incident in June 2014 in which the Claimant was assaulted by a customer at work.*

1.1.1.4. *The Claimant alleges no discussion took place with her prior to the merger of the two Dudley Branches around **OCTOBER** 2014, despite a recommendation of the 2013 grievance incident being that the Claimant move branch to the 235 Dudley Branch.*

1.1.1.5. *An increase in observations between January and April 2015.*

1.1.1.6. *The Respondent's alleged lack of support of the Claimant after she suffered a house fire in March 2015, by failing to give her further time off following an initial period of leave.*

1.1.1.7. *The Claimant alleges she was verbally berated by Claire Butler and Abigail Down: i) in March 2015 after speaking to her union about time off*

[1] The bold caps lock text here and in §1.1.1.4 reflects text C wished to add in order for the issues under 1.1.1 to be agreed.

following the fire, and ii) in a meeting on around 7 April 2015 following her de-authorisation without her knowledge.

1.1.2. Those matters complained of as amounting to harassment (that pre-date her resignation) below.

1.1.3. The alleged failure to make reasonable adjustments.

1.1.4. Discussions with Andrea Grant about her working pattern and phased return in April 2016.

1.1.5. The alleged "final straw" is the alleged failure to provide her with a fixed room in Kingswinford which she alleges was setting her up to fail and the alleged threat of dismissal procedures if she did not hit targets.

Such that she considered that the respondent had breached the implied term of trust and confidence entitling her to resign.

1.2. Can the claimant prove the matters in 1.1 above?

1.3. If so, were they serious enough to amount to a breach of the implied term of trust and confidence?

1.4. If so, were they the reason for the claimant's resignation?

1.5. If so, did the claimant delay too long or otherwise affirm the contract?

1.6. If there was a dismissal, was such dismissal fair in all the circumstances?

1.7. Can the respondent prove that if it had adopted a fair procedure the claimant would/may have been fairly dismissed in any event? If so to what extent and when?

2. **Disability**

2.1. Did/does the claimant have a physical or mental impairment, namely stress, anxiety and depression?

2.2. If so, did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

2.3. If so, was that effect long term? In particular, when did it start and:

2.3.1. Did the impairment last for at least 12 month? If not

2.3.1.1. Is or was the impairment likely to last at least 12 months or

2.3.1.2. Was it likely to recur after at least 12 months and, if so, from which date?

The claimant asserts that she met the definition of disability from the summer of 2015 when she says it became likely that her depression was going to last more than 12 months.

N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.

2.4. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

2.5. The relevant time for assessing whether the claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is from February 2016.

3. **Section 26: Harassment related to disability**
   3.1. Did the respondent engage in unwanted conduct as follows:
      3.1.1. In March/April 2016 manager H Saggu
         3.1.1.1. Isolating the claimant from her colleagues and
         3.1.1.2. Making derogatory comments such as “if it were me I would show you the door”
         3.1.1.3. Pressuring her into sending an email reducing her working hours
         3.1.1.4. Questioning the claimant’s need for breaks
      3.1.2. In April 2016 being sent a letter by the RM saying if things didn’t work out she would be invited to a stage 3 meting
      3.1.3. In May 2016
         3.1.3.1. Excluding the claimant from a team evening meal
         3.1.3.2. Reducing her notice period to 4 weeks
         3.1.3.3. Selecting her reason from leaving on their systems without her input
         3.1.3.4. Not providing an exit interview
      3.1.4. In June 2016 being made to sit with Assistant Manager whilst printing personal date
   3.2. Was the conduct related to the claimant’s protected characteristic?
   3.3. Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
   3.4. If not, did the conduct have the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
   3.5. In considering whether the conduct had that effect, the Tribunal will take into account the claimant’s perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

4. **Reasonable adjustments: section 20 and section 21**
   4.1. Did the respondent apply the following provision, criteria and/or practice (‘the provision’) generally, namely
      4.1.1. The requirement to work from / return to her home branch (Dudley)
      4.1.2. The respondent’s policy on breaks…the requirement to work save when on a contractual break
      4.1.3. Only offering a phased return over 6 weeks / requiring a return to normal hours after 6 weeks
      4.1.4. Requiring customer facing activities including during phased return
      4.1.5. Not providing a designated fixed office for her in Kingswinford
   4.2. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:
      4.2.1. They increased the claimant’s
         4.2.1.1. Anxiety
         4.2.1.2. Insomnia
         4.2.1.3. Headaches and
         4.2.1.4. Absence
      4.2.2. They made it harder to concentrate/meet targets/pass training tests
   4.3. Did the respondent know or could the respondent be reasonably expected to know that the claimant
      4.3.1. Had a disability and

4.3.2. Was likely to be placed at the disadvantage set out above?

4.4. If so, did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

4.4.1. Permanently transferring to Merry Hill

4.4.2. Longer phased return (12 weeks)

4.4.3. Not being required to attend the personal banking academy course in April 2016

4.4.4. Not being required to be customer facing during phased return

4.4.5. Additional breaks

4.4.6. Designated fixed office in Kingswinford

5. **Breach of contract**

5.1. To how much notice was the claimant entitled?

5.2. Did she agree to reduce her notice period such that her employment ended on 12 June instead of 29 June 2016?

5.3. If so, did she do so under duress?

5.4. If so, to how much further notice is she entitled?

6. **Remedies**

6.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

6.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

6.3. There may also fall to be considered whether any adjustments should be made for failure to comply with any relevant ACAS Code.

7. **Time/limitation issues**

7.1. Bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 25 May 2016 is potentially out of time, so that the tribunal may not have jurisdiction.

7.2. Can the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

7.3. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?