EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102151/2020

Hearing held in Glasgow on 1, 2, 3 and 4 August 2023

Employment Judge McCluskey
Members: N Elliot & W Muir

Miss A **Claimant**
Represented by:
Ms H Hiram -
Non practising solicitor

DSR Restaurants Ltd t/a McDonald's **Respondent**
Represented by:
Mr N MacDougal -
Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

1. The complaint of ordinary unfair constructive dismissal is not well founded and is dismissed.
2. The complaint of discrimination arising from disability is not well founded and is dismissed.
3. The complaint of failure to comply with the duty to make reasonable adjustments is not well founded and is dismissed.
4. The Tribunal has no jurisdiction to consider the claimant's complaints of harassment related to disability which are said to have occurred on (a) 6 May 2018 (b) 5-6 May and 22 February 2018 (c) 23 February 2018 (paragraphs 1.20.1.1; 1.20.1.2 and 1.20.1.3 of the final list of issues) and these complaints are dismissed.

5. The complaint of harassment related to disability which is said to have occurred on 24 November 2019 (paragraph 1.20.1.4 of the final list of issues) is not well founded and is dismissed.

6. The complaints of victimisation in the final list of issues at paras 1.26.1 and 1.26.2 are out of time and it is not just and equitable to extend time. The Tribunal has no jurisdiction to hear them. They are also not well founded. Accordingly, these complaints are dismissed.

7. The Tribunal has no jurisdiction to hear the complaints of victimisation in the final list of issues at paras 1.26.3 and 1.26.4 as the asserted acts on 6 May 2018 and 23 November 2019 are not 'protected acts'. Accordingly, these complaints are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 13 December 2015 until 8 December 2019. The claimant presented her claim to the Tribunal on 10 April 2020. Early conciliation commenced on 10 February 2020 and ended on 10 March 2020.

2. As set out in the final list of issues for determination by us (see further below), the claimant brings complaints of ordinary constructive unfair dismissal, discrimination arising from disability, failure to comply with the duty to make reasonable adjustments, harassment related to disability and victimisation. The complaints are defended.

3. The respondent does not accept that the claimant was disabled as defined by section 6 Equality Act 2010 at the time of the events that the claim is about. The respondent does not accept that they had knowledge of any disability at the relevant time. The claimant asserts that her disability is anxiety, depression and stress as set out in the final list of issues.

4. There is a long procedural history to this claim, with several case management hearings having taken place. The case was sisted from around August 2020 until around late 2022 due to proceedings in another court.

Witness statements

5. The claimant gave evidence on her own behalf. JH, ED, DM and LM gave evidence on behalf of the respondent.
6. Parties had prepared and exchanged witness statements prior to the final hearing. At the outset of the hearing, prior to us having read any of the witness statements, the respondent's representative submitted that in his view the claimant's witness statement did not set out evidence in relation to each of the issues identified in the final list of issues in the case management orders dated 21 April 2023 (final list of issues).
7. Following discussion with parties the claimant was granted leave by us to give additional evidence in chief orally, with reference to the final list of issues, prior to cross examination by the respondent. This was not opposed by the respondent.
8. On the afternoon of the first day, before any evidence had been led by either party, the claimant became unwell. The claimant indicated that she hoped to feel better by the following day. Following discussion with parties it was agreed that the hearing would be adjourned until the following day. It was agreed that if the claimant wished to update her written witness statement to include any additional evidence in chief, with reference to the final list of issues, she could do so. It was also agreed that if she wished to update her written witness statement to refer to documents and page numbers from the bundles of productions provided to us, she could do so. Neither of these matters were opposed by the respondent. The parties were reminded that only documents to which we were specifically referred in evidence in chief or cross examination of witnesses would be read by us. Any other documents may not be read.

9. The claimant remained unwell on the second day listed for the final hearing. Neither she nor her representative attended the Tribunal.

10. The hearing resumed on the third day. We discussed and agreed timetabling and breaks with parties at the beginning of each day and throughout the hearing. The format of the final hearing including the use of witness statements, additional evidence in chief, cross examination and re-examination was also discussed and explained to parties on various occasions throughout the hearing.
11. The claimant gave evidence first. Prior to the commencement of her evidence, the claimant provided an updated written witness statement. This contained

references to documents and page numbers from the bundles of documents provided to us. It also attached a further copy of the letter from her GP dated 2 August 2023 which she had provided to us the previous day in connection with her absence from the Tribunal on the afternoon of 1 August 2023 and on 2 August 2023.

12. The claimant's representative confirmed that all evidence in chief which the claimant wished to give was contained in her updated witness statement. The claimant's representative confirmed she had no questions for the claimant by way of further evidence in chief.

13. The updated witness statement of the claimant and each of the respondent's witness statements were pre-read by us. The statements stand as evidence in chief of each of the witnesses.

Productions

14. There was a joint bundle of productions extending to 387 pages (joint bundle) which had been prepared by the respondent in response to standard case management orders prior to the final hearing listed for April 2023. That final hearing had been converted by the Employment Judge to a case management hearing to determine an amendment application made by the claimant and to finalise the issues between the parties for determination at a final hearing. The joint bundle of productions contained documents provided by the claimant and the respondent. Shortly before the commencement of the April 2023 hearing dates the claimant had provided additional documents to the respondent and the Tribunal extending to around 140 pages (claimant's first bundle of productions). There had been no determination by the Tribunal in April 2023 on the late lodging of those documents. An application was made by the claimant at the outset of this final hearing for her first bundle of productions to be received by the Tribunal. This was opposed by the respondent on the basis that it was late and that witness statements of the respondent's witnesses had been prepared with reference only to the joint bundle.

15. We determined that the claimant's first bundle of productions could be lodged late by the claimant. The respondent had had sight of these documents since April 2023. If the respondent wished to lead additional evidence in chief from

any of its witnesses in relation to matters referred to in the claimant's first bundle, it could do so. The claimant's first bundle is paginated (pages 388 – 528).

16. At the outset of this hearing an application was also made by the claimant's representative for further additional productions (claimant's second bundle of productions) to be lodged late. She also made an application for CCTV footage to be viewed by the Tribunal and for this footage to be admitted into evidence. She said that this footage had also only recently become available to her. The late lodging of the claimant's second bundle of productions and the CCTV footage was opposed by the respondent on the basis that they were not relevant to the final list issues to be determined by the Tribunal. It was also opposed on the basis that it was late and that witness statements of the respondent's witnesses had not been prepared with reference to these documents.

17. We determined that the claimant's second bundle of productions in so far as it contained documents pertaining to the claimant's mitigation of loss could be lodged late. In so far as the documents pertained to matters other than mitigation of loss they could be lodged late, subject to consideration as to relevancy once we had heard any evidence led on the documents. We agreed that if the respondent wished to lead additional evidence in chief from any of its witnesses in relation to matters referred to in the claimant's second bundle of documents, it could do so.

18. In relation to the CCTV footage, we noted that there was already evidence contained in the witness statements of both the claimant and the respondent's witnesses about the CCTV footage. We determined that if the parties wished to lead additional evidence in chief from any of their witnesses about the CCTV footage, as they had both viewed it, they could do so. We determined that given the final list of issues to be determined by us, the evidence already in the witness statements about the CCTV footage and that parties could lead additional evidence in chief as set out above, we did not require to view the CCTV footage. The claimant's second bundle of productions extended to 39 pages (pages C1 – C39).

19. Evidence concluded on 4 August 2023. There was insufficient time available for representatives' submissions. It was agreed that parties would provide written submissions to us and to each other by 18 August 2023. If either representative

wished to make further written submissions in response to the submissions from the other party, they would provide these to us and the other party by 25 August 2023. Thereafter there was a deliberations day in chambers with the two members on 8 September 2023.

Issues

20. As set out above the final list of issues to be determined by us had been set out by the Employment Judge in his case management orders dated 21 April 2023. The case management orders recorded that the final list of issues to be decided were discussed in detail with parties and finalised at the case management hearing. The case management orders recorded that parties should ensure that the evidence provided was sufficient to establish each of the issues set out.

21. At this final hearing both parties had a hard copy of the case management orders, including the final list of issues, to which they could refer. Parties were reminded at the outset of the final hearing, and on various occasions throughout the final hearing, that these were the only issues to be determined by us. The issues are appended to this judgment.

Findings in fact

22. We made the following material findings in fact necessary to determine the complaints. All references to page numbers are to the joint bundle, the claimant's first bundle of productions and the claimants second bundle of productions.

23. The claimant was employed by the respondent from 13 December 2015 until 8 December 2019 as a Crew Member. She was employed on a contract requiring her to work a minimum of 16 hours per week.

24. The respondent is DSR Restaurants Ltd trading as McDonald's. The respondent operates several McDonald's franchises across the west of Scotland.

Disability status

25. The claimant has suffered from anxiety and stress since at least 4 October 2017.

26. The claimant was signed off work for the period 4 October – 19 October 2017 with work related stress. She was prescribed medication by her GP for her condition.

27. The claimant was signed off work for the period 27 July 2019 – 1 November 2019 with stress and anxiety.

28. During the period from 4 October 2017 – 25 November 2019 the claimant was prescribed different medications for stress, anxiety and depression. She was on several different medications during the whole of this period. The dosage of such medications varied during the period. At times she was prescribed the maximum dosage.

29. Without medication in the period from 4 October 2017 – 25 November 2019, the claimant would have suffered from panic attacks. She would have been unable to leave the house for extended periods due to such attacks and would have been unable to carry out basic care needs such as washing herself or getting dressed or feeding herself properly.

30. With medication in the period from 4 October 2017 – 25 November 2019, the claimant had times when she could function relatively well, keep a house, run a car, look after two dogs and look after her mum. To help her function she has rituals which she followed each day, such as taking a photo of her front door to reassure herself she has locked it. But even with medication, there were extended periods when the claimant could not function. She had panic attacks. She could not leave the house or carry out basic care needs, such as washing herself or getting dressed or feeding herself properly. The dosage of her medication needed to be increased to a maximum dose on such occasions.

Continually pointing out bullying of claimant by managers /complaints ignored

31. On 28 September 2017 the claimant approached JH and asked to speak to him. She told him it was about "*in house bullying*" and that he should check the CCTV for 23 September 2017 at around 5pm. JH obtained a copy of the CCTV footage.

32. The claimant was absent from work from 4 October 2017 to 19 October 2017. Her GP issued a fit note signing her off work for the period with a diagnosis of work-related stress (p 502).

33. On or around 4 October 2017 the claimant told EP and other managers in the store, including FH that she had been sexually assaulted at work on 23 September 2017.

34. On or around 9 October 2017 the claimant attended a grievance investigation meeting about the matter raised with JH on 28 September 2017. The meeting was with two people from the respondent's HR team, including the HR Manager. The claimant had a companion with her. The claimant said that she had been sexually assaulted in the workplace on 23 September 2017 by a colleague. The respondent took notes of the meeting which were signed by the HR Manager and HR representative, the claimant and her companion (p431 – 441).

35. On 11 October 2017 the claimant emailed the respondent's HR department. In the email she provided further information about her allegation of sexual assault and was critical of how the matter had been handled by the store manager EP (p 429).

36. On 13 October 2017 the respondent's HR Manager emailed the claimant. The email stated that the respondent had completed its procedures in relation to the grievance raised by the claimant. The email stated that the respondent was unable to disclose full details of the disciplinary decision made regarding the colleague. The respondent confirmed that the claimant would no longer work on shift with the colleague (p 235). The respondent considered that the claimant's grievance had been resolved. The claimant did not appeal the outcome which was provided to her.

37. On 15 December 2017 the claimant was given a written reprimand by DM for being 52 minutes late for work on 9 December 2017. The reprimand stated that any incident of lateness of 20 minutes or more is in breach of company policy as set out in the company handbook. The claimant signed the written reprimand which stated, "*I have read and understood the contents of this letter*" (p 238). The written reprimand was given in accordance with the respondent's policy on lateness.

38. On 22 February 2018 the claimant sent an email to the respondent's HR department. She referred to a recent event on shift where she felt that she had been bullied by PA. She stated in her email that she had sent the email to HR as she no confidence in the incident being treated fairly in the store (p244 – 246). The complaint raised in the email was dealt with by EP. EP spoke to the claimant about the email. He was angry and told her that she should speak to him first about anything which happened in his store.

39. On 6 May 2018 the claimant emailed DM. The title of her email was "*Airing my spleen*". The claimant asked DM to ensure that EP received her email (p250). In the email the claimant referred to a recent event on shift where she felt she had been treated unfairly by PA (p 251-252). The complaint raised in the email was dealt with by EP.

40. On or around 6 May 2018 the claimant was unwell and did not attend work. She was disciplined for not following the respondent's absence reporting policy. The disciplinary warning was given in accordance with the respondent's absence reporting policy.

41. On 7 November 2018 the claimant called the store and said she would not be in for her shift that day due to the death of her uncle. She received various missed calls from the respondent thereafter. When she spoke to EP the following day, he told her that she should have been at work.

42. On 25 November 2018 the claimant was 25 minutes late for work. The reason given by the claimant was a power cut which meant her alarm clock didn't work and problems with her car. The claimant was disciplined for this. The disciplinary warning was given in accordance with the respondent's policy on lateness.

43. The claimant did not ask LM, on 29 November 2018 or at any other time, for time off to attend a hospital appointment.

44. On or around 3 - 8 February 2019 the claimant was absent from work by reason of sickness. She had a certificate from her GP signing her off as unfit for work. During the period covered by the certificate the claimant contacted LM who was responsible for scheduling the shifts. The claimant said she was now fit for work and asked to be scheduled for shifts. LM said she could not schedule any shifts for the claimant during the period of the sickness certificate, in case the claimant

was not well enough to complete a shift and left it short. On 8 February 2019 the claimant emailed EP to complain about LM (p276). She did not receive a reply from EP.

45. On 20 April 2019 the claimant was suspended from work on full pay in relation to an allegation of non-attendance at work on 19 April 2019 and failing to report her absence correctly in line with company procedure. The claimant was invited to an investigation meeting on 22 April 2019 (p 179).

46. On 6 May 2019 the claimant received a 'letter of intent" in relation to an unauthorised absence on 19 April 2019. The letter erroneously stated the unauthorised absence was on 20 April 2019. This was a typographical error. The letter stated that her actions would not lead to dismissal, but the discipline would stay live on her file for 12 months from date of issue (p 182). The claimant refused to sign to acknowledge receipt of the letter because she said she had been unable to attend work on 20 April 2019 as she had been suspended on that date.

47. On 20 May 2019 the claimant sent an email to the respondent's HR team to appeal against the letter of intent dated 6 May 2019 and to appeal against disciplinary sanctions imposed on previous dates. She set out details of these previous sanctions and why she considered that the sanctions imposed were unfair (p184). The appeal against disciplinary sanctions imposed on previous dates was late.

48. On 14 June 2019 the HR Manager met with the claimant to discuss the appeal she had submitted on 20 May 2019. A management witness was also present.

49. The HR Manager considered her appeal against the sanction for absence on 19 April 2019. He also considered her appeal against previous disciplinary sanctions although that part of her appeal was late. He decided to impose a first written warning for misconduct, considering all the various disciplinary sanctions imposed which had been included in her appeal email of 20 May 2019 (p201).

Failure to deal with claimant's grievance lodged in July 2019

50. On 21 July 2019 the claimant emailed EP. The subject of her email was "abuse of power". In her email she complained about a floor manager. This was not PA

but a different manager. The complaint involved a disagreement between the claimant and the floor manager about the length of break taken by the floor manager (p280).

51. The respondent carried out an investigation into the allegation made by the claimant. The respondent interviewed the claimant. She was given the opportunity to bring a companion but chose not to do so. The respondent obtained statements from three other colleagues who had been present. The statements said that the claimant had behaved in an aggressive and threatening manner towards them in the office. Two of the statements stated that the claimant had said she would punch someone if she didn't leave her shift.

52. On conclusion of the investigation the claimant signed a statement where she agreed that she had said that she would punch someone if she stayed and agreed that she had walked off her shift early (p202).

53. On 26 July 2019 the claimant was issued with a final written warning as she had left her shift without permission from the shift manager on 21 July 2019. The warning was issued by LM. The warning letter told the claimant she had a right of appeal against the decision. The claimant did not appeal against this decision.

54. The claimant was absent from work by reason of stress and anxiety from 27 July 2019 to 1 November 2019.

Changing verbal agreement of phased return to work on 8 November 2019 and subsequently

55. On 27 July 2019 – 1 November 2019 the claimant was absent from work by reason of sickness. She had certificates from her GP signing her off as unfit for work during her absence due to stress and anxiety.

56. On or around 25 October 2019 the claimant discussed a return to work with EP. She asked him for "shorter shifts". EP used the words "phased return".

57. On 1 November 2019 the claimant's GP assessed the claimant and provided a statement of fitness for work. The statement assessed the claimant and stated that because of "*stress and anxiety / L shoulder strain*" she "*may be fit for work taking account of the following advice: a phased return to work; amended*

duties". In the comments section the GP wrote "*No lifting ideally serving at counter. Phased return with shorter shifts. Suggest 6 hour shifts initially*". Underneath the comments section the statement says "*This will be the case from 28 October 2019 to 2 November 2019*". Underneath these dates the statement says "I *will not need to assess your fitness for work again at the end of this period*" (p 382).

58. The claimant worked on 2, 3, 5 and 6 November 2019. She was scheduled for shifts of six hours and worked the scheduled hours (p328, 330).

59. The claimant worked on 8 November 2019. She was scheduled a shift of seven hours. She worked the scheduled hours (p 330).

60. The claimant worked on 11, 13, 15 and 17 November 2019. She was scheduled for shifts of variously four, five and six hours and worked the scheduled hours (p331).

61. The claimant worked on 19 November 2019. She was scheduled a shift of seven hours. She clocked out after around six hours (p 332).

62. LM and DM had not been told by anyone, including the claimant or EP, that the claimant was on a phased return and was not to work shifts longer than six hours.

On or around 24 November 2019 told to work the longer shifts or "face the consequences"

63. On 24 November 2019 the claimant was scheduled a shift of seven hours. She worked the scheduled hours (p 332).

64. During this shift EP asked the claimant how she was getting on. She told him she was struggling with her anxiety and worried about having a panic attack in front of everyone. She told him she had spoken to managers about the length of her shifts, but nothing had been changed. She told him she would not be able to manage the full shift that night.

65. EP said to the claimant she was to stop accusing his managers of not doing their jobs and that she had to do her shift or face the consequences.

Resignation

66. The claimant submitted a resignation letter dated 25 November 2019. The letter stated *"I would like to inform you I will be leaving my position as crew member. My last shift will be 8 December 2019. This is giving you two weeks notice. I will deal with the issues that has caused my resignation with HR with advice from ACAS, but please note, this decision wasn't taken lightly, especially at this time of year*" (p 207).

67. On 4 December 2019 the claimant submitted a sick line which was backdated for the period 27 November 2019 to 9 December 2019 (p176).

Observations on the evidence

68. The Tribunal has only made findings of fact in relation to matters which are relevant to the legal issues to be decided. Given the passage of time it is inevitable that memories will have faded on certain aspects and the contemporaneous documentary evidence to which we were referred in evidence has therefore been of assistance to us in making our findings of fact.

69. We found the respondent's witnesses to be credible and on the whole reliable, given the passage of time. Their evidence was largely supported by the documentation to which we were referred in evidence. We accepted that contemporaneous documentary evidence as being an accurate account of what had happened.

70. In relation to the material facts as found, there were some areas of dispute between the parties.

71. The claimant's evidence was that she was being disciplined for "misfortune rather than misdemeanour" when she was disciplined for being late or absent from work on various occasions. The evidence of LM and DM was that if a member of staff is going to be late or is unable to attend a shift, they require to give at least two hours prior written notice. Both witnesses were consistent in their evidence, and we accepted that this was the respondent's policy. Their evidence, which we also accepted, was that this was the policy applied to the claimant when she did not provide such prior written notice. We noted that the claimant had signed for receipt of disciplinary warnings for lateness or non-attendance on various occasions without challenge at the time. For example, when she received a written reprimand from DM for being late on 9 December 2017 which stated that she had read and understood the contents of the letter

(p238). We were satisfied that the disciplinary warnings had been issued in accordance with the respondent's lateness and sickness absence reporting procedures.

72. On 6 May 2018 the claimant emailed DM. The title of her email was "Airing my spleen". The claimant asked DM to ensure that EP received her email (p250). In the email the claimant referred to a recent event on shift where she felt she had been treated unfairly by the manager PA (p 251-252).

73. DM's evidence was that she understood that EP was dealing with the disagreement between the claimant and PA on or around 6 May 2018. We accepted DM's evidence and considered that this accorded with the claimant's own evidence to the extent that EP had spoken to the claimant previously about PA and said that if anything happened in store, she should speak to him first. We also accepted DM's evidence that she did not hear further from the claimant about her email of 6 May 2018. We were satisfied that this indicated that EP was taking action in relation to the claimant's complaints about PA and that the respondent did not ignore those complaints.

74. The claimant's evidence was that she felt harassed by receiving various missed calls from the respondent on 7 November 2018 after she had called the store and said she would not be in due to the death of her uncle. We did not hear any evidence as to why the respondent was calling. When she spoke to EP the following day, he told her that she should have been at work. We accepted that EP had said this to her. We were unable to conclude that the reason for the missed calls was to tell the claimant to come into work.

75. The claimant's evidence was that on 29 November 2018 she requested time off to attend a hospital appointment on 13 December 2018 and that the request was denied by LM. LM denied that she had refused the claimant time off to attend a hospital appointment. LM's evidence, which was not challenged, was that the claimant had made numerous requests to LM during her employment to rearrange shifts and that she had tried to accommodate these shifts where possible. LM's evidence was also that she had checked the respondent's records, and the claimant was not scheduled for a shift on the day in question. On balance, therefore, we preferred LM's evidence that she had not denied any request for time off to attend a hospital appointment.

76. The claimant's evidence was that the respondent's HR manager disciplined her on 14 June 2019 for a shift that she was not allowed to work as she was under

suspension. We noted that the claimant was suspended from work on 20 April 2019. We noted that the letter issued to the claimant on 6 May 2019 (p183) did refer to failing to follow the correct sickness reporting procedure on 20 April 2019. We were satisfied that this was a typographical error as the failure to follow reporting procedures had occurred on 19 April 2019. We noted that the hearing on 14 June 2019 was an appeal hearing and that the claimant had appealed against various disciplinary warnings not only the warning for non-attendance in April 2019. We had regard to the terms of the note of the hearing which took place on 14 June 2019 (p. 201) which had been signed by the claimant and which reflected a wider discussion about sickness/absence reporting over a period. We were satisfied that a first written warning had been agreed with the claimant for various sickness/absence reporting issues.

77. The claimant denied that during an investigation meeting with LM on 26 July 2019 she admitted that she had said to colleagues on 21 July 2019 that she would punch someone if she stayed at work. We noted that the claimant had signed a statement where she agreed that she had said that she would punch someone if she stayed at work and where she agreed that she had left her shift early (p202).

78. The claimant's evidence was that she had signed the statement without reading it and she was not aware of the contents, which she now disputed. She said that LM had read out a statement to her. She said that what had been read out to her was different to what she had signed. She said that what LM read out did not contain the statement that the claimant said she would punch someone if she stayed at work.

79. LM's evidence was that the statement was an accurate account of what the claimant had said. We preferred LM's evidence. We consider it unlikely that the claimant would not have read the statement before signing it. We consider it unlikely that LM would not have read out the entire contents of the statement which she was asking the claimant to sign. It is relatively short. Further the statement that the claimant would punch someone if she stayed at work is consistent with the investigation which the respondent carried out with other colleagues following receipt of the claimant's email to EP on 22 July 2019 headed "abuse of power". This is the grievance to which the claimant refers. On balance we determined that LM had read out the statement in full, which the claimant had an opportunity to consider before signing. On balance we

determined that the signed statement was a contemporaneous account by the claimant of what had happened.

80. The claimant's evidence was that during the shift on 24 November 2019 EP said to her that she was to stop accusing his managers of not doing their jobs and that she had to do her scheduled shift of 7 hours or face the consequences. This evidence was not challenged by the respondent as EP was not present at this final hearing. We accepted that EP did say this to the claimant.

Relevant law

Constructive dismissal

81. Section 94(1) Employment Rights Act 1996 (ERA) says as follows "9*4The right (1) An employee has the right not to be unfairly dismissed by his employer*."

82. 95(1) ERA says as follows "*Circumstances in which an employee is dismissed (1) For the purposes of this Part an employee is dismissed by his employer 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*".

83. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: (**Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**).

84. There must be a breach of contract by the employer. This may be a breach of an express or implied term. "*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.*" (**Western Excavating**).

85. The breach may consist of a one-off act amounting to a repudiatory breach. Alternatively, there may be a continuing course of conduct extending over a

period and culminating in a "l*ast straw*" which considered together amount to a repudiatory breach. The last straw need not of itself amount to a breach of contract, but it must contribute something to the repudiatory breach. Whilst the last straw must not be entirely innocuous or utterly trivial it does not require of itself to be unreasonable or blameworthy (**London Borough of Waltham Forest v Omilaju [2005] IRLR 35**).

86. **In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed (i) 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? (ii) Has he or she affirmed the contract since that act? (iii) If not, was that act (or omission) by itself a repudiatory breach of contract? (iv) If not, was it nevertheless a part (applying the approach explained in **Waltham Forest v Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.) (v) Did the employee resign in response (or partly in response) to that breach?

Disability status

87. Section 6(1) EqA says as follows: *"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*"

88. Schedule 1 EqA contains supplementary provisions in relation to the determination of disability. Paragraph 2 states: "*The effect of an impairment is long-term if- (a) it has lasted 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*."

89. Paragraph 5 states: "*5(1) 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 – (a) measures are being taken to treat or correct it; and (b) but for that, it would be likely to have that effect…* "

90. The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the Guidance) does not itself impose legal obligations, but the **Tribu**nal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

91. The Guidance at paragraph B1 deals with the meaning of "substantial adverse effect" and states "*The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect*."

92. Paragraphs B4 and B5 state that: "*An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect...*"

93. Paragraph B1 should be read in conjunction with Section D of the Guidance, which considers what is meant by "*normal day-to-day activities*". Paragraph D2 states that it is not possible to provide an exhaustive list of day to-day activities.

94. Paragraph D3 Provides that: "*In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities*."

95. D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

96. The Equality and Human Rights Commission: Code of Practice on Employment (2011), at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that "*There is no need for a person to establish a medically*

diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause." At paragraph 16 it states "*Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured)*."

97. Section 212 EqA says as follows: ""*212 General Interpretation In this Act - ….'substantial' means more than minor or trivia*l".

98. In **Goodwin v Patent Office [1999] IRLR 4**, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are: a. Does the person have a physical or mental impairment? b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities? c. Is that effect substantial? d. Is that effect **long-term**?

Discrimination arising from disability

99. Section 15 EqA is in the following terms:*15 Discrimination arising from disability (1) A person (A) discriminates against a disabled person (B) if—(a)A treats B unfavourably because of something arising in consequence of B's disability, and (b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim*.

Reasonable adjustments

100. Sections 20 and 21 EqA say as follows:

"*20 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...."

"21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person...."

101. Schedule 8 EqA paragraph 20 says as follows:

"*Part 3 Limitations on the Duty*

20 Lack of knowledge of disability, etc.

(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—...

(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."

102. Where a respondent argues that it could not reasonably have been expected to know of the claimant's disability, the onus falls on the respondent to establish that, and the issue is one of fact and evaluation – **Donelien v Liberata UK Ltd [2018] IRLR 535**. The matter, in the context of a claim under section 15 EqA, was examined in **A Ltd v Z UKEAT/0273/18** where it was held that the assessment included what the respondent might reasonably have been expected to know having made appropriate enquiries.

Harassment

103. Section 26 EqA says as follows:

"*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."

Victimisation

104. Section 27(1) and (2) EqA says as follows:

"*27 Victimisation*

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b)…..

(2) Each of the following is a protected act—

(a)…..

(b)…..

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

Time limits

105. Section 123 (1) EqA says as follows: "*Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable*". For the purposes of this section (a) conduct extending over a period is to be treated as done at the end of the period.

106. Guidance on determining time limits and whether there is a **continuing act of discrimination** is found in **Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA,** as approved by the Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA**. In **Lyfar** the Court of Appeal clarified that the correct test in determining whether there is a continuing act of discrimination is that set out in **Hendricks**. Thus, tribunals should look at the substance of the complaints in question to determine whether they can be said to be part of one continuing act by the respondent.

Burden of proof

107. Section 39 EqA says as follows:

"39 *Employees and applicants …*

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) …..;

(b) …..;

(c) by dismissing B; (d) by subjecting B to any other detriment.

(3)…..

(4) An employer (A) must not victimise an employee of A's (B)

(a)…..;

(b)…..;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

108. Section 136 EqA says as follows: "1*36 Burden of proof If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision*."

109. We have taken into account the well-known guidance given by the Court of Appeal in **Igen Ltd v Wong [2005] ICR 931** which although concerned with

predecessor legislation remains good law. It was approved by the Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054**. **Ayodele v Citylink Ltd [2018] ICR 748, CA** confirmed that differences in the wording of the Equality Act 2010 have not changed the test or undermined the guidance in **Igen Ltd**.

110. First, the claimant must prove certain essential facts and to that extent faces an initial burden of proof. The claimant must establish a “prima facie” or, in plainer English, a “first appearances" case of discrimination which needs to be answered. If the inference of discrimination could be drawn at the first stage of the enquiry then it must be drawn at the first stage of the enquiry, because at that stage the lack of an alternative explanation is assumed. The consequence is that the claimant will necessarily succeed unless the respondent can discharge the burden of proof at the second stage. However, if the claimant fails to prove a ‘‘prima facie" or “first appearances” case in the first place then there is nothing for the respondent to address and nothing for the Tribunal to assess **Ayodele** and **Hewage**.

111. At the first stage of the test, when determining whether the burden of proof has shifted to the respondent, the question for the Tribunal is not whether, on the basis of the facts found, it would determine that there has been discrimination, but rather whether it could properly do so.

112. The following principles can be derived from **Igen Ltd v Wong** (above), **Laing v Manchester City Council [2006] ICR 1519 EAT**, **Madarassy v Nomura International p/c [2007] ICR 867**, and **Ayodele v City link Ltd** (above); which reviewed and analysed many other authorities.

113. At the first stage a Tribunal should consider all the evidence, from whatever source it has come. It is not confined to the evidence adduced by the claimant and it may also properly take into account evidence adduced by the respondent when deciding whether the claimant has established a prima facie case of discrimination. A respondent may, for example, adduce evidence that the allegedly discriminatory acts did not occur at all, or that they did not amount to less favourable treatment, in which case the Tribunal is entitled to have regard to that evidence.

114. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected characteristic and a difference in treatment. That would only indicate the possibility of discrimination and a mere possibility is not enough. Something more is required, see **Madarassy** (above).

115. In order to establish a “first appearances” case of discrimination under section 15 EqA a claimant must show that they have been treated unfavourably by the employer, that “something" arose as a consequence of their disability and that there are facts from which it could be inferred that this “something” was the reason for the unfavourable treatment. If all of that is done, then the burden shifts to the employer to prove either that it did not know that the claimant was disabled (section 15(2)), or that the reason for the unfavourable treatment was not the “something" alleged by the claimant, or that the treatment was a proportionate means of achieving a legitimate aim (section 1 5(1)(b)).

116. In **Project Management Institute v Latif [2007] IRLR 579**, the EAT established that the claimant must establish not only that the duty to make adjustments has arisen, but also that there are facts from which it could be inferred, absent a lawful explanation, that the duty had been breached by the respondent. Therefore, there must be evidence of some apparently reasonable adjustment that could have been made. Once a potentially reasonable adjustment has been identified the burden shifts to the respondent to prove that the adjustment could not reasonably have been achieved. The level of detail required of the claimant will vary from case to case, but it is necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to be able to engage with the question whether it could reasonably have been achieved or not.

117. In **Jennings v Barts and the London NHS Trust UKEAT/0056/12** the EAT held that **Latif** did not require the application of the concept of shifting burdens of proof, which '*in this context*' added '*unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided*' as to whether the adjustment contended for would have been a reasonable one.

118. In **Hewage** (above) the Supreme Court observed that it was important not to make too much of the role of the burden of proof provisions. They required careful attention where there was room for doubt as to the facts necessary to

establish discrimination, but they have nothing to offer where the Tribunal is able to make positive findings on the evidence one way or the other. More recently, a similar endorsement was given by the Supreme Court in **Efobi v Royal Mail Group Ltd 2021 ICR 1263, SC**.

Submissions

119. Both parties provided written submissions. Parties were given an opportunity to provide further written submissions in response to those received from the other party. Neither chose to do so. We carefully considered the written submissions of both parties during our deliberations and have dealt with the points made in submissions, where relevant, when setting out the facts, the law and the application of the law to those facts. It should not be taken that a submission was not considered because it is not part of the discussion and decision recorded.

Discussion and decision

Constructive dismissal

120. We reminded ourselves of the terms of section 95(1)(c) ERA and the legal test for constructive dismissal as set out by Lord Denning in **Western Excavating**. There had to be a breach of contract which went to the root of the contract. It had to be sufficiently serious to entitle the claimant to resign immediately, regardless of whether she actually did so.

121. The claimant asserted that there was a breach of the implied duty of trust and confidence because of the following things: (a) continually pointing out bullying of claimant by managers /complaints ignored; (b) failure to deal with grievance lodged July 2019; (c) changing verbal agreement of phased return to work on 8 November 2019 and subsequently; and (d) on or around 24 November 2019 told to work the longer shifts or “face the consequences”.

Continually pointing out bullying of claimant by managers /complaints ignored

122. The claimant asserts that she continually pointed out that she was being bullied by managers and that her complaints were ignored. The respondent asserts that she was not bullied by managers. The respondent asserts that when she

raised complaints about managers these were dealt with appropriately by the respondent.

123. The allegations upon which the claimant relied in relation this assertion were (i) the complaint made to the respondent on 28 September 2017 and 4 October 2017 that she had been sexually assaulted in the workplace and how this was dealt with by the respondent; (ii) various disciplinary warnings given to her in the period 15 December 2017 – 14 June 2019 about being late or absent from work; (iii) the complaints made to the respondent about the manager PA bullying her in the period 22/23 February 2018 to 5/6 May 2018 and how this was dealt with by the respondent; (iv) phoning the claimant repeatedly when her uncle died; (v) LM denying the claimant time off to attend a hospital appointment scheduled for 13 December 2018; (vi) not being allowed to return to work by LM during the period 3- 8 February 2019 which was covered by a fitness for work certificate from the claimant's GP which stated she was unfit for work.

124. We considered the allegation that the claimant had been sexually assaulted by a colleague and the claimant had complained about this to the respondent. We accepted, from documentary evidence provided, that the colleague was subsequently convicted in the criminal courts in respect of this assault. The claimant asserted, in accordance with the issues identified for determination at the final hearing, that this meant her complaint to the respondent about bullying had been ignored. We did not agree with that assertion. We noted that the claimant told managers about the assault on 28 September 2017 and 4 October 2017. Thereafter, the respondent held an investigation meeting with the claimant, which she attended with a companion. A note of the meeting was prepared by the respondent which was signed at the time by the claimant, her companion and those who attended from HR. The claimant then provided further information to HR for consideration prior to receiving an outcome. The claimant was provided with an outcome from her grievance on or around 13 October 2017. This confirmed that she would no longer be working with the colleague, but the nature of any disciplinary sanction imposed on the colleague was confidential. The claimant did not appeal the outcome of her grievance.

125. We were satisfied that the respondent did deal with the claimant's grievance about the assault at the time using their grievance procedure. We did not agree that because the outcome of the grievance procedure was different to the

outcome of the criminal courts it followed that the claimant's grievance had been ignored. The evidence did not support that her grievance had been ignored. We were satisfied that the respondent had not ignored her grievance.

126. We considered the allegations about various disciplinary warnings given to the claimant in the period 15 December 2017 – 14 June 2019. The claimant asserted that these were for misfortune rather than misconduct. The respondent asserted that the correct disciplinary procedure had been followed and that they were misconduct matters. We preferred the evidence of the respondent's witnesses that disciplinary warnings had been given for failure to follow the respondent's reporting procedures for absence and lateness. The disciplinary warnings given had been signed by the claimant and there had been no appeal against the disciplinary warnings at the time, except for the warning issued on 6 May 2019. The outcome of the claimant's one appeal, which at the claimant's request also discussed earlier warnings for time keeping/lateness, was that a written warning would be issued. The appeal letter from the claimant and the appeal outcome from the respondent, which the claimant signed, referred to the earlier warnings also having been considered in reaching the decision to impose a written warning.

127. We were satisfied that the disciplinary sanctions for misconduct imposed by the respondent were done following the respondent's disciplinary procedures. We were satisfied that the claimant had not been pointing out bullying of her by managers. We were satisfied that no complaints had been ignored.

128. We considered the allegation about complaints made by the claimant concerning PA in the period around 22 February 2018 to 6 May 2018. The claimant asserted that these complaints were ignored. The respondent asserted that EP dealt with them. We concluded from the evidence led about action taken by EP that he had dealt with the complaints at the time and that the claimant had accepted at the time how EP had dealt with them.

129. On around 22 February 2018 the claimant emailed the respondent's HR team with an allegation that she had been bullied by PA. The HR team told EP about the allegation and he spoke to the claimant about it. According to the evidence of the claimant, which we accepted, EP spoke to her about the email, was angry and told her that she should speak to him first about anything which happened in his store. We did not hear any evidence from the claimant that she had

followed up with HR at the time because she considered that her email had not been dealt with by EP or by HR.

130. The claimant's evidence was that EP did not tell her what to do if she felt she was being bullied by PA again. This did not accord with the claimant's evidence that EP told her that she should speak to him first about anything which happened in his store. On 6 May 2018 the claimant emailed EP about further allegations of bullying of her by PA. She also sent the email to DM. It appeared to us that the claimant was doing what she had been told to do by EP, which was speaking to him first about matters in his store.

131. We accepted DM's evidence that she understood that EP was dealing with the disagreements between the claimant and PA. This accorded with the claimant's own evidence that she was to raise matters with EP, which she did. We accepted DM's evidence that she did not hear further from the claimant about her email of 6 May 2018.

132. The claimant asserted that when she phoned in sick on around 7 May 2018 EP did not mention her grievance to her. We did not consider that to show that EP or HR were not dealing with her email. We did not consider that such a call would have been an appropriate time to discuss it. We were satisfied from the claimant's evidence that EP did address with the claimant the complaints which the claimant was making about PA, without any need for HR to be further involved. We were satisfied that HR knew about the complaints but understood that EP was dealing with them, which he was. We were satisfied that the respondent had not ignored these complaints.

133. We considered the allegation that the respondent had phoned the claimant repeatedly, which calls she did not answer, following the death of her uncle. The evidence of the claimant, which we accepted, was that EP had been phoning the claimant when she did not attend for work and had said to her the following day that she should have been at work. There was no evidence about why EP was phoning. We were satisfied that it could have been for any number of reasons. Further, there was no evidence that the claimant had complained of bullying to the respondent about these calls at the time. We were satisfied that the claimant had not been pointing out bullying of her by managers. We were satisfied that no complaints had been ignored.

134. We considered the allegation that LM had denied the claimant time off to attend a hospital appointment. We accepted LM's evidence that she had no

recollection of this. We accepted her evidence that she had checked the respondent's records, and they did not show that the claimant was scheduled to work on the day in question. We were satisfied that the respondent had not denied the claimant time off to attend a hospital appointment. We were satisfied that the claimant had not been pointing out bullying of her by managers. We were satisfied that no complaints had been ignored.

135. We considered the allegation that LM did not allow the claimant to return to work during the period 3- 8 February 2019. We were satisfied that during the period there was a fitness for work certificate from the claimant's GP which stated she was unfit for work. We accepted LM's evidence that she could not schedule any shifts for the claimant during the period of the sickness certificate, in case the claimant was not well enough to complete a shift and left it short. We were satisfied that the respondent would not be expected to schedule shifts for the claimant at her request, when she was signed off sick. The claimant's evidence, which we accepted, was that on 8 February 2019 she emailed EP to complain about LM but did not receive a reply from him. As stated, we were satisfied that the respondent would not be expected to schedule shifts for the claimant when she was signed off sick, such that EP would have been expected to intervene. We were satisfied that no complaints had been ignored.

Failure to deal with grievance lodged July 2019

136. We considered the allegation that the respondent had failed to deal with the claimant's grievance lodged on 21 July 2019 that she had been bullied by a manager, following a disagreement about the length of the manager's break. The respondent asserts that the grievance was dealt with by way of an investigation with the claimant and witnesses. We preferred the evidence of the respondent which was supported by the contemporaneous documentary evidence. This showed that the respondent obtained statements from the claimant and three other colleagues who had been present. The claimant's own statement, which she signed at the time stated that she had said that she would punch someone if she stayed and that she had walked off her shift early. The claimant asserted that she had not said this and that the statement she signed is not accurate. We did not accept this given the contemporaneous evidence of other witnesses who were present. We were satisfied that the respondent had

dealt with the claimant's grievance and had done so in an appropriate manner. We were satisfied that no complaints had been ignored.

Changing verbal agreement of phased return to work on 8 November 2019 and subsequently

137. We next considered whether EP had verbally agreed that the claimant could return to work on a phased return, and if so the terms of that phased return agreement.
138. The claimant's evidence was that she discussed a return to work with EP on or around 25 October 2019. She asked him for "shorter shifts". EP said he would need something in writing from her doctor to say as such. He was the one who used the words "phased return". The claimant spoke to her GP who issued a phased return fit note specifying no longer than 6-hour shifts.
139. We noted that the fitness for work certificate which refers to a phased return is dated 1 November 2019. We noted that it covered the period 28 October 2019 to 2 November 2019. We noted that it stated that the GP did not require to assess the claimant's fitness for work again at the end of this period. We noted that it said "*Suggest 6 hour shifts initially*".

140. We accepted the claimant's unchallenged evidence that she discussed a return to work with EP on or around 25 October 2019, that she asked him for "shorter shifts", he said he would need something in writing from her doctor to say as such and he used the phrase "phased return". There was, however, no evidence led by the claimant about any conversation with EP once she received the fitness for work certificate from her GP dated 1 November 2019.
141. Given the evidence before us, whilst we were satisfied that the claimant had a conversation with EP on or around 25 October 2019 about shorter shifts and a phased return we were not satisfied that there was any agreement between the claimant and EP on 25 October 2019 or at any time thereafter about the terms of any phased return to work, such as the length of any "shorter shifts" or for how long any shorter shifts would be allocated, given the certificate referred to 6-hour shifts "initially".
142. We noted that the claimant had been scheduled to work shifts of six hours on 2, 3, 5 and 6 November 2019. She then worked a scheduled shift of seven hours on 8 November 2019. There was no evidence that she spoke to EP about this

shift of seven hours. The only evidence the claimant led, which we do not accept as set out below was that she spoke to other managers on 18, 19 and 23 November 2019 about phased return shifts. We were satisfied that if the claimant had a verbal agreement with EP of shifts of no longer than six hours which was in place on or after 8 November 2019, she would have raised the seven-hour shift on 8 November 2019 with EP at the time. She did not do.

143. The claimant also asserted that she had spoken to LM, DM and FH about getting phased return shifts, but they had not actioned these.

144. The claimant's evidence was that she spoke to LM on 18 November 2019 and FH on 19 November 2019 about getting her shifts changed to "phased return" shifts.

145. The evidence of LM was that she did not know about any phased return to work for the claimant. She had no recollection of the claimant asking her about a phased return to work. Nor did she have any recollection of the claimant telling her that she was struggling with her shifts or was suffering from anxiety or panic attacks.

146. The evidence of LM was that the claimant spoke to her about reducing her contractual hours. She said she told the claimant that if she wanted to reduce her hours, from her contractual sixteen hours per week, she would need to request this from the store manager. She said she told the clamant that she did not have authority to allocate fewer hours than the claimant's contractual sixteen hours per week. We accepted this evidence.

147. We were satisfied that if the claimant had spoken to LM on 18 November 2019 about getting her shifts changed to "phased return" shifts, this is something which LM would have recalled. We determined on balance, therefore, that the claimant did not speak to LM on or around 18 November 2019 or at any other time to ask her about phased return to work shifts or to tell her she was struggling with her shifts or was suffering from anxiety or panic attacks. This was important information and we determined that if the claimant had given LM this information, LM would have recalled this.

148. The claimant's evidence was that she spoke to DM on 23 November 2019 because despite speaking to LM and FH her shifts had not changed, she was struggling to complete her shifts and she was really concerned about the shift of seven hours for which she had been scheduled on the rota for 24 November 2019. Her evidence was that she also asked DM how soon she could drop her

hours to get shorter shifts and what her notice period would be if she was not allowed to drop her hours.

149. The evidence of DM was that was she did not know about any phased return to work for the claimant. She had no recollection of the claimant asking her about a phased return to work. Her evidence was that if the claimant had asked her for a phased return to work, she would not have been able to authorise this. Such a request would usually be dealt with by the store manager EP and then passed down to her once approved so she could arrange shifts in line with whatever had been approved. We accepted this evidence.

150. The evidence of LM and DM was consistent. Namely that they had no recollection of the claimant asking them about working shorter shifts on a phased return. Further, even if the claimant had asked them, they would not have been able to authorise this request, which would require to have been authorised by EP. We accepted on balance that the claimant had not spoken to either LM or DM as she alleged. It was an important matter, and we were satisfied that if the claimant had spoken to either of them they would have recalled this. We were also satisfied that they would not have had the authority to agree phased return hours with the claimant. Although FH did not give evidence, we were satisfied on balance that it is unlikely that the claimant spoke to him about a phased return as he would not have been able to agree this.

151. We were satisfied that if the claimant had agreed terms of a phased return with EP, including the length of shifts and for how long any phased return was to be in place this is something that LM in particular would have known about as she scheduled the shifts.

152. We were satisfied that the scheduling of shifts of seven hours on 8, 19 and 24 November 2019 was not in breach of any verbal agreement between the claimant and EP that she would not work shifts of more than six hours on those dates. There was no verbal agreement of a phased return to work on the terms asserted by the claimant or at all. Accordingly, there was no breach of any verbal agreement on 8 November 2019 and subsequently.

153. In summary we were satisfied that there was no failure on the part of the respondent to deal with any complaints of bullying made by the claimant; there was no failure to deal with the claimant's grievance lodged in July 2019; and there was no verbal agreement with EP whereby the claimant would not work shifts of more than six hours on or after 8 November 2019.

On or around 24 November 2019 told to work the longer shifts or "face the consequences"

154. We considered the final allegation relied upon by the claimant, namely that EP told her during her shift on 24 November 2019 that she was to work the longer shift of seven hours for which she had been scheduled or face the consequences. We accepted that this had been said. We were, however, satisfied that this was not in itself a repudiatory act. The respondent had been entitled to schedule her to work the seven-hour shift, and that is what it had done. EP was entitled to say to her that if she left her scheduled shift early there would be consequences in doing so.

155. We were also satisfied that this final allegation did not form part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence.

156. Objectively, we were satisfied from the perspective of a reasonable person in the position of the claimant that these events when considered together did not constitute a course of conduct calculated or likely to destroy or damage the relationship of trust and confidence without reasonable and proper cause. There was no repudiatory breach and accordingly the claimant did not terminate her contract in circumstances in which she was entitled to terminate it by reason of the respondent's conduct. The claimant was not therefore constructively dismissed and instead resigned voluntarily.

157. In the circumstances it is not necessary for us to consider whether the alleged breach was a factor (i.e. played a part) in the claimant's resignation or whether the claimant affirmed the alleged breach.

158. The claimant's complaint of constructive dismissal is not well founded and is dismissed.

Disability status

159. We considered each of the questions posed in **Goodwin v Patent Office**, when considering whether the claimant was a disabled person as a result of a mental impairment and reached the following conclusions:

160. Did the claimant have a mental impairment? The claimant provided some of her GP medical records to the Tribunal. There was an entry in the records showing that from 4 October 2017 the claimant suffered from stress. The entry showed that she was prescribed medication from her GP on this date for this condition. There is subsequent correspondence in the medical records from her GP which states that the claimant has suffered from anxiety since she was sexually assaulted in 2017 and that this is well documented.

161. The claimant's evidence was that she remained on medication for stress and anxiety following her return to work in October 2017 and throughout the remainder of her employment with the respondent. Sometimes she required the maximum dose of medication or additional medication such as diazepam for serious life events. We accepted this evidence of the claimant. We accepted that the stress and anxiety amounted to a mental impairment from 4 October 2017**,** that being the earliest date shown in the GP records available to us.

162. Was there a substantial, adverse effect on the claimant's ability to carry out day-to-day activities? From 4 October 2017 and for the rest of her employment the claimant was prescribed medication for stress and anxiety. If she had not been taking the medication her ability to undertake certain day-to-day activities would have been adversely impacted. She would have found it difficult to get washed and dressed, to prepare and eat food and to leave her house for work or other activities. Even when she was taking medication, she sometimes had panic attacks and found it difficult to carry out these activities. She then required to ask her GP for the maximum dose of medication or for additional medication.

163. All of these day-to-day activities would have been significantly more difficult had the claimant not been taking medication for stress and anxiety. We concluded, as a result, that the claimant's mental impairment had an adverse effect on her ability to carry out normal day to day activities. We also concluded that that effect was substantial, i.e. it was more than minor or trivial.

164. Was that effect long term? The information in the GP records provided to the Tribunal showed that the claimant suffered from stress and anxiety from 4 October 2017. She was on medication for the remainder of her employment. By 3 October 2018, the substantial adverse effects of the claimant's mental

impairment had lasted for 12 months. The effect was accordingly, by 3 October 2018, long term.

165. For these reasons we concluded that the claimant was a disabled person, as a result of a mental impairment, from 3 October 2018 onwards.

166. Given the information available to the respondent, we asked ourselves whether the respondent knew, or at very least ought to have known, that the claimant had a disability and, if so, from what date. The claimant was absent from work for a period in October 2017 for work-related stress. They were aware that she had an extended absence from work from 27 July 2019 to 1 November 2019 for stress and anxiety which was documented on fitness to work certificates.

167. We concluded that the respondent may not have known or ought reasonably to have known as of 3 October 2018 that the claimant was disabled. Thereafter, however, the claimant had an extended absence for stress and anxiety from 27 July 2019 to 1 November 2019. We concluded that even if they were not aware of the precise impact on the claimant's ability to undertake day to day activities, this information could have been gleaned from minimal discussion with the claimant by 2 November 2019, which was the date she returned to work. The respondent ought reasonably to have taken this step, given the other information available to them. We concluded that the respondent ought to have known that the claimant had a disability by 2 November 2019.

Time limits

168. The claimant's effective date of termination of employment is 8 December 2019. She submitted her claim to the Tribunal on 10 April 2020. Early conciliation commenced on 10 February 2020 and ended on 10 March 2020.

169. The ordinary unfair constructive dismissal complaint has been presented in time.

170. The claimant brings a discrimination arising from disability complaint relying upon an act which she asserts took place on 24 November 2019. This complaint has been presented in time.

171. She brings a complaint of failure to comply with the duty to make reasonable adjustments. She suggests changing shift patterns by 24 November 2019. This complaint has been presented in time.

172. She brings complaints of harassment related to disability, relying upon acts which she asserts took place on 22 February 2018, 23 February 2018, 5 – 6 May 2018, 6 May 2018 and 24 November 2019. The complaint in relation to the asserted act on 24 November 2019 is in time. The others are out of time, subject to further consideration below.

173. She brings complaints of victimisation. She asserts she was victimised under section 27 EqA on 4 October 2017, on 13 October 2017, on or around 6 May 2018 and on 23 November 2019. The complaint in relation to the asserted act on 23 November 2019 is in time. The others are out of time, subject to further consideration below.

Discrimination arising from disability

174. For a complaint under section 15 EqA to succeed it must be shown that the claimant was unfavourably treated by reason of 'something' arising in connection with her disability. There is no need to identify a comparator. If a valid complaint is provisionally made out, the respondent may be able to argue that the treatment is justified by being a proportionate means of achieving a legitimate aim. If it is able to do so the treatment will not be unlawful.

175. "Unfavourable treatment" is not defined in EqA but the EHRC Employment Code states at para. 5.7 that it means that a disabled person "must have been put at a disadvantage'.

176. The act relied upon by the claimant for the discrimination arising from disability claim is insisting that the claimant work full shifts (on or around 24 November 2019).

177. The 'something' arising in consequence of the claimant's disability upon which she relies in relation to the act complained of is that she could not work the longer shifts.

178. We asked ourselves whether insisting that the claimant work full shifts (on 24 November 2019) is unfavourable treatment.

179. We found that on 24 November 2029 the respondent insisted that the claimant work the full shift of seven hours for which she had been scheduled on the shift rota. We found that that there was no agreement between the claimant and EP that she would not work a seven-hour shift on that date. The claimant had prior notification of this shift. She had been scheduled two previous shifts of seven hours since her return to work. She had worked both of those shifts, albeit she had clocked out after six hours on the second shift. The fitness for work certificate dated 1 November 2019 referred to six-hour shifts "initially". There was no medical evidence about what the GP intended by "initially". She had been scheduled and worked around ten shifts prior to the shift scheduled for 24 November 2019. This included shifts of seven hours. We therefore concluded that there was no unfavourable treatment by insisting that the claimant work the full shift of seven hours for which she had been scheduled on the rota.

180. If we are wrong on that we also considered whether the 'something' identified by the claimant namely that she could not work the longer shifts of seven hours, arose in consequence of or in connection with the claimant's disability.

181. We considered whether the claimant could not work the longer shifts of seven hours. The claimant had been scheduled two previous shifts of seven hours since her return to work. She had worked both of those shifts, working for seven hours on one of the shifts. In the circumstances it could not be said that she could not work the longer shift of seven hours, as she had worked a shift of seven hours on 8 November 2019.

182. If we are wrong on that, we considered next whether the something arose in consequence of the claimant's disability. The fitness for work certificate dated 1 November 2019 referred to six-hour shifts "initially". There was no medical evidence about what the GP intended by "initially". There was no discussion or agreement with the respondent about what was intended by "initially". She had been scheduled for and worked around ten shifts prior to the shift scheduled for 24 November 2019. This included completing a shift of seven hours about which we found she had made no complaint to management. In the circumstances it could not be said that that the something relied upon, that she could not work the longer shift of seven hours, arose in consequence of or in connection with the claimant's disability.

183. In the circumstances the claimant's complaint of discrimination arising from disability is not well founded and is dismissed.

Reasonable adjustments

184. A complaint of failure to make reasonable adjustments requires that a provision, criterion or practice, or a physical feature, or the absence of an auxiliary aid put the claimant at a particular disadvantage compared with people not sharing her disability, and that it would be reasonable for the respondent to make an adjustment which would wholly or partly alleviate the disadvantage. The respondent must have known or reasonably been expected to know about the disability and the disadvantage caused at the time the adjustment allegedly should have been made. Knowledge in this regard is not limited to actual knowledge but extends to constructive knowledge (i.e. what the respondent ought reasonably to have known).

Was the PCP applied to the claimant?

185. The claimant's disability is stress and anxiety. The PCP relied upon is insisting that staff work longer shifts than initially agreed.

186. We determined that there was a typographical error in the final list of issues, although this was not drawn to our attention by the parties. We considered that it ought to have said "**i**nsisting that staff work longer shifts than initially agreed", not "as initially agreed". That was consistent with the claimant's assertions in this complaint.

187. Next we considered whether this PCP was applied to the claimant? We reminded ourselves that it is a two-stage process as explained in the authorities of **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura International Plc [2007] IRLR 246, The** claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for us to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

188. Applying this process to the facts found, we did not find that there was an agreement between the claimant and EP that the claimant would not be required

to work shifts of more than six hours. We did not find that there was an agreement between the claimant and EP that the claimant would not be required to work shifts of more than six hours on 24 November 2019. The claimant had worked ten shifts prior to 24 November 2019. The GP fit note of 1 November 2019 referred to phased return shifts "initially". There was no evidence given of any agreement between the claimant and EP after the fit note had been received as to any shift arrangements which were to be put in place for the claimant. She had not established a first base or prima facie case by reference to the facts made out. Accordingly, we concluded that the PCP was not applied to the claimant and the claimant's complaint of failure to make reasonable adjustments fails at this stage.

Substantial disadvantage

189. If we are wrong that the PCP was not applied to the claimant, we also considered substantial disadvantage. The substantial disadvantage identified by the claimant in the final list of issues was that her stress levels increased.

190. The claimant's evidence in cross examination about her stress levels was that she was really worried about a seven-hour shift. She needed to take more medication for a seven-hour shift than a six-hour shift and she was already on a lot of medication.

191. We carefully considered the substantial disadvantage identified by the claimant. We accepted that the claimant suffered from panic attacks which required to be controlled by medication. We accepted that the claimant required to take additional medication to control her panic attacks. We did not accept that the claimant could work a six-hour shift without additional medication but could not work a seven-hour shift without additional medication. This was an important matter which was an essential component of her reasonable adjustments complaint. The claimant had not addressed the substantial disadvantage in her evidence in chief. There was no medical evidence to support the assertion that her stress levels increased working a seven-hour shift as opposed to a six-hour shift such that additional medication was needed to work the extra hour. We concluded that if the timing of her medication was as she now asserted this is a matter which she would have raised before cross examination. On balance, we did not accept the claimant's evidence about this.

192. Accordingly, we concluded that even if the PCP pled was applied to the claimant, she had not established that she was put at the substantial disadvantage she asserted.

193. If we are wrong on that we also considered knowledge of the respondent of the substantial disadvantage. The claimant had not told the respondent that she needed to take more medication for a seven-hour shift than a six-hour shift. The claimant had been scheduled for two seven hours shifts already, one of which she had completed and, on the findings in fact, she had not complained about these shifts. Accordingly, we were satisfied that the respondent could not reasonably be expected to know that the claimant was likely to be placed at the substantial disadvantage pled

194. In the circumstances the claimant's complaint of failure to comply with the duty to make reasonable adjustments is not well founded and is dismissed.

Harassment related to disability

195. The harassment related to disability complaints are said to have occurred on (a) 6 May 2018; (b) 5-6 May and 22 February 2018; (c) 23 February 2018; and (d) 24 November 2019.

196. The first complaint is that on 6 May 2018 PA encouraged a customer to make an official complaint and required the claimant to undertake extensive manual labour and heavy lifting despite being in physical pain from her back injury and in tears.

197. The second complaint is that on 5-6 May and 22 February 2018 PA caused an intimidating, degrading, hostile and offensive environment in public as a direct result of the claimant lodging grievances against her.

198. The third complaint is that on 23 February 2018 when EP, having received an email from HR regarding unsatisfactory handling of the claimant's grievance, caused an intimidating, degrading, hostile and offensive environment by refusing to accept the claimant's sick call.

199. The fourth complaint is that on 24 November 2019 EP refused the claimant's request to work a moderately shorter shift (one hour) despite the kitchen being overstaffed and a phased return being recommended.

200. The fourth complaint which is asserted to have occurred on 24 November 2019 is in time.

201. We asked ourselves whether any of the complaints prior to 24 November 2019 can be said to be part of a continuing course of conduct and, if not, whether it would be just and equitable to extend time in relation to those complaints. We had concluded that the claimant was a disabled person, by reason of a mental impairment, by 3 October 2018. We did not find that the claimant was a disabled person prior to 3 October 2018. The earlier harassment related to disability complaints were all before 3 October 2018. Accordingly, we had no jurisdiction to hear those complaints.

202. In the circumstances the Tribunal has no jurisdiction to consider the claimant's complaints of harassment related to disability which are said to have occurred on (a) 6 May 2018 (b) 5-6 May and 22 February 2018 (c) 23 February 2018 and these complaints are dismissed.

203. We next considered the complaint of harassment related to disability which is in time.

204. The claimant asserts that on 24 November 2019 EP refused the claimant's request to work a moderately shorter shift (one hour) despite the kitchen being overstaffed and a phased return being recommended.

205. We have found that EP did refuse the claimant's request to work a shift of six hours as opposed to the shift of seven hours for which she had been scheduled. There was no evidence led by the claimant about the kitchen being overstaffed. We have found that the GP fit note dated 1 November 2019 stated "Phased return with shorter shifts. Suggest 6 hour shifts initially". We concluded that there was no recommendation by the GP of a shift of six hours on 24 November 2019 as part of any phased return. The fit note referred to 6 hour shifts initially. The claimant had been scheduled for and worked around ten shifts prior to the shift scheduled for 24 November 2019. This included completing a shift of seven hours for which she had been scheduled and about which we found she had made no complaint to management. It could not be said that EP refused the claimant's request to work a moderately shorter shift (one hour) despite the kitchen being overstaffed and a phased return being recommended.

206. In the circumstances the claimant's complaint of harassment related to disability which is said to have occurred on 24 November 2019 is not well founded and is dismissed.

Victimisation

207. The victimisation provisions of EqA provide that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act. Making an allegation (whether or not express) that the respondent or another person has contravened EqA is one type of *"protected act"*.

208. The claimant asserts she was subject to four detriments because of doing protected acts.

Failure to communicate details or outcome of investigation

209. The claimant asserts that she did a "protected act" on or around 26 September 2017 when she verbally reported an incident of workplace bullying to her area manager JH and asked if he could check CCTV footage.

210. The allegation of workplace bullying, when investigated by the respondent, was an allegation of sexual assault and sexual harassment. We concluded that this was an allegation that the respondent or another person had contravened EqA. Accordingly, it was a protected act.

211. In relation to the protected act on or around 26 September 2017 we asked ourselves on what date the asserted detriment of failure "to communicate any details or the outcome of the investigation" is said to have happened. This is to determine whether a complaint of victimisation in relation to this assertion is brought within the time limit such that the Tribunal has jurisdiction to hear the complaint.

212. We found that on 13 October 2017 the respondent emailed the claimant and stated that it had completed its procedures in relation to the grievance raised by the claimant about the assault. The email confirmed that the claimant would no longer work on shift with the colleague. The respondent stated that for confidentiality reasons it could not disclose details of any disciplinary outcome made against her colleague.

213. There was no evidence led about any occasion on or after 13 October 2017 when the parties communicated with each other about the response the claimant had received. Accordingly, we concluded that the asserted detriment of failure to communicate any details or the outcome of the investigation, being the asserted detriment, took place on 13 October 2017.

214. The claimant presented her claim on 10 April 2020. This is over two years after the asserted detriment took place on 13 October 2017. There was no later communication between parties about the outcome sent on 13 October 2017. Accordingly, it could not be said that the asserted detriment was part of any continuing course of conduct such that the complaint is in time.

215. We then considered whether it was just and equitable to extend time. There is prejudice to the claimant if this detriment complaint is not allowed to proceed. There is prejudice to the respondent if it is allowed to proceed.

216. The claimant has provided no explanation for her delay in presenting these victimisation complaints. Her claim form was presented on 10 April 2020, around two and half years after this act of victimisation is said to have occurred. Parties are now being asked to recollect matters that occurred nearly six years ago. There was a real risk that the cogency of the evidence would be significantly impaired. The HR Manager who provided the outcome of the grievance on 13 October 2017 was not called as witness by either party. Accordingly, having carefully considered the balance of prejudice we concluded that this fell in favour of the respondent.

217. We also considered for completeness whether, if we had determined that it was just and equitable for the asserted detriment on 13 October 2017 to proceed, from the facts found it could be said that the respondent "failed to communicate any details or even the outcome of the investigation". The claimant was provided with an outcome from her grievance on 13 October 2017 by email. This confirmed that the respondent had completed its procedures in relation to the grievance raised by the claimant. The email stated that the respondent was unable to disclose full details of the decision made to the claimant. The respondent confirmed that the claimant would no longer work on shift with the colleague. Accordingly, we concluded that it could not be said that the

respondent "failed to communicate any details or even the outcome of the investigation".

Matters put on hold and delegated to "FH"

218. The claimant asserts that she did a "protected act" on 4 October 2017 when she attempted again to draw matters regarding the assault to her managers' attention. This was the same allegation of sexual assault and sexual harassment. It was an allegation that the respondent or another person had contravened EqA. Accordingly, there was a protected act on 4 October 2017.

219. In relation to the protected act on 4 October 2017, the asserted detriment occurred on 4 October 2017 when the claimant spoke to EP and to "FH".

220. The claimant presented her claim on 10 April 2020. This is over two years after the asserted act of victimisation took place on 4 October 2017. There was communication between parties after 4 October 2017 until 13 October 2017 about the grievance and outcome. There was no communication after 13 October 2017. Accordingly, it could not be said that the asserted detriment was part of any continuing course of conduct such that the complaint was in time.

221. We again considered whether it was just and equitable to extend time. There is prejudice to the claimant if this detriment complaint is not allowed to proceed. There is prejudice to the respondent if it is allowed to proceed.

222. The claimant has provided no explanation for her delay in presenting these victimisation complaints. Her claim form was presented on 10 April 2020, around two and half years after this act of victimisation is said to have occurred. Parties are now being asked to recollect matters that occurred nearly six years ago. There was a real risk that the cogency of the evidence would be significantly impaired There is no documentary evidence in relation to the victimisation complaint on 4 October 2017. EP and FH, who are identified in relation to the complaint on 4 October 2017 were not called as witnesses by either party. Accordingly, having carefully considered the balance of prejudice we concluded that this fell in favour of the respondent.

223. We also considered for completeness whether, if we had determined that it was just and equitable for the complaint on 4 October 2017 to proceed, from the facts found it could be said that "matters were put on hold again and EP delegated the investigation to FH the only other witness present". There was

an investigation meeting on 9 October 2017 with two people from the respondent's HR team, including the HR Manager. The claimant had a companion with her. The respondent took notes of the meeting which were signed by the HR Manager and HR representative, the claimant and her companion. On 11 October 2017 the claimant provided further information to the respondent's HR department. On 13 October 2017 the respondent's HR Manager emailed the claimant to confirm it had completed its procedures. Accordingly, we concluded that it could not be said that "matters were put on hold again or the investigation had been delegated to FH.

Did not progress matter after reporting bullying by PA

224. The claimant asserts that she did a "protected act" on 6 May 2018 when she contacted EP through MG to report an incident of bullying from PA. We have not been referred in evidence to a person called MG or to any contact with a MG on 6 May 2018 or on any other date. We have been referred to an email on 6 May 2018 from the claimant to DM about PA (p 251-252). The bullying referred to is about the claimant's interaction with customers. There was no evidence given about how this email on 6 May 2028 or any other contact on 6 May 2018 was an allegation that the respondent or another person had contravened EqA. Accordingly, this was not a protected act.

Refused reasonable adjustments in connection with phased return

225. The claimant asserts that she did a "protected act" on 23 November 2019 when she reported to MG that she was being denied a phased return to work. We have not been referred in evidence to a person called MG or to any report to a MG on 23 November 2019 or on any other date. We have been referred in evidence from the claimant to speaking to Ms DM on 23 November 2019 about getting phased return shifts. We have already found that no such conversation took place. Accordingly, this was not protected act.

226. In conclusion the complaints of victimisation i**n** the final list of issues (paras 1.26.1 and 1.26.2) are out of time and it is not just and equitable to extend time. The Tribunal has no jurisdiction to hear them. Accordingly, these complaints are dismissed. In any event, they are also not well founded.

227. As the asserted acts on 6 May 2018 and 23 November 2019 are not protected acts, the Tribunal has no jurisdiction to hear the complaints of victimisation in the final list of issues at paras 1.26.3 and 1.26.4. Accordingly, these complaints are dismissed.

Conclusion

228. In reaching our determination on each of the complaints we considered the written submissions of both representatives. The claimant' representative submitted that the respondent's witness statements did not match the grounds of resistance (defences) submitted by the respondent in its defence to the claim. It was submitted that this was fatal to the respondent's defence of the complaints. We did not agree. We were mindful that this was a claim with a long procedural history including several case management hearings where the claimant had clarified her complaints. Those complaints had then been finalised in the final list of issues to which we have already referred. It was for both parties to lead evidence in relation to the final list of issues as those were only issues for determination by us.

229. The claimant's representative submitted that as the respondent's witness statements did not match the grounds of resistance (defences) the evidence contained in the respondent's witness statements should be disregarded in their entirety. She submitted that for each of the discrimination complaints the burden of proof had shifted to the respondent and that they were unable to discharge that burden as their witness statements should be disregarded. We did not agree. We were satisfied that the evidence contained in the respondent's witness statements should be admitted into evidence for the reasons already given.

230. The claimant's representative referred to the decision in **Efobi v Royal Mail Group Ltd 2021 ICR 1263, SC.** We noted that **Efobi** is a recent endorsement of **Hewage** (above) where the Supreme Court observed that it was important not to make too much of the role of the burden of proof provisions. They required careful attention where there was room for doubt as to the facts necessary to establish discrimination, but they have nothing to offer where the Tribunal is able to make positive findings on the evidence one way or the other.

231. The claimant's representative also referred to the EAT decision of **Chandok v Tirkey [2015] IRLR 195** and quoted from that decision. Part of the quote she referred to was "The claim as set out in the ET1 is not something just to set the ball rolling … which is otherwise free to be augmented by whatever the parties choose to add or subtract... parties must set out the essence of their respective cases on paper...". As set out already the claimant's claim was subject to a long procedural history including several case management hearings where the claimant had clarified her complaints by way of written further and better particulars and a subsequent clarifying of the final issues for determination. The respondent quite properly responded to those final issues in the evidence led by the respondent's witnesses in their witness statements. It is entirely proper that that evidence stands as the evidence in chief of the respondent's witnesses.
232. For all the reasons given, each of the complaints brought by the claimant fail and are dismissed.

J McCluskey
Employment Judge McCluskey

Employment Judge

2 October 2023

Date

Date sent to parties 22 December 2023

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APPENDIX 1

FINAL LIST OF ISSUES

Time limits

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

Constructive unfair dismissal

1.2 Was the claimant dismissed?

1.2.1 Did the respondent do the following things:

1.2.1.1 The claimant continually pointed out that managers were allegedly bullying her and her complaints were ignored;

1.2.1.2 The alleged failure by the respondent to deal with the grievance which was lodged in July 2019;

1.2.1.3 Changing the verbal agreement whereby the claimant had been on a phased return to work (to work 6 hour shifts), which was changed on 8 November 2019 and subsequently; and 1.2.1.4 On or around 24 November 2019 when the claimant explained that she could not

physically and mentally work full time on or around, she was told that she required to work the longer shifts or "face the consequences", which was the last straw.

1.2.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

1.2.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and 1.2.2.2 whether it had reasonable and proper cause for doing so.

1.2.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

1.2.4 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.2.5 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

1.3 If the claimant was dismissed, it is conceded that the dismissal would be unfair.

Remedy for unfair dismissal

1.4 The claimant seeks compensation only. If there is a compensatory award, how much should it be? The Tribunal will decide:

1.4.1 What financial losses has the dismissal caused the claimant?

1.4.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

1.4.3 If not, for what period of loss should the claimant be compensated?

1.4.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

1.4.5 Did the respondent unreasonably fail to comply with it by the respondent not progressing the claimant's grievance?

1.4.6 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

1.4.7 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

1.4.8 Does the statutory cap of fifty-two weeks' pay apply?

1.4.9 What statutory benefits did the claimant obtain?

1.5 What basic award is payable to the claimant, if any?

1.6 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Disability

1.7 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

1.7.1 Did she have a mental impairment, namely anxiety, depression and stress?

1.7.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

1.7.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.7.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

1.7.5 Were the effects of the impairment long-term? The Tribunal will decide:

1.7.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

1.7.5.2 if not, were they likely to recur?

Discrimination arising from disability (Equality Act 2010 section 15)

1.8 Did the respondent treat the claimant unfavourably by insisting the claimant work full shifts (on or around 24 November 2019

1.9 Did the fact that the claimant could not work the longer shifts arise in consequence of the claimant's disability?

1.10 Was the unfavourable treatment because of that?

1.11 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were the efficient running of the business and the need to ensure a full rota.

1.12 The Tribunal will decide in particular:

1.12.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

1.12.2 could something less discriminatory have been done instead;

1.12.3 how should the needs of the claimant and the respondent be balanced?

1.13 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

1.14 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

1.15 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: Insisting that staff work longer shifts as initially agreed .

1.16 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the stress levels increased?

1.17 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

1.18 What steps could have been taken to avoid the disadvantage? The claimant suggests changing shift patterns

1.19 Was it reasonable for the respondent to have to take those steps and when?

1.20 Did the respondent fail to take those steps?

Harassment related to disability (Equality Act 2010 section 26)

1.20.1 Did the respondent do the following things:

1.20.1.1 On 6 May 2018 PA encouraged a customer to make an official complaint and required the claimant to undertake extensive manual labour and heavy lifting despite being in physical pain from her back injury and in tears.

1.20.1.2 On 5-6 May and 22 February 2018 whereby PA caused an intimidating, degrading, hostile and offensive environment in public as a direct result of lodging grievances against her.

1.20.1.3 On 23 February 2018 when Mr Polukus, having received an email from HR regarding unsatisfactory handling of the claimant's grievance, caused an intimidating, degrading, hostile and offensive environment by refusing to accept my sick call.

1.20.1.4 On 24 November 2019 when Mr Polukus refused the claimant's request to work a moderately shorter shift (one hour) despite the kitchen being over-staffed and a phased return being recommended.

1.21 If so, was that unwanted conduct?

1.22 Did it relate to disability?

1.23 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?

1.24 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation (Equality Act 2010 section 27)

1.25 Did the claimant do a protected act as follows:

1.25.1 On or around 26 September 2017 when the claimant verbally reported an incident of workplace bullying to area manager (John) and asked if he could check CCTV;

1.25.2 On 4 October 2017 when the claimant attempted again to draw matters regarding the assault to her managers' attention;

1.25.3 On 6 May 2018 when the claimant contacted EP through MG to report an incident of bullying from PA; and

1.25.4 On 23 November 2019 when the claimant reported to manager MG that she was being denied a phased return to work.

1.26 Did the respondent do the following things:

1.26.1 (in respect of the protected act 1.25.1), the respondent' failed to communicate any details or even the outcome of the 'investigation';

1.26.2 (in respect of the protected act 1.25.2), matters were put on hold again and EP delegated the investigation to FH (the only other witness present);

1.26.3 (in respect of the protected act 1.25.3), the respondent did not progress the matter; and 1.26.4 (in respect of the protected act 1.25.4), the claimant was refused reasonable adjustments in connection with her phased return to work.

1.27 By doing so, did the respondent subject the claimant to detriment?

1.28 If so, was it because the claimant did a protected act?

1.29 Was it because the respondent believed the claimant had done, or might do, a protected act?