Case Number: 1400483/2023

EMPLOYMENT TRIBUNALS

Claimant: **Ms Catherine Harvey**

Respondent: **John Lewis Plc**

Heard at: **Bristol** **On:** **21, 22, 23 and 24 November 2023**

Before: **Employment Judge Halliday**

Representation
Claimant: Mr Bonham-Carter, lay representative
Respondent: Ms G Hicks, counsel

RESERVED JUDGMENT

1. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

2. The complaint of harassment related to disability is not well-founded and is dismissed.

3. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

4. The complaint of constructive unfair dismissal is not well-founded and is dismissed.

5. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant, Ms Harvey, was employed by the Respondent until she left her employment on 18 October 2023 following her resignation on that day.

2. The Claimant is disabled and alleges that she suffered discrimination by reason of her disability. The Claimant also claims that she has been unfairly constructively dismissed.

3. She claims that she resigned from her employment as a consequence of a fundamental breach on the part of the Respondent of the implied term within her contract relating to trust and confidence relying both on the alleged discriminatory treatment and other breaches.

4. The Claimant also brings a claim for her notice pay.

5. The Respondent contends that it did not treat the Claimant in a discriminatory manner; that the Claimant resigned and that there was no dismissal; and in any event that its actions were fair and reasonable.

6. The Claimant was represented by her partner, Mr Bonham-Carter. Both she and he gave sworn evidence. The Respondent was represented by Ms Hicks of counsel, and I heard evidence from Mr Rob Waite, Branch Manager, Ms Aneta Smak, Deputy Branch Manager at the material time, and Ms Nicola Evans, Regional Manager, for the Respondent. I also reviewed a statement prepared by Ms Jackson, a Team Manager with the Respondent at the material time, but as she was unable to attend the hearing, I gave this statement only limited weight. I found the Respondent's three witnesses to be credible and notwithstanding the passage of time in relation to the issues raised, in the main their evidence was consistent with the documentary evidence provided. There were some incidents about which the Respondent did not present oral evidence although to some extent these were addressed by reference to general practices and documents included in the bundle. The lack of direct evidence has been taken into account in reaching my conclusions and to the extent that the Respondent's witnesses had not directly witnessed the events they referred to, this was also taken into account.

7. The Claimant's responses to questions were sometimes very direct and she emphasised on a number of occasions that she could recall some details clearly. Her recollection of other events was less clear and on a number of occasions inconsistent. She also expressly stated that she could not remember anything for a period of time during the incident which took place in April 2022. Whilst the Claimant expressly stated that she could remember some incidents clearly, her evidence even in relation to these incidents was not always consistent with contemporaneous evidence and she struggled to recollect other incidents and documents to a greater degree than other witnesses. I conclude that the Claimant, although genuine in her assertions, did not always provide reliable evidence in support of her contentions. Mr Bonham-Carter did not witness the majority of the events about which the complaints were raised so his evidence was of limited value in determining the factual basis of the complaints.

8. I have also reviewed the documents referred to in the witness statements and drawn to my attention during the course of the hearing contained in the bundle (777 pages) and the written submissions of Counsel for the Respondent (75 pages) and for the Claimant (15 pages).

Claims and Issues

9. In a claim form received by the Tribunal on 21 January 2023 (Claim Form) the Claimant brought claims of constructive unfair dismissal, sex discrimination, disability discrimination, for notice pay and arrears of pay. At the Case Management hearing on 1 June 2023 before Regional Employment Judge Pirani (Case Management Hearing), the Claimant confirmed she no longer wished to pursue her claims for arrears of pay, sex discrimination, indirect discrimination and direct disability discrimination.

10. At the start of this hearing the claims and issues were further clarified as set out below

Disability

11. At the Case Management Hearing, the Claimant confirmed she relied on the following conditions:

    11.1. aspergers
    11.2. vertigo
    11.3. menopausal symptoms
    11.4. anxiety and depression
    11.5. asthma.

12. Following receipt of medical evidence after the Case Management Hearing, the Respondent conceded that the Claimant had a disability at all relevant times by reason of her:

    12.1. aspergers/autism spectrum disorder (condition)
    12.2. vertigo
    12.3. anxiety and depression.

13. At the start of the hearing there was a discussion about the remaining impairments (asthma and menopausal symptoms) which had not been conceded by the Respondent as satisfying the statutory test of a disability. The Claimant confirmed that given the time allocated for the hearing and the fact that the asthma and menopausal symptoms were relied on only to a limited extent, she would proceed with her claim on the basis of the admitted impairments only and not on the basis that she was disabled by reason of her asthma and menopausal symptoms.

Constructive Dismissal

14. At the Case Management Hearing it was agreed that the Claimant's constructive unfair dismissal claim relied on breach of the implied term of trust and confidence based on the events listed at paragraphs 66.1 to 66.14 of the Case Management Order dated 1 June 2023.

15. The issues were agreed as follows:

    15.1. 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 if so,

15.2. Whether it had reasonable and proper cause for doing so.

15.3. Did the Claimant resign because of the breach? 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.

15.4. Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

15.5. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

Disability Discrimination

16. The Claimant's disability discrimination complaints were agreed and recorded by Regional Judge Pirani at the Case Management Hearing as:

16.1. failure to make reasonable adjustments as identified at paragraphs 77 to 82 of the Case Management Order,

16.2. harassment related to disability as identified at paragraphs 84 and 85 of the Case Management Order; and

16.3. discrimination arising from disability under section 15 of the Equality Act 2010 as identified at paragraph 86 of the Case Management Order.

17. Following the Case Management Hearing the Claimant's representative wrote to the Tribunal requesting a number of amendments to the Case Management Order. These included:

17.1. a request to include reference to the fact that the Claimant was not told in advance of her breaks when others were (as set out at Paragraph 17 of the Particulars of Claim) as a further incidence of harassment/discrimination arising from disability.

17.2. a request to include an additional reasonable adjustment in relation to the failure to provide the Claimant with opportunities to undertake training in working hours.

18. In the Claimant's document entitled Additions to Respondent's Key Documents & Chronology, the Claimant also asked for an allegation that her contribution to the workplace had been downplayed (relied on as a breach for the purposes of the unfair dismissal claim) to be included as an allegation of harassment and discrimination arising from disability.

19. After discussion and having noted Counsel for the Respondent's submission that the claims were "evolving", specifically in relation to the training issue, it was concluded that no application to amend was required in relation to the request at paragraph 17.1 as it had been referred to in the Particulars of Claim and the additional incidents referred to at paragraphs 17.2 and 18 should be added to the list of issues as set out below as they were already included in the list of issues as a breach of contract (failure to acknowledge contribution)

or were linked to a pleaded issue already identified as a potential failure to make a reasonable adjustments (access to training). The revised issues were then discussed and agreed in relation to the failure to make reasonable adjustments and are set out in full below for clarity.

Failure to make reasonable adjustments

20. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:
    20.1. requiring the Claimant to work on the self service tills (SCOs)
    20.2. requiring checkout staff to conduct essential training standing at a computer at a high desk;
    20.3. expecting staff to ask for time out to do on-line training in work hours.

21. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:
    21.1. she found it difficult standing due to vertigo;
    21.2. she found it hard to ask for time due to her aspergers/anxiety.

22. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage.

23. What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:
    23.1. providing autism training to managers;
    23.2. rostering her away from the SCOs;
    23.3. providing a system whereby the Claimant does not have to train whilst standing up or ask for time away from the check-out.

24. Was it reasonable for the Respondent to have to take those steps and when?

Discrimination arising from disability and harassment

25. In relation to the discrimination arising from disability and harassment claims (which rely on the same incidents), in addition to the six allegations set out in the Case management Order two further allegations were added:

    25.1. the Claimant was not told in advance of her breaks when others were;
    25.2. her contribution to the workplace had been downplayed (in her performance review).

Other Preliminary points

26. It was agreed that as the listing has been reduced from six to five days, the hearing would deal with liability only.

27. The Claimant confirmed that her claim for notice pay was also being pursued.

28. In the course of the proceedings, the Claimant referred to a number of other issues and concerns she had with her treatment by the Respondent, but unless they are relied on by the Claimant as breaches of the implied term of trust and confidence for the purposes of her constructive unfair dismissal claim, as incidents of discrimination or are otherwise relevant to the matters in dispute between the parties, they are not dealt with in this judgement.

29. The Respondent accepted that the unfair dismissal claim had been brought within three months of the Claimant's resignation but did not accept that the discrimination claim had been brought in time and/or that the incidents constituted a continuing act.

30. The Claimant confirmed that no specific adjustments were required during the hearing, but it was agreed that breaks would be taken as and when this would be helpful and that any party could request a break.

Findings of fact

31. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary and after having read the factual and legal submissions made on behalf of the respective parties.

Background

32. The Claimant was employed from 8 October 2018 as a supermarket assistant in the Respondent's Bath Waitrose store working 12.5 hours a week. She was consistently rated as good in her annual performance reviews.

33. The Claimant has a number of identified health issues including the agreed disabilities, (aspergers/autism spectrum condition, vertigo and anxiety and depression), as well as asthma and menopausal symptoms.

34. The Claimant has had vertigo since 2006 but it worsened in 2020 and resulted in her being unable to stand for more than approximately 20 minutes.

Issue of Uniform

35. In or around September 2020 new uniforms were issued to all staff. The Claimant's uniform was too big for her. The Claimant raised this with her line manager at the time as well as with the manager in charge of issuing uniforms. I find that there was a general problem with the sizing of the new uniforms at that time, but I do not find that the Claimant was treated in any way differently from other members of staff, nor that the issue of a poorly fitting uniform was directed at her personally nor that she suffered any disadvantage that was in any way related to her accepted disabilities. I was provided with no evidence that the Claimant subsequently followed this concern up despite seeing notes of regular Wellness meetings with her line managers Ketia Enfield and Laura White in 2022 arranged specifically to support the Claimant, as well as notes of meeting with occupational health, and the Claimant provided no specific details of who she claims she spoke to or when, other than references to "Hattie" and "Izzy" at the time the uniforms were issued. I accept the Respondent's evidence that the general practice was to replace ill-fitting uniforms as and when required.

OH Referral 21 December 2020

36. Following a referral from Partnership Health Services (PHS) the Claimant attended an Occupation Health (OH) review on 21 December 2020. The OH

advice included a recommendation to complete a Wellness and reasonable adjustments form with the Claimant.

37. On 8 January 2021 the Claimant and her manager Keita Enfield completed a Wellness form. This identified that the Claimant could self-manage "facing up" (tidying/sorting the shelves) and was not going to be asked to work on the self-check-out tills (SCOs). It was identified that the adjustment had been communicated to the Customer Service Assistants (CSAs) but not more widely, but that if the Claimant was asked to go on the SCOs then she could say she was not able to do this due to reasonable adjustments and that [her managers] were aware of this.

SCO incident January 2021

38. The next day, on 9 January 2021 the Claimant was asked to work on the SCOs and she became unwell and had to leave work early.

16 January 2021 – Fire alarm and interaction with Mr Waite

39. On Saturday 16 January 2021, a day on which the Claimant was working, the fire alarm sounded in the Bath store. Shortly afterwards, at the end of her shift, the Claimant was trying to establish if a colleague Cassie was working that day so she could speak to her about a Diversity and Inclusion initiative and she asked a manager, Keita Enfield who confirmed Cassie was not working.

40. The events which followed are recorded in a contemporaneous note made of the Claimant's account by Mr Bonham-Carter immediately after the incident and in a note prepared by Mr Waite shortly after the incident which was handed to the Claimant on 22 January 2021 by Ms Enfield (see below). Ms Enfield who did not give evidence at the hearing and therefore could not have her evidence tested under cross-examination, provided a later statement in the course of an investigation when the Claimant raised a grievance in October 2023.

41. I accept the Claimant's evidence that the alarm had finished sounding while she spoke to Ms Enfield. I do not find it credible that she would be seeking information from Ms Enfield whilst the full alarm was sounding, or that Mr Waite would have spoken in the way he says he did if the full alarm was still sounding rather than telling the Claimant to exit the building immediately. I accept the alternative explanation offered by Mr Waite during the Tribunal hearing that although it was his recollection that the alarm was sounding, it could have been the fire alarm panel that was still sounding as this continues after the main alarm has stopped. This is consistent with Mr Waite's evidence that he and Ms Enfield were still trying to resolve the situation with the fire alarm and establish the cause of the alarm going off whilst the Claimant was trying to speak to Ms Enfield.

42. There was considerable discussion during this hearing about the exact sequence of events and the exact words used during the incident and I

observe that it is not uncommon for recollections of conversations and events to differ slightly without there being a deliberate intention to mislead.

43. I conclude that after Ms Enfield had confirmed that Cassie was not working that day, Ms Enfield asked the Claimant if it was something that she could assist with. The Claimant responded to this question, by raising the SCO situation that had occurred on 9 January 2021. Ms Enfield asked if this could be discussed later as she was dealing with an emergency. The Claimant felt it was important to discuss the SCO situation then as she was finishing her shift, and continued to press Ms Enfield to engage in a discussion with her and Ms Enfield was unable to bring the conversation to a close. It is not disputed that Mr Waite then intervened to bring the conversation to a close. I find that no reference was made in that conversation to a "meeting", as alleged by the Claimant although this may have been the inference drawn by the Claimant. I find that the conversation was in the corridor, near to the alarm panel, which was sounding, and that the understandable priority of the two managers was to establish the cause of the alarm going off.

44. The Claimant says that Mr Waite "snapped" at her and spoke in an "aggressive" tone and that she started crying. She confirmed in the note of the event prepared by Mr Bonham-Carter, that she accepts that Mr Waite probably did not see her cry and I conclude that he did not. Mr Waite states that he spoke with brevity but strongly refutes that he was aggressive. I conclude that Mr Waite did not speak aggressively to the Claimant but did stop the conversation between Ms Enfield and the Claimant, which Ms Enfield was attempting to bring to a conclusion, and that he may have been short with her. I do not find that the interaction constituted bullying or harassment as alleged by the Claimant although I do accept that she was upset. I also accept Mr Waite's evidence that he thought the Claimant understood the situation.

45. The Claimant then went back onto the shop floor and started putting items into a shopping trolley. She then felt unwell and says she sat down by the magazines. Mr Waite's account is that the Claimant was lying down and that he was alerted to this fact by a customer. I accept Mr Waite's evidence that the Claimant was lying down and that he was alerted to this fact by a customer. The Claimant's evidence is that she was distressed, whereas Mr Waite was not, and I therefore conclude that her evidence is less reliable on this point. The Claimant also refers in her evidence to a customer asking if they could help and to Mr Waite informing the customer that he would deal with the situation which is consistent with Mr Waite's account. The Claimant and Mr Waite also agree that a colleague/first aider came to assist and supported the Claimant in moving to sit on a chair by the Welcome/Customer Service Desk, although the Claimant confirmed in cross-examination that she was not able to recall who called the first aider over and I conclude that Mr Waite did this as he states.

46. The parties also agree that there was then an unproductive discussion about the fact that the Claimant had removed her mask during this incident. It is common ground that Mr Waite was saying that she either needed to put her mask back on or wear an exemption badge. It is also common ground that there was some discussion of both store and government policy/guidance at

the time and that the Claimant was "arguing back" about the policy. She maintains that it was unreasonable for her to be required to put on a mask whilst she was unable to breathe properly, and she was not required to wear a mask or an exemption badge under the then current Government guidance.

47. The Claimant's evidence in relation to this conversation was inconsistent. In the note of the conversation made by Mr Bonham-Carter at the time, the Claimant reports herself as stating to Mr Waite that her exemption badge was at home. In her witness statement and under cross-examination she maintains that she was not aware of the store guidance at that time which had only been introduced on 13 January 2021 and that she had not been provided with information about the need for an exemption badge, or a mask. I accept the Respondent's evidence that the reference to wearing a mask or an exemption badge in the update to staff on 13 January 2021 was a reminder of previous guidance and conclude that the Claimant was aware of the guidance at the time of the incident on 16 January 2021 and had previously been provided with an exemption badge. Her main dispute appears to have been that this requirement went over and beyond the then Government guidance which did not require an exemption badge to be worn, which I accept was the case.

48. The Claimant does not say in either the note of the incident (taken down by Mr Bonham-Carter) or in her witness statement, that she explained she was having difficulty breathing but confirms that she focused on pointing out to Mr Waite the difference between store policy and government guidance. I therefore conclude that she did not inform Mr Waite that she was having difficulty breathing, and from her behavior (which included some coughing but also arguing about guidance) he genuinely did not understand that this was the issue and was not aware at that time that the Claimant suffered from asthma. I note that this incident occurred at the height of the pandemic and the responsibility Mr Waite had as Branch Manager to keep both staff and members of the public safe, both from COVID and also from the clash of different personal opinions about the reality of the pandemic and the need for consistent compliance with rules including mask wearing. I also accept that the Respondent's guidance was that either an exemption badge or a mask had to be worn. I therefore do not find that Mr Waite was unreasonable in asking the Claimant to either wear a mask or an exemption badge which was in line with the Respondent's internal policy on mask wearing at that time.

49. Whilst the Claimant sat at the welcome desk, I find that the Claimant was offered assistance with her shopping, and a taxi to take her home if she felt unwell. I also find that Mr Waite did encourage the Claimant to go home if she was unwell and not putting on a mask.

50. I find that Mr Waite took the decision to walk away as he felt the conversation was unproductive and that he subsequently concluded that the matter should be followed up in writing to address his concerns at the Claimant's behaviour.

51. The Claimant then continued with her shopping wearing a face mask and Mr Waite did not approach her again.

52. On leaving the building the Claimant felt the need to sit down to recuperate and after speaking to another member of staff was then able to get up and cycle home.

53. I accept that Mr Waite wrote a note to the Claimant that evening setting out his future expectations which he intended to hand to the Claimant in person.

Events immediately following 16 January 2021 incident

54. On 17 January 2021 the Claimant wrote to Ms Enfield. The Claimant referred to the fact:

    54.1. that she had worked on the SCOs on 9 January 2021, despite the adjustment in place and that this had made her unwell;

    54.2. that people were not seeing her asthma and referred to an incident when a colleague had complained about working on the SCO due to his bad back; an incident where the Claimant had spoken to her line manager about the difficulties she had in using reusable masks; and the incident the day before where Mr Waite had "snapped" at her and pressurised her into putting on a mask. She referred to the fact that Government guidance did not require an individual to wear an exemption badge.

55. The Claimant also referred to her autism and her anxiety. The Claimant expressed a wish to meet with Ms Enfield to find a constructive way forward without her needing to initiate a formal grievance process.

56. The references to the incident the previous day in that letter were limited to being pressurised to wear a mask and to Mr Waite "snapping" at her.

57. On 18 January 2021 Ms Enfield sent an email to retail managers setting out that the Claimant should only be asked to work on the checkout tills and not on kiosks or the SCOs and that she should not be asked to support with recovery.

58. On 22 January 2021, the Claimant met with Ms Enfield and they completed a Wellness Form together. There is no challenge to the form as an accurate record of the meeting by the Claimant, other than she notes that it does not refer to the fact that she was also handed the note prepared by Mr Waite which addressed the events of 16 January 2021 during the meeting, which both parties accept did happen.

59. In relation to the material points in issue in this case, the outcome in relation to masks was that the Claimant was to confirm if she wanted to wear a mask or an exemption badge. In her oral evidence before the Tribunal the Claimant confirmed that from then on, she wore the exemption badge and usually also wore a mask, but that the exemption badge enabled her to remove her mask if and when she was experiencing breathing difficulties and that she complied with both store and Government guidance.

60. In relation to working on the SCOs this was discussed in the review meeting, and it was identified that the Claimant felt she was ok at the time (on 9th January 2021) and didn't feel she could say no. The restriction on duties had by then been disseminated to the retail managers as well as the CSAs and the Claimant confirmed that she did not want it communicated more widely and that she would say something if she was asked to go on the SCOs.

61. The Claimant stated in her grievance in October 2022 that she was upset at receiving Mr Waite's note (although this is not recorded in the Respondent's contemporaneous meeting notes) and she was visibly distressed in the hearing at recalling the incidents of the 16 January 2021. I accept that it may well have been the case that she was upset by receiving the note, but there is no suggestion in any of the evidence that this was apparent to the Respondent at that time, and I conclude that it was not apparent to them on the basis that in relation to other identified issues raised by the Claimant, these were noted and addressed.

62. Mr Waite was cross-examined at length on the precise words used in the letter and his beliefs and intentions in sending the note. He was also criticised by the Claimant for it not being in a letter form; for the fact that he did not meet with the Claimant in person; on the basis that he was prioritising the commercial needs of the organisation above the needs of the Clamant; and it was put to him on several occasions that his treatment of the Claimant both on the day and in sending such a note was bullying and discriminatory. Whilst I accept that the Claimant having dwelt on the terms used in the letter finds some of them in isolation genuinely upsetting, I find that Mr Waite had constructed his note carefully with the intention of explaining clearly and directly to the Claimant as a manager his view of the events on that day, so the Claimant could understand the expectations the Respondent had of her and in order that she could be supported to achieve them. I find that Mr Waite would not usually have had any significant dealings with the Claimant given the layers of management between them and he made a conscious decision that a written (informal) note was the most appropriate way of addressing his concerns and setting out the Respondent's requirements. I find that it is not inappropriate for a senior manager to challenge an employee's behaviour and I do not find that Mr Waite was unreasonable or bullying in the way he did so, either on the day or in the letter.

Review 5 February 2021

63. The adjustments that had been put in place were reviewed with the Claimant on 5 February 2021 by Ms Enfield and the Claimant confirmed she had not been asked to go on the SCO since and that she was happy with the masks/exemption badge requirement and was adhering to it.

64. A work place stress assessment was also completed on the 5 February 2021 by Ms Enfield. This identified no on-going issues but identified that historically when the Claimant became stressed, she felt she couldn't talk to anyone, and she was encouraged to talk to a manager or to Partner Support if this feeling recurred. The only item that was identified as to be kept under review related to communication and understanding where it was identified that she did not use google chat but was happy to ask if she had a query. She specifically confirmed in this meeting that she was content with the level of training provided and had no equipment issues.

Loudspeaker announcements and breaks

65. From January 2021 the Claimant states that she believes she was called by loud-speaker to return to her till after breaks when she was not late and this did not happen to other colleagues. I heard no evidence about specific

incidents or comparators. I did hear some evidence about when head-seats were and were not available or worn (relevant to whether a public message over the tannoy would be required) and I accept that if a head-set was being worn then a public message would not be required. I do not find that the Claimant was picked on by being asked to return to her till when she was not late by a loudspeaker announcement when others weren't or that any request to do so arose from any issue related to her personally) including in relation to her agreed disabilities). I also find that from her return to work from 11 June 2022 she worked initially on a phased return and then her hours were changed permanently so she worked three days from 9.00 am to either 1.00pm or 1.15 pm and from this date she did not therefore need to and in fact did not take breaks during her shifts (see also paragraph 94 and 103 below).

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Leaving Shift Early

66. The Claimant also states that she believes others were allowed to leave shifts early before her. In the Case Management Order this is referred to as "most notably" on Thursday evenings and in the hearing the Claimant confirmed that she was referring to Thursday evening shifts. Again, this is a perception that the Claimant appears to hold genuinely but there is no cogent supporting evidence for her belief, and I was provided with no clear examples of dates/times and comparators. Ms Smak gave credible evidence that the process is that staff are only able to leave shifts before the scheduled finish time with the prior agreement of their manager, and that to the extent that employees were allowed to leave early by prior agreement, the Claimant would not be aware of when permission had been granted. I therefore conclude that others may on occasion have been allowed to leave before the Claimant, but only on occasion for good reason and with the prior agreement of a manager. The Claimant's contention that she was picked on or to the extent that she was not allowed to leave early, that her being required to fulfill her contractual hours was in any way related to her personally and/or her disability is not made out. I also note that from her return to work on 11 June 2022 the Claimant did not work on a Thursday evening, and therefore this complaint can only apply to the period prior to 12 April 2022.

SCO incident - May 2021

67. The Claimant refers in her witness statement to an incident in May 2021 when she worked on the SCOs and this resulted in three days' absence. No further details have been provided and unlike the other incidents there is no contemporaneous note of the event, nor does it appear to have been the subject of any complaint at the time. On balance I conclude that there was an incident where the Claimant worked on the SCOs and that following this she had three days' sick leave, but I can draw no other conclusions about the circumstances in which this occurred.

February 2022 – Performance Review

68. In February 2022 the Claimant had an annual performance review and was graded "good" (as she had been in previous years). In the review it was noted that she "*showed an interest in the diversity team at work but hasn't been present at recent meetings/in the chat*".

69. On 18 March 2022, the Claimant sent an email to her new manager Charlotte Bowe noting "*the fact that she had attended meetings in her own time when notified of the dates*" and "*contributed documents*", also in her own time and stated that she felt "*a bit disappointed*" that this had not been acknowledged. She also referred to the fact that she was "*not very comfortable with google chat due to her form of aspergers and social anxiety*" but that she wished to continue contributing to the group and "*would be disappointed to be excluded from the group for not fitting into one particular form of communication*". These concerns were not addressed at that time by the Respondent as other events intervened, but I accept that the performance review had originally been undertaken by Hattie Lofthouse who left the Respondent's employment in or around February 2022 and that the performance review process was finalised by Charlotte Bowe. I do not find that the failure to note expressly that the Claimant had made other contributions to the group whilst still rating her overall contribution as good, and her being as a result a "bit disappointed" raises any concern that could not be addressed in the normal course of discussions with her manager, as indeed they were subsequently on her return to work form 11 June 2022, where arrangements were agreed whereby she could continue to contribute to diversity team.

9 April 2022 – working on the SCOs and interaction with Lara Jackson

70. From January 2022 Ms Jackson worked at the Bath store in the role of Team Manager. She did not have direct line management responsibility for the Claimant but as part of her role she was on occasion rostered as duty manager. Ms Jackson says in her statement that she was aware that the Claimant preferred not to work on the SCO's but understood she was willing to do so for a short period of time. She says she had not been informed of any health reasons why the Claimant could not work on the SCOs or that adjustments had been put in place. I accept Ms Jackson's evidence as set out in her statement which is consistent with the note of adjustments initially agreed on 8 January 2021 and then re-confirmed by Ms Enfield in the 22 January 2021 Wellness Review meeting that: "*the restriction on duties had now been disseminated to the Retail Managers as well as the CSAs and the Claimant confirmed that she did not want it communicated more widely and that she would say something if she was asked to go on the SCOs*.

71. The evidence of what occurred on 9 April 2022 provided by Ms Jackson in her statement and the Claimant is also broadly consistent, albeit with some variations in the individual accounts on some of the details. I find that due to other colleagues also having medical restrictions there was a shortage of staff to work on the SCOs on that day. After some attempts to find an alternative solution by the CSA, the Claimant was asked to cover the SCOs. Due to her concern for a fellow employee who had recently returned from sick leave and who also had health restrictions, and who had also offered to go on the SCOs (as recorded by the Claimant in her contemporaneous note of the incident) she agreed to do this as "*she was ok at the moment*". Although the agreement on adjustments that had been agreed in January 2021 and had been operating since that date, was that she could say "no" to such a request due to her medical restrictions, I accept that on this occasion she did not feel that she was able to say this and therefore felt she ought to agree to go on the SCOs as she felt able to do so at that time.

72. The CSA kept an eye on her and noted firstly that that she was sitting on a closed SCO and then the next time she checked, that she was sitting on the security scales, and asked her not to. The Claimant at the time responded by saying that it was not a scale but subsequently realised that it was. The Claimant was feeling unwell due to having to stand at the SCOs and asked to come off the SCOs. She then felt unable to stand any longer, so she sat down. There was a disagreement in the evidence about whether this was on the floor or on a metal buffer bar. The exact location where the Claimant sat down, appears to have only limited relevance to the complaints, but as it is relevant to overall credibility I note that in her contemporaneous note of the incident, the Claimant records herself that she sat on the floor which accords with the witness evidence of Ms Jackson (albeit that this has been given limited weight) and the contemporaneous note made by Ms Livingstone (who did not give evidence in this hearing) and I therefore conclude that the Claimant sat on the floor.

73. I find that Ms Livingstone was concerned for the Claimant and was seeking to make arrangements to cover the SCOs and that was why she went to speak to Ms Jackson. I accept that the Claimant did not know that this was her intention. When Ms Jackson and Ms Livingstone returned together they saw the Claimant sitting on the floor and I accept that Ms Livingstone then took over the SCOs and Ms Jackson helped the Claimant to stand and asked her to go and sit at one of the tills.

74. The Claimant says that Ms Jackson said during this exchange, "*this is what you always do*" which Ms Jackson says in her statement that she cannot recall saying, but does not expressly deny. On balance, having heard from the Claimant directly, I conclude that this comment (or one materially similar) was made by Ms Jackson.

75. The parties agree that the Claimant went over to the till, but the accounts of the next events differ materially. The Claimant has recorded in the account of the incident set out by her partner on that day that she then returned to Ms Jackson and said that she wanted to go home; that she dropped her water bottle; and then gives a detailed account of a subsequent conversation on the stairs with Ms Jackson. I note, however, the Claimant put in her witness statement that she lost awareness of what she was doing and under cross-examination in the Tribunal she stated that she had an autistic episode and could not remember the events or what she said during the period in which she was walking across the shop floor and that it was only when she came back to herself and realised she was shouting "*my mum is fucking dying*", that she then decided to leave. I therefore conclude that the accounts set out in the witness statements of Ms Livingstone and Ms Jackson prepared at the time and as corroborated by Ms Jackson's signed statement prepared for this hearing (albeit that she did not attend) are materially correct and that the Claimant did variously shout and swear, including using the words; I am "*fucking going home*" and " *my fucking mother is dying*" and that she threw her water bottle down (although not at anyone). The fact that the account recorded by her partner at that time does not refer to the swearing leads me to conclude that the account the Claimant gave at the time may have been filtered by Mr Bonham-Carter at the time or is otherwise incomplete. I base this finding on the Claimant's later corroboration of Ms Jackson's account, specifically in relation to the swearing when she referred to her mother.

76. I also find that following the meltdown, the Claimant and Ms Jackson did have a further conversation as referred to by both the Claimant in her original account and Ms Jackson in her contemporaneous statement and in her witness statement. I do not accept the Claimant's evidence as set out in her witness statement that she then tried to say as little as possible and left as soon as she could. I find that in that conversation, the Claimant shared with Ms Jackson that she was autistic, which Ms Jackson had not previously known, and that Ms Jackson did suggest that if she was struggling, then work may not be the right place for her. I do not accept that this was an attempt either overtly or implicitly by Ms Jackson to suggest that the Claimant should leave her employment as the Claimant is suggesting. I find that this comment was a reference to her being in work at a time when the Claimant was struggling and her behaviour, in particular the swearing, was self-evidently unacceptable.

77. On 9 April both Ms Jackson and Ms Livingstone made statements about the incident on the basis that they expected it would need to be investigated. I find that the Respondent and the individual managers concerned could reasonably have concluded that some disciplinary action against the Claimant may have been appropriate given her behaviour. I therefore see nothing untoward in the setting down of a contemporaneous account of the incidents. I note however that no disciplinary action was in fact taken and I do accept as submitted by Mr Bonham-Carter on the Claimant's behalf that if the Claimant had not been asked to work on the SCOs then it is likely that this incident would not have occurred.

78. On 10 April 2022 Mr Bonham-Carter wrote to Charlotte Bowe on behalf of the Claimant setting out his concerns about the lack of support provided to the Claimant for her disabilities and referring specifically to the incident on the previous day; the comment by Ms Jackson about the Claimant's ability to undertake her role; the fact that she had to log on out of hours to do required training; referring to the fact that her contribution to the diversity group had not been recognised adequately in her performance review; and suggesting that either the Claimant should not be required to work at the SCOs or she should be provided with a chair.

79. The Claimant states in her witness statement that at this point she intended to leave her employment and go to an Employment Tribunal. However, she was then contacted by Aneta Smak who tried to resolve matters.

80. On 11 April 2022 the Claimant sent two short emails to Charlotte Bowe, the first apologising for leaving early on the Saturday and referring to the fact that standing up at the SCO had made her feel sick and dizzy and made her asthma worse so she had to leave, and a second email saying that she wanted to put in a grievance complaint to avoid further bullying from managers who did not understand her complex needs, particularly her aspergers and asthma.

Sickness absence 12 April 2022 to 11 June 2023

81. On the 12 April 2022 the Claimant was signed off sick from work.

82. Aneta Smak, was at that time the Deputy Branch manager at the Bath store. She was asked by Mr Waite to try and resolve the situation with the Claimant.

On 12 April Ms Smak emailed the Claimant offering to meet with her and her partner (as an adjustment to the usual process) to discuss disability support and the events of the 9 April 2022. Ms Smak's focus was on supporting the Claimant to return to work.

83. Ms Smak met with the Claimant and Mr Bonham-Carter on 13 April 2022 having reviewed the statements from Ms Jackson and Ms Livingstone made on 9 April 2022 and the letter from Mr Bonham-Carter of 10 April 2022 in advance of the meeting. The incident on 9 April 2022 was discussed and I find that Ms Smak believed that the Claimant understood that her behaviour was not acceptable. However, Ms Smak's primary concern was that the Claimant appeared unwell. I do not accept Mr Bonham-Carter's suggestion that Ms Smak agreed in this meeting that the Claimant had been discriminated against or that she had concluded that Ms Jackson had acted inappropriately.

84. Ms Smak made a referral to Partnership Health Services (PHS) and in the meeting it was agreed that the Claimant would return to work the next day. Some of the Claimant's concerns were addressed immediately by an express agreement that: she would only work on the mainline tills; she would be told her breaks in advance; and that the branch's diversity and inclusion group would send her meeting invitations to her personal email address. Ms Smak then told the wider management team that until further notice the Claimant was to work on the mainline tills only, even if she indicated she could cover breaks on the SCOs. This request was followed up by email on 14 April 2022. The Claimant did not, however, return to work the next day as she continued to be unwell.

85. On 16 April 2022, the Claimant sent a letter of apology to Ms Jackson saying she was sorry for the events of last Saturday, that she was feeling manic at the moment and had had little sleep and should not have been put on the SCOs. She said she did not mean to be difficult that morning.

86. The Claimant remained signed off sick and spoke with PHS on 25 April 2022 and 29 April 2022. A report was then sent to Ms Smak which included confirmation that the Claimant should contact Job Centre Plus so that an Access to Work assessment could take place, a recommendation that educational sessions (on autism) should take place in branch, supporting the decision that the Claimant should work only on the mainline tills, and recommending completion of an Individual Stress at Work Risk Assessment together with a Wellness Action Plan.

87. On 9 May 2022 Ms Smak met with the Claimant and Mr Bonham-Carter and competed the Stress Risk Assessment. The outcome of the assessment was that it was agreed that the Claimant would continue on the main line tills only; that she would work a fixed rota; and would have weekly one to ones with her new line manager, Laura White.

88. Ms Smak also made internal enquires about autism awareness training and received confirmation that there were no workshops or toolkits for autism awareness available internally. Ms Smak gave oral evidence, which I accept, that at another Waitrose branch where she had worked, there had been educational support on autism following an assessment by Access to Work which had been very effective, and she felt this was the best option. She

anticipated that although there was a waiting time for Access to Work services, that both the assessment and the training would then be facilitated by them.

89. A follow-up meeting with PHS was held on 17 May 2022 at which it was recommended that the Claimant meet with her new line manger before she returned to work, noted that the Claimant had made contact with Access to Work but that the timeline for return contact was lengthy, that she had made contact with a local aspergers group who could potentially provide information to colleagues and also that she remained focused on the two previous incidents, which I understand to be those of 9 April 2022 and in January 2021. The clinical notes also state the Claimant did not feel an apology would assist with resolving the January 2021 incident as it was too long ago.

90. A further meeting with PHS was held on 6 June 2022, immediately before the Claimant's return to work on 11 June 2022 and a phased return was recommended and agreed together with adjustments to support the Claimant's return that she should work fixed shifts with a fixed morning start time (instead of one late shift, one mid-shift and one early shift) and no requirement for breaks due to the timing and number of hours worked each day. It was also agreed that she should have weekly one to one meetings with her new line manager Ms White and would only be required to work on the main tills. These adjustments were agreed and implemented by the Respondent.

91. On 7 June 2022, Mr Bonham-Carter emailed Ms Smak enclosing a letter from Bristol Autism Spectrum service dated 1 June 2022. This set out some generic information about managing autism in the workplace but also highlighted some key issues that related directly to the Claimant. These included; difficulty in understanding social rules and conventions which had led to misunderstandings; the fact that the Claimant would benefit from advance notice of her breaks; difficulty in dealing with unplanned events or unpredictable situations, particularly if asked to do tasks outside of the Claimant's remit for health reasons; and recommending a phased return and regular check-ins. I find that the recommendations were noted and implemented by the Respondent where action on their part could address the issues identified.

92. In his email of 7 June 2022, Mr Bonham-Carter also asked for information about raising a grievance or alternative procedures to resolve the issues arising from the April 2022 and January 2021 incidents which he stated would be required for the Claimant to return to work on a sustained basis. Ms Smak responded the same day, referring to the adjustments that had been put in place to support the Claimant's return and sending a link to the Respondent's Grievance Operating Procedures. The Procedures refer to informal resolution, mediation, signpost potential support from the People Policy and Action team and set out the formal Grievance process. The Claimant did not raise the issue further at that time, contact the People Policy and Action team, request mediation or raise a grievance. Mr Bonham-Carter confirmed in his evidence that he and the Claimant did not consider mediation to be appropriate.

Return to work 11 June 2022

93. The Claimant returned to work on 11 June 2022 and worked without issues on her return with the agreed adjustments being applied. In her Wellness Review Meetings on 17 June 2022, 22 July 2022, 29 July 2022, 5 August 2022, 13 August 2022, and 19 August 2022 the Claimant confirmed to Ms White that there were no on-going issues other than making a reference to her mother's health decline and to on-going headaches. On a number of occasions during the hearing the Claimant expressed her gratitude to Ms Smak for supporting her with her return to work. The Claimant says in her evidence that these interviews were not in the most suitable format as she felt they were rushed and held at the end of her shift, sometimes over-running into her own time, but I conclude that they were held regularly, the format was in line with the Respondent's procedures and they provided an adequate review of the arrangements put in place to ensure that the Claimant could continue to work in her role and to assess whether the agreed adjustments were working.

94. From this date, the Claimant was not required to work on the SCOs, nor did she finish late on a Thursday (each of her shifts taking place in the morning), nor did she have any breaks.

95. In the Wellness Review on 26 August 2022, reference was made to an incident in which the Claimant passed out whilst at the check-out and on 5 September 2022 the Claimant fell off her bike. These incidents were not related to her work. In the Wellness Review on 9th September 2022 there was a discussion about making the reduced and fixed hours worked by her during the phased return to work a permanent contractual change.

96. The Claimant does, however, say there were two things which were not resolved. Firstly, the recommendation that autism awareness training was held, was not implemented which I find was the case. Secondly the Claimant alleges that there was a failure to address unresolved issues from the two previous incidents, although this was not a matter pleaded as a breach, or relied on as an act of discrimination in the list of issues and it is unclear how the Claimant felt her concerns could effectively be resolved.

Training

97. In addition, the Claimant alleges that there was an on-going requirement to undertake training at a high desk, which she could not do due to her vertigo and further that the training was not pro-actively scheduled for till staff but that staff had to ask for the time to undertake it.

98. I find that whilst there was a high desk available to use, there were other alternatives available including at the Welcome desk, security or in the training room. I was not provided with a floor plan so I am unable to conclude which was the nearest available computer (assessments varying between the witnesses) but I am satisfied that at least one computer at normal desk height was available within easy reach of the Claimant's usual place of work on the mainline tills and on the same floor, and there was no requirement for her to undertake the training at the high computer. I do not accept that the Claimant was expressly told that she could not use an alternative desk.

99. I am also satisfied that the Claimant was offered opportunities to undertake training whilst on shift. In her witness statement evidence [par 28] the Claimant states she was "*offered*" training by supervisors (in support of her claim that she was required to train at a high desk) and later she says that other than offers of training at a high desk she was not offered training except on one occasion in mid-June 2022.

100. I accept Mr Waite's evidence in response to a question from Mr Bonham-Carter in his capacity as the Claimant's representative that staff were not expected to ask for time out, but that there was a practice of scheduling time away from the primary tasks to undertake training and this was increasingly prioritised as the deadline for completion of the training came closer with automatic Workday system generated reminders for managers to ensure all staff completed the necessary training within the required deadline.

101. I am therefore satisfied that the Claimant was offered time to undertake training in working hours and did not have to ask for time out, and that this could have been undertaken at one of the alternative normal height desks available.

Failure to respond to the Claimant's bell in September 2022

102. During September 2022, the Claimant alleges that she rang her bell and her Supervisor, Grace, did not respond for five minutes and that she was then responded to in a dismissive way when she re-rang her bell. The Claimant asserts that the Supervisor did not delay in responding to other colleagues nor did she speak to them dismissively. Whilst this may be a genuine perception it is subjective, and I do not find that there is sufficient evidence for me to conclude that the reason for the delay was in any way related to the Claimant personally (whether due to one of her disabilities or otherwise), but find that the reason for the delay on this occasion, was that the Supervisor was otherwise occupied talking to another person (as identified in the Claimant's own evidence), an occurrence which I accept is not uncommon in supermarkets where bells requesting help from staff are not always responded to immediately by Supervisors. I further do not find that there is sufficient evidence to find that the Supervisor did in fact speak to the Claimant dismissively. The words reported by the Claimant are that the Supervisor asked her not to ring her bell repeatedly as she heard her the first time. I find that this is a reasonable request in a busy store.

Wellness Review meeting - 23 September 2022

103. A further Wellness Review Meeting was held on 23 September 2022, during which it was confirmed that the Claimant's hours would be permanently adjusted to Thursday and Saturday 9.00 am to 13.00 pm and Friday 9.00 am to 13.15 pm (totaling her 12.25 hours (12 hours 15 mins) contracted working hours) in order that the Claimant did not need to take any breaks and as that time had been identified as a suitable and a less stressful time for the Claimant to start her shift. During this meeting there was also a discussion about the previous issue with the Branch Manager Rob Waite and about arranging a meeting between the Claimant and Mr Waite. The Claimant says in evidence, and I accept, that she was not, however, convinced that this would be helpful. I do not find that she had at any time previously agreed to or requested a mediation meeting with either Mr Waite or Ms Jackson as has

been suggested at some points during these proceedings. I also conclude that she had been aware (or could reasonably have been expected to be aware), at all material times (and at the latest since 7 June 2022) that she could have taken out a grievance or pursued the other avenues open to her, (informal resolution, mediation, or support from the People Policy and Action team) but elected not to do so but concentrated on her return to work.

104. The Claimant gives evidence in her witness statement, that her mental health was impacted during September and early October 2022, (she says by her treatment at work) and that this resulted in two or three situations when she had autistic meltdowns. The medical evidence supports the fact that she was unwell as she claims and I accept that this was the case, but the evidence does not support the fact that this was caused by any particular treatment she received at work. On the contrary, I find that the Claimant had suffered from a number of on-going health issues, both physical and mental, had personal issues in that her mother was dying (as stated by the Claimant) and that she was being well supported at work, with regular Wellness Reviews, changes to her working hours to assist her anxiety and limited duties on the tills. She had demonstrated previously sensitivity to perceived slights and the OH reports highlight that she was not able to move on from the incident with Mr Waite in January 2021 or with Ms Jackson in April 2022 which the Claimant felt had not been resolved. The Claimant in the Tribunal hearing did not demonstrate any awareness that both of these incidents could and perhaps in other circumstances would have resulted in disciplinary action being taken against her for her behaviour, (which was on both occasions inappropriate), but that taking into account her medical history, the Respondent chose not to take disciplinary action, but instead elected to support her in continuing in her role.

Delay in finishing shift – 7 October 2022

105. On Friday 7 October 2022, the Claimant was due to attend a return to work interview at the end of her shift with Ms Smak. Her shift was scheduled to finish at 1.15 pm, it being a Friday. She was expecting to be released from her till at 1.00 pm but her till was not shut until between 1.05 and 1.10pm which meant that her meeting with Ms Smak could not be concluded before the end of her scheduled shift.

8 October 2022 – further interaction with Ms Jackson

106. On 8 October 2022 the Claimant became unwell and told her supervisor she needed to go home. Ms Jackson was the floor manager on that day, and she spoke to the Claimant and asked her if she was able to continue with her shift. The Claimant confirmed she was not able to continue and left the store. The Claimant says that Ms Jackson did not say anything else. Ms Jackson's note of the conversation (which I accept she made at the time as she was aware that the Claimant was being supported to remain in work by Ms Smak and Ms White) sets out that she said, '*OK, go home and we hope to see you next week'*. I accept that this was said, although the precise words were not included in the Claimant's account of the conversation, on the basis that they were recorded by Ms Jackson at the time before it became apparent that the Claimant was raising further issues. The Claimant believed she was spoken to in an abrupt and unfriendly way and that Ms Jackson demonstrated a lack of sympathy. I did not have the benefit of hearing oral evidence from Ms

Jackson, but having heard from the Claimant in relation to this incident and having reviewed the words recorded by the Claimant which were specifically: '*Lara asked me … whether I could continue my shift*' I find that this is a subjective perception by the Claimant, not corroborated by other evidence. I conclude that Ms Jackson did not respond in an unfriendly way, nor did she show a lack of sympathy. I accept that this was a short conversation and that Ms Jackson did not engage at length with the Claimant or enquire in more detail after her health, perhaps being mindful of their previous interaction. However, I do not find that there was anything unusual or inappropriate in the conversation.

107. I do accept that the Claimant had had little contact with Ms Jackson, since her return to work on 11 June 2022, and that this further interaction brought back the feelings of anxiety that she had experienced in relation to the April incident and that she therefore felt resentful and upset because in her view the issue had not been dealt with. However, I do not find that this was as a result of any untoward behaviour on the part of Ms Jackson, or any failure on the part of the Respondent to deal with her concerns. The Respondent had been supportive in treating the Claimant's behaviour in relation to both incidents (in January 2021 an April 2022) as health issues and additional support had been put in place to facilitate the Claimant's successful return to work in June 2022. I conclude that the April incident had been an upsetting one for the Claimant, which along with the January 2021 incident involving Mr Waite, she had not found a way to move on from, but that this was a personal challenge and one which the Respondent could not resolve for the Claimant without some positive suggestion from the Claimant as to how this could be done.

108. On 9 October 2022, both Ms Smak and Ms White spoke to the Claimant who confirmed that simply speaking to Ms Jackson had been enough to trigger her. Ms White established that no previous request for mediation had been made but agreed to arrange a mediation meeting between Ms Jackson and the Claimant to seek to resolve the Claimant's concerns. Ms White also identified that the Claimant felt that there were unresolved issues with Mr Waite but due to a period of extended leave by Mr Waite no meeting could be arranged at that point in time. As Ms Smak was due to leave the Bath store, the Claimant declined to engage with her further.

Resignation

109. The Claimant remained off sick until her resignation on 18 October 2022, so no mediation meeting was held. She stated in her evidence that she was re-living the April incident (following her interaction with Ms Jackson on 8 October 2022) and that she felt she needed to resign due to the impact the situation was having on her health. She also referred in her witness evidence, to the fact that she felt the previous incidents with Ms Jackson and Mr Waite had not been resolved, and separately, that she was not able to move on from the January 2021 incident with Mr Waite or the April 2022 Ms Jackson incident.

110. On 18 October 2022 the Claimant posted on Linked-In that she had been "bullied and at times would rather die than come into Waitrose". She then went into the store and resigned because (in her own words) she "*realised she may get into trouble for that*" and "*panicked*". The reason for her

resignation was recorded as Loss of Belief in Partnership purpose/leadership and the secondary reason as being Relationship with colleagues. It was recorded on the Respondent's HR system that it was a "regrettable" termination, and that the Claimant was eligible for rehire.

111. I find that the Claimant was unwell at that time and had already concluded that she needed to resign to protect her health but that she may not have done so with immediate effect had she not made a post which she knew to be in breach of the Respondent's guidelines, and which may have led to disciplinary action being taken. This was the operative reason for her resignation on 18 October 2022.

112. The Claimant subsequently raised a grievance on 23 October 2022. This raised an allegation that Mr Waite had bullied her in the January 2021 incident; that Ms Jackson had bullied her in the April 2022 incident and that these incidents had not been resolved satisfactorily.

113. The grievance also raised other issues: specifically: the lack of a mentor in October 2018; the need for further management training about autism; the lack of acknowledgment of the Claimant's contribution to the Diversity and inclusion imitative; the fact that time for routine training was not pro-actively scheduled (which impacted the Claimant as she was less able to ask for time out); in relation to holiday allowance; access to updates on partnership developments; and incidences of discrimination listed as being called back to the tills by loudspeaker, being kept beyond the end of her shift, working on the SCOs and being required to wear a mask.

114. A supplemental Grievance Statement was submitted on 6 November 2022. Although bearing the Claimant's name, the Claimant did not seem familiar with its contents whilst giving evidence in Tribunal and confirmed that it had been prepared by her partner on her behalf. It raised additional issues:

    (i) *Failure to make adjustment for vertigo* both in relation to the requirement to work on the SCOs prior to April 2022, and scheduling breaks for the Claimant to undertake training at a high desk after her return to work on 11 June 2022.

    (ii) *Management priorities resulted in lack of support for disabled staff:* again, this referred to the issue with the SCOs prior to April 2022, and also to well-being meetings sometimes running over outside working hours, and to a specific incident where the Claimant was not released in time from her shift at 1.00 pm to attend a meeting with Ms Smak.

    (iii) *Prejudicial treatment and labelling because of health issues and Autism disorder;* referring to the above incidents and also failure by a colleague to respond to the Claimant's bell for five minutes and being treated dismissively.

    (iv) *Inadequate Uniform:* following the issue of new uniform in or around September 2020 but which was not resolved at the time the Claimant left.

(v) *Lack of Implementation of suggestions by the Occupational Health Advisor: specifically:* educational sessions on autism*;* making adjustments so the Claimant did not have to stand; not pro-actively addressing the two incidents in January 2021 and April 2022 which are referred to as "haunting" the Claimant and which the Claimant suggests may have been resolved if she had been told to contact the People Policy and Advice team.

(vi) *Last Day of Work:* her treatment by Ms Jackson and the fact that she had not been advised she could contact People Policy and advice*.*

115. To the extent that the matters raised in the grievance do not form part of the complaints raised in this claim, they are not relevant, and I make no findings. To the extent that the findings made during the Grievance process are relevant to the complaints before this Tribunal(even though reached after the Claimant's resignation) then the relevant findings are set out below.

116. A grievance meeting was held on 28 November 2022 by Nicola Evans, Regional Manager. The grievance was partially upheld, and the Claimant was notified of the outcome on 13 April 2023. The findings were:

116.1. The allegation of bullying against Mr Waite was not upheld but there was a finding that the matter could have been handled more sensitively, so overall this allegation was upheld in part.

116.2. The allegations in relation to the application of the face mask were not upheld.

116.3. The allegation in relation to having to stand at the SCOs was upheld.

116.4. The allegation of bullying against Ms Jackson was not upheld.

116.5. The allegation that the bullying incident was not properly dealt with was not upheld.

116.6. The allegation in relation to keeping up to date with developments and support (access to People Policy and Advice) was not upheld.

116.7. The allegation that the End of Year conversation was not completed accurately could not be addressed due to staff turnover.

116.8. The allegation into holiday allowance is not relevant to these proceedings.

116.9. The allegation in relation to inadequate uniform could not be addressed due to staff turnover.

116.10. The allegation in relation to discrimination in training was partially upheld. It was identified that there were multiple devices available in store and that during her employment the Claimant had indicated in a risk assessment on 5/12/22 that she was happy with the level of training for her role and no equipment issues were raised, but it was acknowledged that she may find it hard to ask for time away from the

check-out to undertake the required training due to her autism and anxiety.

116.11. The allegation of lack of support and understanding towards disability was partially upheld. Whilst there were no findings of discrimination or failure to make reasonable adjustments some learning was identified and recommendations were made.

116.12. The allegation of lack of implementation of suggestions of the OH Advisor was partially upheld. Whilst most had been implemented, some were still in progress at the point the Claimant resigned.

117. A number of recommendations were made and set out in the outcome letter.

118. The Claimant appealed against the grievance outcome on 17 April 2023 and, at the Claimant's request, the appeal hearing scheduled for 26 May 2023 with Nigel Towse was converted to a consideration of the appeal on the papers. Mr Towse upheld the original grievance decision.

The Law

119. Having established the above facts, I now apply the law.

Time Limits – disability discrimination

120. This is in part a claim alleging discrimination on the grounds of a protected characteristic, disability, under the provisions of the Equality Act 2010 ("the EqA").

121. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of:

(a) the period of three 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.

122. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period. Under section 123(3)(b) of the EqA a failure to do something is to be treated as occurring when the person in question decided on it.

123. A prospective claimant must obtain an early conciliation certificate from ACAS, (or have a valid exemption) before issuing employment tribunal proceedings. Section 207B of the Employment Rights Act 1996 (ERA) provides that the three month time limit is extended to allow for early conciliation and to ensure that a claimant has at least one month to submit a claim after the end of the early conciliation period.

124. Section 2017B(5) ERA provides that where an employment tribunal has power under [this Act] to extend a time limit by a relevant provisions, the power is exercisable in relation to the time limit as extended by this section.

125. Counsel for the Respondent has referred me to the case of *Clarke v Hampshire Electro-Plating Co Ltd [1991] IRLR 490 EAT* in support of the contention that where a discrimination claim is based on a failure to take some action with respect to the claimant, the date is to be determined by asking whether a cause of action has crystallised, rather than by focusing on whether the claimant felt that [he] had been discriminated against and to the case of *Barclays Bank plc v Kapur [1989] IRLR 387*, (affirmed in the House of Lords: [1991] IRLR 136) where it is stated that an act will be taken as being done over a period only if the employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The tribunal must distinguish between the regime and the consequences. It is only in the former case that the act should *be treated as extending over a period: Kapur at 392).*

126. *Okoro v Taylor Woodrow Construction Ltd [2013] ICR* 580 is relied on by the Respondent to show that there is a distinction between a continuing state of affairs and a one-off act with ongoing consequences. In this case, it was found that absent an ongoing relationship between the parties there was no continuing state of affairs on which a complaint could be based (*per Pill LJ at [37]).*

127. In relation to continuing acts. Counsel for the Respondent has also referred me to the case of *Hendricks v Metropolitan Police Comr [2003] IRLR 96* which states; In order to establish a continuing act, a claimant has to prove that (a) the incidents are linked to each other, and (b) that they are evidence of a "continuing discriminatory state of affairs". This will constitute "an act extending over a period":

128. Neither the Claimant nor Mr Bonham-Carter provide a factual explanation in their witness statements as to why the claim was not notified to ACAS until after the primary time limit of three months had expired in relation to certain complaints, or provide an explanation as to why 29 November 2022 was the earliest time on which the notification could be made. The Claimant relies for both her constructive unfair dismissal claim and the disability discrimination claims on the argument that the treatment she was subjected to, was a continuing act/on-going discrimination so the claims are in time, or alternatively Mr Bonham-Carter submits in his written representations that it would be just and equitable to extend time in relation to the discrimination claims. Mr Bonham-Carter refers me to the case of *Cathedral Wells and Stringer v Mr Souter and Ms Leishman [EA- 2020-000801-JOJ (Previously UKEATPA/0836/20/JOJ]* in support of his contention that the Tribunal has a wide discretion to allow an out of time claim.

129. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the case of *British Coal v Keeble [1997] IRLR 336 EAT*. For the record, these are the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.

130. However, Underhill LJ in *Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23*, comments that a rigid adherence to

such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. “The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular … “The length of, and the reasons for, the delay”. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its *thinking (par 37.)*

131. This follows the dicta of Leggatt LJ in *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraphs 18 and 19: “[18] … It is plain from the language used, (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”

132. *Robertson v Bexley Community Service [2003] IRLR 434 CA* is authority for the proposition that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: As per Auld LJ "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule". These comments have been supported in *Department of Constitutional Affairs v Jones [2008*] *IRLR 128 EAT* and *Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.*

133. Per Langstaff J in *Abertawe Bro Morgannwg University Local Health Board v Morgan* (at the EAT) states that before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

134. However, As Sedley LJ stated in *Chief Constable of Lincolnshire Police v Caston* at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in *Robertson* that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so

in any one case is not a question of either policy or law: it is a question of fact and sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

135. These authorities were recently reviewed in *Jones v Secretary of State for Health and Social Care 2024 EAT* 2, in which it was noted that there was a '*common practice'* among those seeking to argue that time limits should not be extended of relying on the comments of Auld LJ in *Robertson v Bexley* that time limits in the employment tribunal are '*exercised strictly'* and that a decision to extend time is the '*exception rather than the rule*', as if they were principles of law. HHJ Tayler stated that the practice of relying on these comments out of context should cease. In the EAT's view (see also *Chief Constable of Lincolnshire Police v Caston)* the principles for which *Robertson* is authority are that employment tribunals have a wide discretion to extend time on just and equitable grounds and that appellate courts should be slow to interfere, and therefore the comments of Auld LJ needed to be viewed in that context.

Disability Discrimination

136. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person. The Respondent accepts that the Claimant is a disabled person applying these provisions.

137. The Claimant is pursuing claims for discrimination arising from disability, harassment and failure to make reasonable adjustments.

Discrimination arising from disability

138. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

139. For a claim under S.15(1) of the Equality Act 2010 (EqA) to succeed, the unfavourable treatment must be shown by the claimant to be 'because of something arising in consequence of [his or her] disability'. In other words, the discriminatory treatment must be as a result of something arising in consequence of the claimant's disability, not the claimant's disability itself. Or to put it another way, there must be something that led to the unfavourable treatment and this 'something' must have a connection to the claimant's disability.

140. In *Secretary of State for Justice and anor v Dunn EAT 0234/16* the EAT identified four elements that must be made out in order for the claimant to

succeed in a S.15 claim: (i) there must be unfavourable treatment, (ii) there must be something that arises in consequence of the claimant's disability. (iii). the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and (iv) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

141. A claimant bringing a claim of discrimination arising from disability under s.15 is entitled to point to treatment that he or she alleges is unfavourable in its own terms, there is no need for a comparator.

142. "Unfavourable treatment" is not defined in the EqA, although the Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') states that it means that the disabled person 'must have been put at a disadvantage' (see para 5.7) and further indicates that unfavourable treatment should be construed synonymously with '*disadvantage*'. It states: 'Often, the disadvantage will be obvious, and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably'.

143. The EHRC Employment Code also considered what are the consequences of a disability and states that this includes: 'include anything which is the result, effect or outcome of a disabled person's disability' (para 5.9). Examples given of an example with more links in the causation, include the example of a woman who 'is disciplined for losing her temper with a colleague. However, this behaviour was out of character and is a result of severe pain caused by her cancer, of which her employer is aware. This disciplinary action is unfavourable treatment. The treatment is because of something which arises 'in consequence' of the worker's disability'.

144. The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability,

145. Counsel for the Respondent has cited *Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT* in which Simler P stated that section 15 EqA requires an investigation of two issues, (i) did A treat B unfavourably because of an (identified) something and (ii) did that something arise in consequence of B's disability. This is consistent with the judgment in *Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT,* in which it was held that: there is a need to identify two separate causative steps for a claim under S.15 EqA to be made out. These are that: (i) the disability had the consequence of 'something', and (ii) the claimant was treated unfavourably because of that 'something'. The order in which these questions are addressed by a Tribunal is not material.

146. In *Pnaiser v NHS England and anor 2016 IRLR 170, EAT*, the proper approach to causation was summarised as being: first, the tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the

conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then establish whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

147. The claim will not succeed even if the above elements are made out if the Respondent can show that the treatment was objectively justified. The EHRC Employment Code states that the aim pursued should be legal, should not be discriminatory in itself, and should represent a real, objective consideration. As to proportionality, the EHRC Employment Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

Harassment

148. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

149. Three elements therefore need to be proven: (i) unwanted conduct; (ii) that it has the proscribed effect; and (iii) it must relate to the protected characteristic. (*Richmond Pharmacology v Dhaliwal [2009] IRLR 336*0.

150. The EHRC Employment Code notes that unwanted conduct can include 'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour' (para 7.7). The conduct may be blatant (for example, overt bullying), or more subtle (for example, ignoring or marginalising an employee). An omission or failure to act can constitute unwanted conduct as well as positive actions.

151. Counsel for the Respondent has directed the Tribunal to the case of *Nazir and Aslam v Asim* [2010] ICR 1225 in support of the contention that conduct must be "*related to*" the protected characteristic.

152. In *Bracebridge Engineering Limited v Darby [1990] IRLR 3 EAT* it was identified that harassment will often concern conduct persisting over a period of time, but this is not a requirement provided the conduct is sufficiently serious. An '*environment*' means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration (*Weeks v Newham College FE UKEAT/0630/11 [2012])*.

153. In relation to the conduct having the requisite purpose or effect, this contains both subjective and objective elements *(Richmond v Dhaliwal)* i.e even if it did have that effect, it must also be reasonable that it did so.

Failure to make Reasonable Adjustments

154. The provisions relating to the duty to make reasonable adjustments are set out in sections 20 and 21 of the EqA which sets out three separate requirements. The first is relevant in this case, namely that 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, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know and could not reasonably be expected to know … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to.

155. The duty to make an adjustment arises where the claimant is at a "substantial disadvantage" due to a disability and substantial in this context means "more than minor or trivial" (*section 212(1) EqA*).

Buden of Proof

156. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

157. These provisions need to be considered carefully where it is not clear on the facts whether discrimination has or has not occurred bearing in mind that discrimination is often not obvious or overt, but do not need to be considered if a tribunal is in a position to make positive findings of fact based on the evidence one way or another (*Hewage v Grampian Health Board [2012] IRLR 870 SC).*

158. *Igen v Wong [2005] IRLR 258 CA* sets out guidelines on the burden of proof. Once the burden of proof has shifted it is for the respondent to show that they have not committed an act of discrimination. In order to discharge that burden the resident must show, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

159. *Madarassy v Nomura International Plc [2007] ICR 867 CA* is authority for the proposition that: "The burden of proof does not shift to the employer simply on the claimant establishing a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination".

160. Counsel has also referred me to the cases of *CFLIS v Reynolds [2015] 1010* as authority for her submission that the tribunal should only consider the

mental processes of individuals if that forms part of the claimant's pleaded case and further that there is no blanket obligation on the employer to prove the non-discriminatory motivations of every employee.

Constructive Unfair Dismissal

161. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he 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.

162. If the claimant's resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the *dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

163. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in *Western Excavating (ECC) Limited v Sharp [1978] IRLR 27*: "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 his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

164. In *Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131*, Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

165. In *Courtaulds Northern Spinning Ltd v* Sibson [1987] ICR 329 it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from the cases of Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. It need not be the predominant, principal, major or main cause for the resignation. [*Nottingham County Council v Meikle*

[2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT].

166. With regard to trust and confidence cases, which this case is, *Morrow v Safeway Stores plc (2001) EAT/0275/00, [2002] IRLR 9* holds that all breaches of the implied term of trust and confidence are repudiatory, and Dyson LJ summarised the position in *Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA*: "The following basic propositions of law can be derived from the authorities:

    166.1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: (*Western Excavating)*.

    166.2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example *Malik v Bank of Credit and Commerce International SA [1998*] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). This is referred to as "the implied term of trust and confidence".

    166.3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A*; "the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship".

    166.4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer"."

167. Counsel for the Respondent also relies on *Omilaju* in support of the principle of law that as the test is objective, there will be no breach because the claimant subjectively feels that such a breach has occurred no matter how genuinely that view is held.

168. This has been reaffirmed in *Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA*, in which the applicable test was explained as:
    (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied;
    (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;

(iii) it is open to the employer to show that such dismissal was for a potentially fair reason;

(iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see *Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA*) fell within the range of reasonable responses and was fair."

169. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (*Claridge v Daler Rowney [2008] IRLR 672*).

170. If an employee is relying on a series of acts, then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (*Lewis v Motorworld Garages Ltd [1985] IRLR 465*). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (*Omilaju)*.

171. The judgment of Dyson LJ in Omilaju has been endorsed by Underhill LJ in ; *Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA.* Having reviewed the case law on the "last straw" doctrine, including *Kerry v Motorworld*, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee ie, if there has been prior repudiatory breach of contract (whether arising from a one-off incident or previous cumulative breaches), and the employee has in the interim affirmed the contract but subsequent actions on the part of the employer might constitute a breach of the implied term of trust and confidence then the employee is entitled to rely on the previous breaches as the start of the series of actions which might cumulatively amount to a breach of the implied term of trust and confidence.
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172. In addition, it is clear from *Leeds Dental Team v Rose [2014] IRLR 8 EAT* that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed and does not turn on the subjective view of the employee. In addition, it is also clear from *Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT* that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract. Counsel for the Respondent has also referred the Tribunal to the case of *Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166 CA* in support of the proposition that constructive dismissal is not always unfair and that a Tribunal should make explicit findings on the reason for the dismissal and whether the employer has acted reasonably in all the circumstances.

173. The employee must resign in response to the breach and not because of some other unconnected reason. The breach need not be the sole cause, but it must be an effective case of resignation but as noted above, it need not be the predominant, principal, major or main cause for the resignation. Counsel

has referred the tribunal to the case of (*Norwest Holst Group Administration Limited v Harrison [1984] IRLR* in her submission on this point.

174. On affirmation and waiver, I have also considered the case of *WE Cox Toner (International) Limited v Cox (1981) ICR 823,* and specifically the premise that at some stage the employee must elect between affirming the contract or waiving the breach. Although there is no need to do this in a reasonable time and delay by itself does not constitute affirmation, if the innocent party calls on the guilty party for further performance, s/he will normally be taken to have affirmed the contract. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract.

175. As re-emphasised by the EAT in the decision of *Upton-Hansen Architects ("UHA") v Gyftaki UKEAT/0278/18/RN*, it is for the employer to advance in pleadings, assert in evidence, and prove a potentially fair reason for the dismissal, and a failure to do so may preclude them from a defence to a claim of constructive dismissal.

176. The case of *W Devis & Sons Ltd v Atkins [1977] AC 931, [1977] 3 All ER 40 HL* confirms that in considering the principal reason for the dismissal the tribunal must not take account of events subsequent to the dismissal although such conduct should be taken into account when considering contribution.

Decision on liability.

Disability Discrimination – Time limits
Harassment and discrimination arising from disability

177. I consider first whether the Claimant's complaints of harassment on grounds of disability and discrimination arising from disability under section 15 EqA are in time. The Claimant relies on eight incidents in support of these claims as set out at par 25 above.

178. The Claimant's effective date of termination of employment was 18 October 2022. The early conciliation period ran from 29 November 2022 to 3 January 2023 and the claim form was received on 21 January 2023. Any acts pre-dating 29 August 2022 are therefore outside the primary limitation period of three months (EqA section 123(1)(a)).

179. The first two incidents occurred in January 2021 and involved Mr Rob Waite. The Claimant says that Mr Waite's actions on 16 January 2021 constituted both harassment and discrimination arising from disability as did his follow-up correspondence handed to her on 22 January 2021. Any claim in relation to this incident is outside the primary time limit of three months.

180. I then need to consider whether the claim was brought within such other period as the employment tribunal thinks is just and equitable under section 123(1)b EqA. The Claimant has provided no explanation for why she did not bring a claim in relation to this incident before 21 January 2023. She was in work from February 2021 until 11 April 2022 and although she was unwell between 12 April 2022 and 10 June 2022, she then successfully returned to work on 11 June 2022 and had no health issues that would have prevented

her from bringing a claim in relation to these two incidents prior to the 18 October 2022.

181. The Claimant confirmed in her evidence that she intended to resign and bring an employment tribunal claim in April 2022 but following further discussions with Ms Smak and with OH she was supported back to work. By April 2022, a claim in relation to an incident in January 2021 would already have been out of time, but at the latest by April 2022, I conclude that although it would have been possible for her to bring a claim and she considered doing so, she chose did not to. I note that she was also provided with information about bringing a grievance on 7 June 2022 and likewise did not at that time elect to raise a grievance (although she did subsequently do so). There is a substantial delay between the incidents and the eventual issue of proceedings, and I accept Counsel's submission that the cogency of the evidence has been affected by the delay with Mr Waite having to recall incidents that were as far as he was aware dealt with satisfactorily. To the extent that these two issues can be considered isolated incidents, I therefore do not conclude that the claim has been brought within such additional period as is just and equitable.

182. The third incident is the incident on 9 April 2022 when the Claimant alleges that she was made to work on the SCO. This incident is also outside of the primary time limit of three months. In considering whether it would be just and equitable to allow the claim to be brought outside the time limit, I am again cognisant of the fact that the Claimant has provided no explanation as to why she chose not to bring a claim at that time given her stated intention to resign and bring an employment tribunal claim as a direct consequence of this incident. I am not persuaded that the cogency of the evidence would be significantly adversely affected in this instance, but I am satisfied that the Claimant was aware that she could have resigned and/or brought a Tribunal claim but supported by Ms Smak and OH, instead decided to return to work which she did successfully do. To the extent that this incident can be considered an isolated incident, I therefore do not conclude that the claim has been brought within such additional period as is just and equitable.

183. In relation to the fourth incident of being summoned by loudspeaker, I have found that this predates the Claimant's period of absence from 11 April 2022 and is therefore outside of the primary time limit. The Claimant could have brought a claim in reliance on this incident along with the other incidents, but chose not to do so, rather she chose to return to work. In addition, given the lack of clarity on dates, times and comparators, I conclude that the delay has affected the Respondent's ability to respond to this head of claim and it would not be just and equitable to extend time to bring a claim.

184. The fifth incident on 5 September when the Claimant's supervisor failed to respond to the Claimant's bell promptly is in time.

185. In relation to the sixth incident of colleagues being allowed to leave before her on Thursday evening shifts, I have found that this predates the Claimant's period of absence from 11 April 2022 and is therefore outside of the primary time limit. The Claimant could have brought a claim in reliance on this incident with the other incidents but chose not to do so, rather she returned to work. In addition, given the lack of clarity on dates, times and comparators, I

conclude that the delay has affected the Respondent's ability to respond to this head of claim and it would not be just and equitable to extend time.

186. The first additional incident added to the list of issues at the start of this hearing was the Claimant not being told in advance when her breaks were, I conclude that this also related to the period before her absence from 12 April 2022 and is therefore outside of the primary time limit. The Claimant could therefore have brought a claim in reliance on this issue with the other incidents in April 2022, but chose not to do so, rather she returned to work from 11 June 2022. In addition, given the lack of clarity on dates and times, I conclude that the delay has affected the Respondent's ability to respond to this head of claim and it would not be just and equitable to extend time.

187. The last incident relied on, which was also added to the list of issues at the start of this hearing was the misrepresentation/lack of acknowledgement of the Claimant's contribution to the workplace, specifically the Diversity and Inclusion initiative in her annual appraisal in February 2022. Again this occurrence is outside the primary time limit of three months and I do not consider it just and equitable to allow a claim in relation to this incident to be submitted late as I am satisfied that the Claimant could have chosen to do so, having expressly referred to the fact that she considered issuing proceedings in the employment tribunal in April 2022, but instead chose to return to work.

188. Having considered each of the allegations in turn, I now consider if all or some of these incidents should be treated as conduct extending over a period under section123(3)(a) EqA. I conclude that each of the incidents of being required to work late on a Thursday, being summoned on the tannoy at the end of a break, not being told in advance of her breaks and being required to work on the SCOs could potentially be conduct extended over a period of time with the last incident of each being the relevant time for considering if the claim has been submitted in time. However, in each case, the last incident relied on occurred before the Claimant's period of sick leave commending on 11 April 2022 and as set out above no cogent explanation for the delay has been provided as to why the Claimant did not submit a claim at that time, when she had considered it, or why, having not done so in April she waited to contact ACAS until 29 November 2022. I therefore conclude that to the extent that these incidents constitute conduct continuing over time with the last incident occurring prior to 11 April 2022, it is not just and equitable to extend time to allow the claim to proceed.

189. I conclude that the Rob Waite incident on16 January 2021 and the resulting note of expected behaviour given to the Claimant on 22 January 2021, were one-off events that did not constitute conduct extending over a period of time on the basis that the Claimant had no further significant interaction with Mr Waite (as per *Okoro*) and the incident related to specific circumstances that were not repeated and there was no continuing discriminatory state of affairs as referred to in Hendricks,

190. Likewise, I find that the Performance Appraisal in February 2022 and the September 2022 failure to respond to the Claimant's bell were also one-off events involving different individuals and do not constitute conduct extending over a period of time, were not repeated and there was no on-going discriminatory state of affairs.

191. Lastly, I consider whether all of the incidents although apparently unrelated, could together constitute conduct extending over a period of time with the last such event being the failure to respond to the Claimant's bell on 5 September 2022 and conclude that they do not. The incidents relied on involved a number of different individuals and unrelated circumstances and I accept as submitted by Counsel for the Respondent that there was distinct change in conduct from 13 April 2022 onwards, when Ms Smak became involved. From that point on there was no recurrence of the Claimant being required, requested to or allowed to work on the SCOs and she engaged with OH and held regularly review meetings with her manager. Even if the 5 September incident had been an act of discrimination (which I do not find it to be – see par 194-5 below), it was unrelated and did not retrospectively mean that the previous incidents could be used as a basis for arguing that there had been continuing discriminatory conduct, there had not been. Although not part of the Claimant's pleaded case or the issues identified in the Case Management order or at the start of the hearing, as it was raised by the Claimant in the hearing, I record that I do not conclude that there was a culture of discrimination as the Claimant alleged.

Disability Discrimination – Time limits
Failure to make reasonable adjustments

192. The first PCP relied on by the Claimant is that she was required to work on the self-service tills (SCOs). The Claimant says this put her at a substantial disadvantage in that she found it hard to stand due to her vertigo. I have found that initially the adjustment agreed on 8 January 2021 was that the Claimant would not be asked to work on the SCOs and if asked, could explain that she was unable to work on the SCOs and that her managers were aware of the situation. From 13 April 2022, the agreed adjustment was that she would not be rostered on the SCOs, nor would she be asked to cover on the SCOs and this instruction was disseminated more widely across the Bath store so the Claimant would not be put in a position where she had to explain that she could not do this. The Claimant gave evidence and I have found that these were effective from the 13 April 2022 and on the Claimant's return from sick leave on 11 June 2022, these adjustments were in place and consistently applied. This complaint is therefore outside the primary time limit, and I do not conclude that it would be just and equitable to extend time as I am satisfied that the Claimant was aware of her right to bring a claim in April 2022 but chose not to do as her concerns had been resolved and this allowed her to return to work on 11 June 2022. The Claimant could have brought a claim any time from 11 June 2022 until she notified ACAS of her claim on 29 November 2022

193. I conclude that the complaint there was a PCP of requiring checkout staff to conduct essential training standing at a computer at a high desk and of expecting staff to ask for time out to do on-line training and a failure to make a reasonable adjustment by providing a system whereby the Claimant does not have to train whilst standing up or ask for time away from the check-out was on-going as at the date of termination and that autism training had not been provided prior to the Claimant's resignation.

Disability Discrimination - discrimination arising from disability

194. The only incident relied on for the claim of discrimination arising from disability under section 15 EqA and harassment that is not out of time, is the incident on 5 September 2022, when the Claimant says that her supervisor failed to respond to her bell promptly.

195. I have concluded that the Claimant has failed to adduce sufficient evidence to support her contention that there was any untoward delay in answering her bell. To the extent that there was a slight delay, I have found that no cogent evidence has been adduced that it was personally motivated and not just a consequence of the store being busy. I further do not conclude that waiting for a few minutes for a supervisor to arrive is a disadvantage. Even if I am wrong on this, and it constitutes a disadvantage then I do not find that it arises as a consequence of any of the Claimant's disabilities which are in themselves very separate conditions. Taking the Claimant's argument at its strongest, although it was not articulated in this way in the hearing, she may have been seeking to suggest that her autism and/or vertigo have resulted in a poor perception of her that has in turn resulted in her being responded to in a dismissive manner and with delays in responding to her bell. I do not find that this is the case. Rather, I find that she is sensitive to any perceived slights and does not take into account other pressures and demands that her colleagues may be under, focusing on her own immediate needs and interpreting their prioritisation of those other demands and priorities as prejudicial or unfavorable treatment directed at her. She has not adduced sufficient evidence of discrimination to shift the burden of proof to the Respondent and her claim therefore fails.

Disability Discrimination - harassment

196. The same incident of 5 September 2023 is relied on by the Claimant for her claim of harassment, all the other incidents being out of time. I rely on the same findings of fact as referred to above in relation to the section 15 claim. I do not conclude that waiting for a few minutes for a supervisor to arrive, constitutes harassment on the basis that, however perceived by the Claimant, it could not reasonably be expected to violate her dignity or create a hostile or degrading environment. I further do not find that this incident arose as a consequence of any of the Claimant's disabilities. The Claimant's claim for harassment therefore fails.

Disability Discrimination – failure to make reasonable adjustments

197. The claim that there was a failure to make reasonable adjustments in relation to the PCP that the Claimant/staff were required to work on the Self-service tills, fails as it is out of time.

198. As this complaint goes to the heart of the Claimant's claim, for completeness, and in case this finding were to be incorrect, I consider the substance of the claim. I agree with the Respondent's submissions that whilst this was a general requirement (PCP), an adjustment was in place from 8 January 2021 whereby the Claimant would not be rostered on the SCOs or asked to work on the SCOs. However, as communication of this adjustment was limited at the Claimant's request, it was agreed that if she were to be asked to go on the SCOs she would say she was not able to do so. This was in line with the other self-managed issues that were agreed at the Wellness Review meetings in January 2021. Based on the information available at the time and

the Claimant's request I accept that this was a reasonable adjustment and find that there was no failure to make a reasonable adjustment on the Respondent's part at that time notwithstanding that on two occasions the Claimant did agree to work on the SCOs. This adjustment remained in place and no evidence was submitted that the Claimant asked for this to be reviewed or that any concerns were highlighted by the Claimant about the agreed adjustment (other than in relation to the incident on 9 January 2021, the day after the adjustment had been agreed) or that the Respondent could reasonably have been aware of any concerns after that date until the April 2022 incident. After the April 2022 incident when it became apparent that the Claimant did not feel able to refuse to go on the SCOs but in fact volunteered to do so, to her own detriment, the adjustment was varied so that all managers were advised that the Claimant should not work on the SCOs by email on 14 April 2024, even if she said she was able to do so. This was consistently applied until the termination of her employment. I therefore conclude that there was no failure to make a reasonable adjustment in relation to this PCP.

199. The second element of this head of claim relates to the requirement to undertake training which relates to the two PCPs relied on by the Claimant of requiring checkout staff to conduct essential training standing at a computer at a high desk; and of expecting staff to ask for time out for training. These complaints are in time on the basis that the Claimant says this was the situation at the time of her resignation. I deal with these two complaints together.

200. The Respondent denies that theses PCPs were applied and relies on the fact that the Claimant did raise issues of concern at various times in her employment and could have raised the training issue more consistently if this were a genuine issue. They also submit that the complaints about training have morphed, from an initial complaint on 10 April 2022 that as a cashier she did not have access to a computer at all in work hours, to her grievance on 23 October 2022 where she said it was unrealistic to expect her to pro-actively ask for time out for training to the additional grievance information on 6 November 2022 where she said the desk provided was too high. In these proceedings the PCP in relation to the timing of the training is articulated as a requirement for staff to ask for time out to undertake training. The Respondent also notes that the Claimant did not raise any issues about training in the Wellness Review meetings held between her return on 11 June 2022 and her employment ending on 18 October 2022.

201. It was accepted by the Respondent, and I concur, that a PCP requiring the Claimant to stand to undertake training would put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that she found it difficult standing due to vertigo. However, the Respondent says that there was no such requirement.

202. Having found that other desks were available for use both by other staff and the Claimant within easy reach and on the same floor as the mainline tills, which did not require the employee to stand, I conclude that there was no PCP requiring the Claimant to use the computer at the high desk at which she would have to stand. Her claim that the Respondent failed to make a reasonable adjustment in relation to this PCP therefore fails.

203. In relation to the PCP of expecting staff to ask for time out for training, the Respondent does not concede that there was such a PCP nor that the Claimant found it hard to speak out about any perceived issues and submits that the Claimant was in fact offered opportunities to undertake the required training.

204. I have found that the Claimant in her own evidence states that she was "offered" training whilst on shift (which she says was at a high desk other than on one occasion) and I have accepted Mr Waite's evidence that that there was a practice of scheduling training, overseen by management, to ensure that the necessary training was undertaken within the required time-frames. I note that the Claimant's evidence on this point was not clear, and I conclude that that there was no PCP that staff had to ask for time out to undertake on-line training as alleged, so this claim for failure to make a reasonable adjustment also fails.

205. It was not clear on the Claimant's pleaded case or her evidence which PCP the proposed autism training was intended to address. However, as I have concluded that reasonable adjustments were implemented in relation to the SCOs with effect form 11 June 2022 and that the PCPs relied on by the Claimant in relation to the training did not apply, then this ceases to be relevant for the purposes of this claim. I note however, that although the delay in providing autism training is perhaps understandable, and the Claimant had left before it had been implemented, some appropriate training for managers may have eased some of the communication difficulties experienced between the parties and note that the Claimant's grievance on this point was partially upheld.

Constructive Dismissal

206. The Claimant is relying on the fourteen incidents set out in the Case Management Order at paragraph 66 starting with the first SCO incident on 9 January 2021 and finishing with the incident on 8 October 2022.

207. The Claimant's representative confirmed in the hearing that that Claimant was not seeking to argue that any single alleged breach in itself was a fundamental breach of the implied duty of trust and confidence by the Respondent and was aware of the test of reasonable practicability which applies to time limits in unfair dismissal claims. He said the Clamant relied on the series of events set out in the Case Management Order which cumulatively destroyed the trust and confidence between the parties, and specifically: the on-going discrimination; the on-going failure to provide the Claimant with a new uniform; the matters described in the Claimant's witness statement at paragraphs 88-98; and the unsympathetic treatment of the Claimant by Ms Jackson on 8 October 2022 which he submits was the "final straw" - as supported by the evidence given by and on behalf of the Claimant during the hearing.

208. I first consider whether the incident on the 8 October 2022 is capable of constituting a "final straw". If it is not, then the Claimant's complaint of unfair dismissal fails.

209. I have found that the factual accounts of the conversation do not materially differ and have accepted that there was a short exchange in which the

Claimant confirmed she was unwell and could not continue her shift. I have concluded that Ms Jackson did not respond in an unfriendly way, nor did she show a lack of sympathy. I accept that this was a short conversation and that Ms Jackson did not engage at length with the Claimant or enquire in more detail after her health. However, I have not found that there was anything unusual or inappropriate in the conversation. I do not find that Ms Jackson spoke to the Claimant in a way calculated or likely to destroy the relationship of trust and confidence, nor that this act contributed or added something to the earlier series of acts on which the Claimant relies. To the extent that the Claimant resigned in response to this incident, then her claim fails.

210. In case I am wrong on this point, I have also considered firstly whether the last straw event relied on was in fact the operative cause of the Claimant's resignation and secondly whether the previous events relied on could in any event be said to have been in breach of the implied duty of trust and confidence (looked at cumulatively).

211. The Claimant's evidence (which I have accepted) is that following the incident on 8 October 2022, she was re-living the April incident involving Ms Jackson. and that she felt she needed to resign due to the impact the situation was having on her health. I have also accepted that she had found herself unable to move on from the January 2021 incident with Mr Waite and conclude that this too was adversely impacting her health.

212. I have also found that on 18 October 2022 the Claimant made an inappropriate post on Linked-In and resigned with immediate effect because she "*realised she may get into trouble for that*" and "*panicked*".

213. I have found that the Claimant was unwell at that time and that she had already concluded that she needed to resign to protect her health. However, she did not do so immediately, events intervened and having made a Linked-In post which she knew to be in breach of the Respondent's guidelines, and which may have led to disciplinary action being taken, she resigned with immediate effect that day. I conclude that she therefore resigned on 18 October 2022 in order to avoid the risk of disciplinary action and not because of the incident on 8 October 2022. It is clear from Meikle, Abbey Cars and Wright that the "final straw" relied on does not have to be the sole cause of the resignation, but that it does need to be an effective cause. Noting that to be an effective cause of the resignation, it does not need to be the predominant, principal, major or main cause for the resignation, I do not find the 8 October 2022 interaction was an effective cause of the Claimant's resignation.

214. Counsel for the Respondent raised a number of further arguments in support of the Respondent's contention that the claims should fail as there had been no breach of the implied duty of trust and confidence. I do not propose to address all of them in this judgment, but in order to provide some clarity for both parties I record my conclusions on the key submissions.

215. I accept Counsel's submission that whilst there had been three incidents where the Claimant worked on the SCOs and became unwell (January 2021, May 2021 and April 2022), following the Claimant's return to work on 11 June 2022 revised adjustments were in place and there was no recurrence of this

situation. To the extent that these events constituted a breach of the implied term of trust and confidence (either looked at alone or cumulatively with the other incidents relied on by the Claimant before her sick absence commenced on 12 April 2022), the contract of employment was affirmed by the Claimant's engagement in the successful return to work process from 11 June 2022. Specifically, I have found that at that point she was aware of her right to bring an Employment Tribunal claim stating expressly in her evidence that she had intended to resign and bring a tribunal in April 2022 but instead she chose to accept the support offered and returned to work.

216. The Claimant could however re-ignite these issues for the purposes of her claim if there were further breaches in the period between 11 June 2022 and her resignation on 18 October 2022 which entitled her to rely on these prior (alleged) repudiatory breaches of contract as the start of the series of actions which might together amount to a breach of the implied term of trust and confidence (*Kaur*).

217. The Claimant seeks to rely on seven issues which she says either occurred or continued in the period from 11 June to 8 October 2022:

    217.1. I have already concluded that the "final straw" event on 8 October 2022 was not in any way calculated or likely to destroy the relationship of trust and confidence.

    217.2. In relation to the September 2022 incident, I have found that the delay in responding to the bell by her supervisor was not directed at the Claimant personally and assessing the incident objectively, however genuine the Claimant's perception, I do not find that it was calculated or likely to destroy or seriously damage the trust and confidence between the parties.

    217.3. I conclude that the same principle applies to the delay in releasing the Claimant early from her shift. I note the Claimant was still released before the end of her scheduled shift at 1.15 pm and I conclude that this was a minor incident which occurred during the normal working day when some degree of flexibility was required to service customer need.

    217.4. Likewise, a failure to expressly direct the Claimant to the People, Policy and Advice resource would not satisfy this test even I had not concluded (as I have) that the Claimant had been sent the relevant information on 7 June 2022.

    217.5. In relation to the allegation that the Claimant was provided with an ill-fitting uniform, I have found that this occurred in September 2020, and that following some initial discussions with her managers at the time, the Claimant did not follow this up. Specifically, she did not raise it between 11 June 2022 and 8 October 2022. Further and in any event the mis-sizing of uniforms was a general issue at that time; it was not personal to the Claimant; and I conclude was not calculated

or likely to destroy or seriously damage the trust and confidence between the parties as evidenced by the fact that she did not raise it as an issue although other issues were identified and raised by her.

217.6. In relation to the arrangements for training, I have already considered this aspect of the claim in relation to failure to make a reasonable adjustment both in relation to the allegation that there was an on-going requirement to undertake training at a high desk, which the Claimant could not do due to her vertigo and further that the training was not pro-actively scheduled for till staff but that staff had to ask for the time to undertake it, which the Claimant found difficult to do due to her aspergers/autism spectrum condition. I have found that other desks were available to use which did not require her to stand and that she had been offered the opportunity of undertaking the training in normal working hours. I therefore conclude that this allegation is not made out.

217.7. In relation to the provision of autism training, which was first suggested by OH in the report of 29 April 2022, I have found that Ms Smak did make internal enquiries and established that at that time no in-house training was available. I accepted Ms Smak's oral evidence, that at another Waitrose branch where she had worked there had been educational support on autism following an assessment by Access to Work which had been very effective, and she felt this was the best external option. She anticipated that although there was a waiting time for Access to Work services, that both the assessment and the training would then be facilitated by them. This had still not been put in place by the time the Claimant went off sick but the Claimant, was aware that this was the plan and in light of the other adjustments in place which had supported the Claimant through her phased return to implementing a return to normal working arrangements incorporating a permanent change in hours, I conclude that the delay in setting up the training was not to any extent calculated or likely to destroy or seriously damage the trust and confidence between the parties.

218. On that basis there was no action (or omission) of the Respondent, which was calculated to or, looked at objectively, was likely to destroy or seriously damage the trust and confidence between the parties between 11 June 2022 and 8 October 2022. I also considered if this could be the case when all or any of these acts or omissions were looked at cumulatively but again conclude not. The Claimant having previously affirmed the alleged breaches which pre-dated her sickness absence, cannot therefore re-ignite them, there being no subsequent breach of the implied term of trust and confidence.

219. The Claimant's resignation should therefore not be construed as a dismissal under section 95(1)(c) Employment Rights Act 1996.

220. I therefore do not find that the Claimant was unfairly dismissed.

221. As there is no breach of contract on the part of the Respondent entitling the Claimant to resign, the Claimant's claim for wrongful dismissal fails.

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Employment Judge Halliday

_____

Date **23 February 2024**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

5th March 2024

FOR EMPLOYMENT TRIBUNALS