EMPLOYMENT TRIBUNALS

Claimant: Ms C Johnson

Respondent: ASDA Stores Limited

Heard at: Midlands West

On: 17, 18, 19, 20, 21, 24, 25, 26, 27 and 28 November 2025

Before: Employment Judge Faulkner
Mrs D Hill
Mr P Simpson

Representation: **Claimant** - in person
Respondent - Ms B Clayton (Counsel)

JUDGMENT having been sent to the parties on 1 December 2025, and written reasons having been requested by the Claimant in accordance with rule 60(4) of The Employment Tribunal Procedure Rules 2024, the following reasons are provided.

REASONS

Introduction

1. This case principally concerned events after the Claimant was reinstated following her dismissal in May 2023, those events culminating in her resignation in early September 2023. She complained of unfair constructive dismissal, protected disclosure detriment, discrimination arising from disability, indirect disability discrimination, harassment and victimisation.

Issues

2. Following case management hearings before Employment Judges Perry and Broughton, the parties agreed the list of issues attached as Schedule 1, which is varied in accordance with discussions on day 1 of this Hearing and, in relation to remedy, discussions on day 10.

Hearing

3. An agreed bundle of over 1,300 pages was provided. Page references below relate to that bundle. A couple of new documents were added by consent during the Hearing. We were asked to read key documents – decision letters, appeals and the like – before hearing oral evidence, making clear that otherwise it was for the parties to take us to documents they wished us to consider.

4. We read statements from the following witnesses – the Claimant, her former colleagues Jayne Csollak and Samantha Crutchley, and for the Respondent, Nahiam Munir (an Operations Manager), Paul Delemere (General Store Manager), Jemma Thompson (Store Manager), Tracey Davis (Customer Trading Manager), Richard Hardie (General Store Manager), Susan Hughes (formerly Replenishment Section Manager), Mitchell Downs (General Store Manager) and Holly Ince (General Store Manager). All of the witnesses gave oral evidence, except Ms Crutchley who was unable to attend for family reasons. We therefore afforded less weight to her statement than might otherwise have been the case. Alphanumeric references below relate to the statements.

5. The Claimant identified only on day 1 who allegedly made harassing comments about her, namely Mr Cooper, Abigail Smith and Jilly Kwarteng (issue 11.1.2). Ms Smith has left the Respondent's employment; it was agreed that the other two should be permitted to give evidence on this point. The Respondent also sought permission for Mr Cooper to give evidence on his alleged assault of the Claimant. Although not entirely convinced by the Respondent's explanation as to why he was not called to address this beforehand, given he was the direct subject of this allegation, we granted the Respondent's application by consent, given Ms Clayton's assurance that he would essentially be repeating what he had said during the Respondent's internal investigation of the matter. That is what transpired.

6. The Respondent's strike out application, based on the rule in **Henderson v Henderson**, was withdrawn on day 2 after the Respondent had considered case law we drew to its attention.

7. The Claimant asked us to note that it was only on 14 November 2025 that she received CCTV footage of the incident that contributed to her dismissal in March 2023, after months of asking for it. We directed the Respondent to explain its late disclosure, which explanation was provided by the Respondent's solicitors on day 3. We were not asked to draw any adverse inferences from the delay in disclosing the footage and, having read the explanation, did not think it appropriate to do so.

8. The Claimant submitted that the footage should not be shown to the whole hearing room, via our JVS screen. We treated this as an application for a privacy order, which we refused for reasons we gave orally, though we made clear that we doubted the relevance of the footage to the issues. As it turned out, it was unnecessary for us to view it, as we anticipated.

9. The Claimant withdrew an application made on 6 September 2025 to rely on a supplementary statement from Ms Csollak. On 14 November 2025, the Respondent applied for Mrs Hughes to give evidence by video, at her request. For reasons given orally, we granted the application.

Facts

10. We based our findings of fact on the evidence we were taken to and heard. We did not deal with every factual matter put to us, focussing on those which we thought most relevant to the issues before us, but just because we do not mention below something referred to by the parties does not mean it was not considered. Of course, where there was a dispute between the parties we made our findings of fact on the balance of probabilities.

Background

11. The Claimant was employed by the Respondent from 18 October 2005 as a Service Colleague at its Walsall Living Store until her resignation on 5 September 2023. She reported to Mrs Hughes. She had a clean disciplinary record before March 2023.

Handbook/policies

12. The Respondent's Handbook (not in the bundle) states that colleagues are responsible for using their own swipe card to swipe in immediately prior to the start of their shift and out at the end of their shift and that if a colleague swipes "*with somebody else's card or misuses, or allows misuse of,* [their] *own card then this may result in disciplinary action up to and including dismissal*". Obviously, errors in swiping in or out can impact on pay.

13. The Respondent's Grievance Policy (from page 1216) provides that to instigate the formal grievance process a complaint must be set out in writing; what it says is that employees "should clearly outline the grounds of their concern in writing, highlighting any potential evidence/witnesses".

14. The Appeals Policy (page 190 to 200) provides that colleagues have the right to submit an appeal based on one or more of the following grounds:

14.1. Procedure – an allegation that the correct procedure has not been followed, such as not being offered representation.

14.2. Facts – an allegation that the facts the decision was based on are incorrect or that relevant evidence, new evidence, or information was not considered.

14.3. Severity – claims that the severity of the sanction is not appropriate or is inconsistent with previous decisions.

15. The Claimant accepted that there have to be some criteria to manage appeals proportionately. The Appeals Policy also provides that if the appeal letter does not refer to the grounds set out above or if the basis for the appeal is unclear, then the colleague should be asked to submit their appeal again and state clearly the basis for the appeal, with reference to the stated grounds, before it will be heard.

16. The Disciplinary Policy (pages 168 to 189) lists examples of gross misconduct as including financial integrity breaches and intentional dishonesty. It provides for "disciplinary counselling" where the misconduct is minor and formal action otherwise.

17. The Investigation Policy provides (page 293): "Any evidence gathered as part of the case can be shared with the colleague if required to assist with remembering a situation or timeline. Evidence should not be withheld during an investigation".

Knowledge of disability

18. The agreed disability is anxiety and depression. Knowledge of disability was contested, the Respondent pointing out that none of the Claimant's absences over 17 years of employment were for this reason. We had regard to the following relevant additional evidence:

18.1. At page 302 is a note of a meeting in September 2017 in which the Claimant disclosed to Mrs Hughes that she had experienced a panic attack. In October 2017, they discussed counselling she had been having, and the Claimant said she was agitated, shaking and upset on a Saturday shift. She referred to her mental health and said that she had experienced two breakdowns, was on medication and had been diagnosed with anxiety and panic attacks. Mrs Hughes accepted in evidence that she knew the Claimant struggled with anxiety on Saturday shifts, because they are busy, though she denied the Claimant had ever asked to leave work because she felt unwell.

18.2. On 26 October 2017 (page 317) the Claimant wrote to Philip Marsh (her former Store Manager) saying she had suffered anxiety, stress and panic issues since 2014 and that she had had problems with the stress of Saturday shifts for a long time, raising what she had discussed with Mrs Hughes.

18.3. On 27 November 2017 (pages 325 to 326) Occupational Health ("OH") referred to a GP diagnosis of anxiety and the Claimant being on anti-depressants. No routine wellbeing review was required. The tests conducted at the appointment indicated a severe level of anxiety and a mild level of depression, so that the Claimant was "vulnerable to emotional upset impacting on her emotional resilience".

18.4. It is agreed the Claimant told Ms Thompson in late February 2023 that she was struggling, and that this was linked to working on Saturdays. We accepted that Ms Thompson did not know for how long the Claimant had experienced anxiety and depression.

18.5. On 2 May 2023, in the context of the disciplinary case that led to her dismissal (see below), the Claimant produced for Mrs Ince a statement (pages 471 to 472) in which she stated that she suffered from extreme anxiety/panic disorder, OCD and depression and that she regularly left early on Saturdays (she told us this was about once a month). She described her symptoms in the statement, including confusion, lack of concentration and forgetfulness. At the disciplinary hearing (page 452) she told Mrs Ince that she started taking Sertraline on 20 March 2023 and was "absolutely not" taking it on 11 March 2023, so that she was not "in [her] right mind" on that date. The Claimant also raised why no thought had been given to supporting her during the disciplinary process given her mental health. Mrs Ince told us there was no evidence on file of the Claimant having mental health issues at the time of the clocking out incident; she seems not to have seen the OH report when checking the Claimant's file. Her evidence was that she believed the issues the Claimant described flowed from the disciplinary investigation itself and told us she did not

know for how long the Claimant had experienced anxiety and depression. We accepted that evidence; the statement the Claimant showed her did not indicate a timescale for it.

18.6. On 11 July 2023, OH produced another report (pages 987 to 989) and again referred to an historic anxiety diagnosis and that the Claimant was taking an anti-depressant and a beta blocker for anxiety. It concluded she had severe levels of anxiety symptoms and moderately severe levels of depressive symptoms. Telephone counselling was recommended. She was unfit for work.

18.7. The Claimant told us that a lot of her colleagues knew that she left early on Saturdays. We accepted that, and correspondingly did not accept that she at no point asked Mrs Hughes if she could do so because she was feeling unwell.

Dismissal – May 2023

19. On 31 March 2023 the Respondent commenced an investigation into alleged swipe card misuse by the Claimant on 11 March 2023. Two other colleagues were thought to be involved, Ms Crutchley and Hajeera Bibi, both resigned before a disciplinary investigation could be commenced in relation to them; we drew no conclusions about their conduct from their doing so. The Respondent says that its CCTV showed the Claimant leaving early and handing her smart card to Ms Crutchley who signed an exceptions record the following day to say she had signed the Claimant out at 9.00pm, when in fact she had left at 8.34pm. The Claimant accepts she left early but denies giving her card to anyone else. It was not necessary for us to draw detailed conclusions about what actually happened on this day, though of course we need to refer to some important issues related to it and will do so below.

20. As indicated above, the Claimant said in evidence that Saturday shifts were always distressing because of the noise and number of people (CJ4a); she added that Ms Crutchley sometimes encouraged her to leave early if she was struggling. Although she was not on anti-depressant medication as at 11 March itself, she told us that her leaving as she did, without her card and without swiping out at the correct time, was because of the symptoms of her anxiety and depression. We accepted that the Claimant regularly left early on Saturdays because she was feeling anxious and it was effectively agreed by the parties that this was the reason she left early on 11 March. We will return in our conclusions to the Claimant's evidence that her anxiety was also the reason she forgot to clock out.

21. On 5 April 2023 the Claimant raised an anonymous ethics complaint against Mrs Hughes who was to investigate the disciplinary case (page 382); the Claimant had previously brought a grievance against her in 2017. Mrs Hughes was replaced by Tracey Davis who decided on 17 April 2023 to refer the clocking out matter to a disciplinary hearing – page 444. It was not necessary for us to say anything about Mrs Davis's reasons for doing so.

22. The Claimant told us (CJ3e) that Ms Bibi informed her on 5 April 2023 that she and Mr Cooper had accessed the CCTV footage of 11 March 2023. The Claimant also says that Mr Cooper told her on the telephone that he knew what was on the footage, when she asked him to be her representative in the disciplinary process (he could not be, because she was not a member of the union at the time of the incident). Mr Cooper denies viewing the footage. He

sent her a text on 6 April 2023 (page 411) in which he said "the evidence is damning", also saying "I don't have all the facts". He told us what was damning were the rumours saying the Claimant had given her card to a colleague who swiped her out. We will return below to the question of whether the CCTV footage was viewed as the Claimant alleges.

23. The Claimant was summarily dismissed by Mrs Ince on 2 May 2023. The notes of the disciplinary hearing are at pages 447 to 461. As shown at pages 451 to 452, the Claimant referred Mrs Ince to her difficulties working on Saturdays and shared that she had not been on anti-depressant medication on 11 March but was from 20 March. Not being on medication, she said, was "why I wasn't in my right mind and I was going through an extremely traumatic time". The Claimant also made clear she did not want to view the CCTV footage (page 448). The record of what Mrs Ince said to the Claimant after an adjournment is at page 464. She told the Claimant that the Respondent takes mental health seriously, but the Claimant had declined an OH referral in discussion with Ms Thompson, had not started medication until 20 March, and there were no written conversations about the Claimant's health on file. She told the Claimant she was dismissed as she had intentionally breached the Respondent's clocking in procedures and defrauded it.

24. The dismissal letter of 2 May 2023 is at pages 466 to 467. Mrs Ince found that the Claimant had handed her card to Ms Crutchley, could not remember why she did so – which she evidently found unconvincing – and was let out early. She also noted that Ms Bibi and Ms Crutchley had resigned, which she told us she thought relevant because it showed to her mind that they and the Claimant had colluded to swipe her out. Mrs Ince did not disclose to the Claimant that by this point Ms Bibi had admitted to Mrs Hughes that it was she who had swiped out using the Claimant's card. It was Ms Bibi who had made the allegations of clocking in offences in the first instance, blaming Ms Crutchley. Mrs Ince did not think this relevant to what the Claimant herself had done. She concluded the Claimant had knowingly handed her card to someone else, so that she could be clocked out after she left the store.

25. The Claimant's case was that Mrs Ince chose not to consider why she left without following proper clocking out procedures, namely that she was suffering with her mental health, though she accepts that Mrs Ince "probably did" believe she had defrauded the Company. The Claimant also said in evidence that she would not have left the store early if she did not have anxiety and depression. Again, we will return to that in our conclusions. When reflecting during her oral evidence, Mrs Ince accepted that the Claimant left early because she was anxious about Saturday work, but told us that this was not any part of her reason for dismissing the Claimant, because she concluded that whatever the reason for leaving early, by not clocking out she had defrauded the Company. She noted that the Claimant and Ms Crutchley had discussed the Claimant not being able to afford to go home early, which made Mrs Ince think the clocking out offence was agreed between them. She also thought it lacked integrity that the Claimant did not want to watch the CCTV given that she was accused of something she said she did not remember.

26. The Claimant appealed on 4 May 2023 (page 480) on various grounds, including the outcome being too severe, discrepancies during the investigation and procedures not being adhered to. She did not detail the grounds beyond those headings. She was reinstated on appeal from 18 May 2023, on a final

written warning, by Mr Delemere – see his summary on pages 496 to 497 and his decision at pages 499 and 500. This was on the basis that the first ground of appeal should be upheld because the Claimant had not intended to defraud the Respondent and that Ms Crutchley had decided to swipe the Claimant's card after she left the store. He also thought it unclear whether the Claimant had given her card to Ms Crutchley and felt that the latter's evidence was unreliable. He also said, "throughout the disciplinary, your mental wellbeing was not explored or considered". He told us that what he meant was that the Respondent should have referred the Claimant to OH, including on the question of whether what she did on 11 March was consistent with her "being of sound mind".

May 2023

27. The Claimant says that on returning to work after reinstatement she was given a hostile reception by colleagues. Specifically, her case was that she was ignored by Mrs Hughes and Ms Thompson, although she went further and said that Mrs Hughes had ignored her from April 2023 when the Claimant sought her removal from the disciplinary investigation process. The Claimant told Ms Thompson (see below) that she did not want to speak with Mrs Hughes unless she had to (JT49) and told us that it was better for her and Mrs Hughes not to get into deep conversations and just to be respectful. What she wished to emphasise was that Mrs Hughes would turn away on seeing her approach and, for example, left the canteen on one occasion on the Claimant arriving there. Mrs Hughes said in her statement that she would greet the Claimant daily on letting her into the store in the morning and the Claimant ignored her attempts at conversation, whilst the Claimant says Mrs Hughes only sometimes let her in, and that it was she who said good morning and was ignored.

28. The Claimant told us that colleagues not speaking to her was related to disability because they knew her mental health was why she was reinstated. She had regular contact with Ms Thompson whilst off sick from 9 June 2023 (JT18 to 25). We concluded as follows:

28.1. The relationship between the Claimant and Mrs Hughes changed, as both seem to agree, on the Claimant's return to work following her successful appeal, and quite probably after her ethics complaint, but given what the Claimant said to Ms Thompson and to us (namely that she did not want to speak with Mrs Hughes unless she needed to), given that she said Ms Thompson also ignored her but agreed they had many points of contact whilst she was off sick (which coloured her evidence on this issue), and given it seems unlikely a manager/employee relationship could be properly conducted at all without some communication, we concluded that Mrs Hughes did not ignore her, and that any frostiness between them was as much the Claimant's responsibility. We concluded that they engaged with each other for work purposes when necessary.

28.2. We did not think the Claimant established on the evidence that Ms Thompson had ignored her at this stage. Perhaps this relationship also became more business-like than personal, but she was not ignored. Moreover, as we will come to below, the Claimant told us she was comfortable speaking with Ms Thompson at a later grievance hearing. That confirmed our conclusion in this respect.

28.3. We thought it likely too, on balance, that Ms Thompson and Mrs Hughes were aware of Mr Delemere's decision, which included the statement that the

Respondent had not properly taken the Claimant's mental health into account in dismissing her.

29. The Claimant also says she was the butt of inappropriate comments by Mr Cooper, Jilly Kwarteng and Abigail Smith, specifically that "she faked (or was putting on) her mental health" and that she "shouldn't be there". She says she told Ms Thompson of these comments on 15 April 2023, but whilst Ms Thompson accepts that they spoke on this occasion, she says the Claimant made no reference to comments from Mr Cooper, and that she met with Ms Kwarteng and Ms Smith on 17 April to discuss their conduct (see pages 439 and 440) because the Claimant had said they were gossiping, and that Ms Smith had said in the Claimant's presence, "Shall I hand my card over now?". In other words, she denied the Claimant making reference to colleagues saying she had faked her mental health or should not be there.
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30. Mrs Kwarteng accepted in her evidence that she was somewhat resentful of the Claimant following her reinstatement, given that she was very close to Ms Bibi, but told us she did not make the comments attributed to her and did not know about the Claimant's mental health as they were not close enough for the Claimant to mention it (JK11). She also gave evidence that she did not know why the Claimant was reinstated and so could not have made any comments about that either. Mr Cooper denies any such comments as well (SC11), adding (SC13) that he had no knowledge of the Claimant's disability. We concluded:

30.1. It is agreed there was gossip about the Claimant's return to work.

30.2. On balance, it seemed likely to us that Mrs Kwarteng did say something to the effect that the Claimant shouldn't be there (whether directly to the Claimant or otherwise) given her loyalty to Ms Bibi and her resentment of the Claimant at that point.

30.3. We accepted however that she did not know of the Claimant's disability and also concluded that had the Claimant reported to Ms Thompson the comment about faking her mental health, this would have appeared in Ms Thompson's notes. She is an assiduous notetaker and was clearly willing to raise other, similar points with both Mrs Kwarteng and Ms Smith. We thus found that this comment was not made by either of those individuals.

30.4. As for Mr Cooper, it is telling that the Claimant did not relay to Ms Thompson any comments made by him at this juncture. We found that there were no such comments on his part at this point either.

31. The Claimant says that on 26 May 2023 she was physically and verbally assaulted by Mr Cooper. She was told by a colleague, Amber Matthews, on return from a smoking break, that Mr Cooper was angry with her and was considering putting in a grievance about the number of breaks she was taking. When she subsequently spoke to him about this at the canteen door, asking him if he had a problem with her, she says he pushed her away with his body to prevent her entering, which she also described in her evidence as "body slamming".

32. Mr Cooper told us that if he had done this, the Claimant would have slapped him given how aggressive she was. He denies being angry at the Claimant approaching him, saying he was in fact surprised as he did not know Ms

Matthews had spoken to the Claimant, though he accepts he may have been angry about the Claimant's behaviour during their exchange. The Claimant also says Mr Cooper told her she was disgusting and that he did not want to look at her, whilst Mr Cooper told us this is not the kind of terminology he would use. In turn, he says the Claimant called him a "dirty scumbag" and pointed her finger in his face. After a colleague, Tracey Siverns, had intervened (see below), Mr Cooper left to attend to his duties. We will return to our conclusions about this altercation when we have dealt with what other witnesses said about it during the relevant grievance investigation.

33. The Claimant called Mr Delemere, who told us that she relayed she had been assaulted, that Mr Cooper had blocked her way and that she had pushed him; she did not tell him Mr Cooper had moved her with his body. The Claimant denies saying that she pushed Mr Cooper, but we preferred Mr Delemere's evidence. He clearly had a good relationship with the Claimant, expressing concern during their phone call that she was on a final written warning; he was consistent about this comment from the outset; and he has no reason to contrive his evidence on this point.

34. Mr Delemere then called HR to let them know what he had been told. Helen Aston was identified as the relevant person and informed him she had not long arrived at the store. The Claimant was told by Tracey Siverns that she should wait in the warehouse out of the way, but neither Ms Aston nor any manager came to speak with her. Ms Aston subsequently produced a statement of her recollections of the day (pages 502 to 503). She said that she saw the Claimant outside on entering the store but did not speak to her; she did not think the Claimant looked upset. She said she later sent Tracey Siverns to let the Claimant know she was in the office if she wanted to chat, Ms Siverns returning to say the Claimant was no longer in the warehouse (where she had been waiting for some considerable time for someone to come and speak with her), so must have left. Ms Aston later saw the Claimant outside and said in her statement, "she was aware that I was in store if she needed to speak with me".

35. The Claimant says her reaction to these events (it appears to be agreed she was loud and emotional on leaving the store) was heightened by her disability, putting her into a panic state. Her case is that Mr Cooper's actions were related to disability because he knew she was vulnerable, but we accepted his evidence that he knew nothing about her mental health. The Claimant says he did know about it because he saw how upset she was during the altercation, but that is far from sufficient to show he knew that she suffered from anxiety and depression, given that it was a situation likely to lead to her being upset in any event and given that very obviously even severe upset can arise from any number of causes.

Grievances

36. On 22 May 2023, the Claimant sent a grievance by email to Jemma Thompson (page 501) about the following:

36.1. "Serious breach of GDPR/personal data whilst a formal investigation was taking place".

36.2. Being "a victim of bullying, harassment, victimisation and possible discrimination in the workplace".

36.3. A breakdown of relationship with her line manager, Mrs Hughes.

37. The Claimant relied on this as both a protected disclosure and a protected act. She says the breach of confidentiality (that is, Mr Cooper and Ms Bibi watching the CCTV footage of 11 March) was not just about her and she thus believed it to be in the public interest. On 26 May 2023 she filed a separate grievance about Mr Cooper (page 504), by a call to the Respondent's ethics hotline. She said he had called her disgusting and did not want to look at or speak to her, and had used his body to forcefully move her out of the way. She said she put her hands up in front of her chest but he was still shoving her. She added that no-one came to check on her and so she had reported the matter to the police.

38. On 27 May 2023, Mr Cooper filed his own grievance, addressed to Ms Thompson (page 505). He said that the Claimant had approached him aggressively, asking if he had a problem with her, shouted at him and called him a bully and a dirty scumbag. He said he did not know if she would strike him. He said he had told her in anger that she liked getting people sacked, and that she shouted at him as she left the store. He described feeling "humiliated and violated". The Claimant's case was that Mr Cooper presented his grievance because of her own grievance of 22 May, but she accepted during cross-examination that she did not have any evidence to prove that Mr Cooper knew she was raising a grievance at all. Rather, she assumed it from how angry he was and from him assaulting her just a few days afterwards. She also told Mr Munir (NM116.1) that Mr Cooper brought his grievance because he knew she was on a final written warning and was maliciously trying to get her sacked. Mr Cooper told us he was not aware of the Claimant's grievance at the time (SC18.4). There was no evidence that he did, the Claimant could do no more than speculate based on subsequent events, and on balance therefore we concluded that he did not.

39. Notwithstanding paragraph 28 of her Particulars of Claim (page 68) the Claimant said in evidence that she did not assert that Mr Cooper's grievance was a response to hers of 26 May. She also said she accepts Mr Cooper was entitled to raise a grievance about her shouting at him and calling him names, and that anyone, disabled or not, would be upset at an altercation that had involved name calling.

40. Ms Thompson sought further information from the Claimant following an informal conversation with her on 1 June (page 508), the Claimant responding on 5 June to say she had evidence (a text message and call log) to support the data breach and had been bullied by various individuals from 31 March. Ms Thompson also sought advice. There was a formal grievance meeting on 13 June and they also met on 27 June because the Claimant wanted to add to the earlier meeting notes. In their meetings, the Claimant raised the issues of Mr Cooper and Ms Bibi viewing the CCTV (which she said Ms Crutchley had mentioned to her); Mr Cooper, Ms Smith and Mrs Kwarteng speaking about her; and Mrs Ince ignoring her mental health by saying in her decision to dismiss the Claimant that she could not confirm she was experiencing difficulties in this regard on 11 March. Ms Thompson also interviewed Mr Cooper and Mrs Hughes. The former denied viewing the CCTV footage, saying he had heard of the incident from Ms Bibi, it would have taken ages to find the clip and that it would have been inappropriate for him to do so given his role.

41. When asked why she says that Ms Thompson did not take her grievance seriously, the Claimant told us her complaint was really about Ms Thompson's decision, which she says was influenced by the seriousness of her complaints which Ms Thompson did not want to deal with, and by her ethics complaint about Mrs Hughes. She nevertheless accepted in evidence that Ms Thompson's decision was unrelated to disability.

42. Ms Thompson concluded on 13 August 2023 (pages 830 to 835) as follows:

42.1. There had been no breach of confidentiality – Mr Cooper denied viewing the footage, she was confident in his response, Mrs Hughes had said she did not share it with anyone, and the Claimant's evidence did not either prove or disprove what she was alleging. Ms Thompson cited in support of her decision (page 636) that Mr Cooper had said in his text to the Claimant of 6 April that he did not have all the facts. She also said she could not take Ms Crutchley's statement into account as she had left the business; that is what she was advised by the Advice & Guidance Team ("A&G"), though in evidence she was unable to explain the rationale behind it.

42.2. She also said the Respondent's data protection team had not received any complaint from the Claimant about the footage, the Claimant having told Ms Thompson that she had contacted them – see pages 621 to 622. Ms Thompson said, "I am unclear if you intended to mis-inform me that you had raised a data breach concern with our data protection team. Falsifying information/lying during a formal meeting is potentially gross misconduct". A document handed up by the Claimant on day 6 of this Hearing shows that she had in fact emailed the Respondent's privacy team (which is not the same as the data protection team), though Ms Thompson was not made aware of this at the time.

42.3. Ms Thompson also noted that the Claimant had said on 27 June she had a statement from Mr Delemere, when in fact it was part of the notes from the appeal meeting he had conducted. Ms Thompson said, "I am unclear on why you declared that you had a statement from PD when in fact what was produced was appeal meeting notes. Misquoting or fabricating information during the course of a formal process is potentially gross misconduct". The Claimant told us that she believed what Mr Delemere said at the appeal hearing about the password to the CCTV footage being changed when it should not have been (page 494), was a statement on his part.

42.4. As Ms Thompson had spoken with Abigail Smith and Mrs Kwarteng and directed them not to gossip about the Claimant's dismissal, she said that this had been dealt with. She said there was no evidence of bullying by Mr Cooper, and no details of any incidents of harassment or victimisation. As to discrimination, she said the Claimant had told her Mrs Ince had basically said that her mental health "did not exist". Ms Thompson had checked the notes of the dismissal hearing and saw that Mrs Ince had in fact said she had no way of confirming the Claimant's mental health issues. She concluded, "it is extremely serious to make false allegations and to raise such serious issues where there is no evidence to support this. I would also like to stress to you my concerns in regard to this and would urge you to ensure any points you raised are fully supported". Ms Thompson told us she was referring here to the Claimant saying the whole store had harassed her (see JT45), but this was clearly a reference to what the Claimant had said to her about Mrs Ince's decision.

42.5. As to Mrs Hughes, Ms Thompson concluded that the Claimant had contributed to the breakdown in their relationship, particularly by her conduct in the original investigation meeting. She stated, "There is reasonable belief based on the evidence available that this point has been raised with malicious intent against SH", telling us this was because the Claimant had said Mrs Hughes was to blame for the disciplinary investigation.

43. The Claimant says Ms Thompson made the comments about potential disciplinary action to deter her from making further complaints. Ms Thompson for her part says at JT99 that a number of the allegations were serious and if proven may have had grave repercussions for others. The Claimant also told us that Ms Thompson, Mrs Hughes, Mr Munir and Ms Aston were colluding against her in relation to the outcome of her grievances.

44. The Claimant's grievance against Mr Cooper was heard by Mr Munir. He met with the Claimant on 8 June 2023 and on that date discussed with her both her own and Mr Cooper's grievances (pages 545 to 549 and 528 to 531). He says all he knew about the Claimant's mental health was that she had panic attacks, as she had told him this and he had shared with her that he has them too. In terms of his explicit knowledge of the Claimant's mental health at that point, we accepted his evidence.

45. The Claimant says that Mr Munir seemed calm at first but when he started questioning her he became harsh. She says he called her a liar, was rude to her, and instructed the notetaker to leave out parts of the discussion whilst he was making certain comments. She also says he repeatedly raised his voice, banged his fists on the table and leant back in his chair with his hands behind his head, turning his face away in a dismissive manner. It is agreed that during one of the meetings on this date the Claimant had a panic attack; Ms Csollak says Mr Munir came to see the Claimant in the resulting break to check on her. The Claimant says that after the break Mr Munir told her that they needed to continue as he did not want to waste any more time on it and that off the record he stated, "If I want to sack you, I will", "You're not fooling anyone". In oral evidence she also told us Mr Munir said he did not believe she had called the police, that he had been a manager for 30 years and that no-one tells him what to do; Mr Munir is 42 years old.

46. Ms Csollak's statement supports the Claimant's case as she too says that Mr Munir laughed, banged his fists, leant back in his chair rolling his eyes and said he had been a manager for 30 years. Ms Csollak adds that he used phrases like "You expect me to believe". In oral evidence, Ms Csollak agreed that she, the Claimant and Mr Munir smoked and stood together during a break in one of the hearings without any sign of an issue between them. She said in re-examination however that she had reflected on her evidence and was now saying this did not happen. We did not accept that explanation, and took as her actual recollections those which she gave initially. This obvious change in evidence also reduced our confidence in her evidence generally.

47. In his oral evidence, Mr Munir accepted that he leant back in his chair a few times, to stretch his legs, but denied the other behaviour attributed to him. He told us there was no need for it given that he was fact-finding. He also told us he had no power to sack the Claimant and so would not have made a comment saying he could.

48. It is recorded in the notes that during their discussion on 8 June about Mr Cooper's grievance (page 530), the Claimant asked Mr Munir why he was laughing after she had referred to Mr Cooper having a conversation with Mrs Hughes on 26 May about putting in a grievance and had said she would not tell Mr Munir who witnessed that conversation. Mr Munir is recorded as saying, "I am laughing because you are telling me about incidents that you have not heard or seen with your own eyes and ears and are expecting me to believe the validity of your answers. When asked who has told you this you don't want to name the colleague yet expect me to believe that you are giving me truthful answers". He describes his conduct as "a scoff" (NM34), which he accepted in oral evidence was not appropriate, albeit he did it unconsciously. The Claimant says he laughed because of how she presented, struggling to answer his questions. She also says he was influenced by his knowledge of her complaints of discrimination, because he is close to Ms Aston, Mrs Hughes and Ms Thompson. Again, this was her point that they were all colluding.

49. We noted email exchanges between the Claimant and Ms Thompson in early July (page 700) when the Claimant said she did not want a call from Mr Munir, though she did not give as a reason that he had conducted himself as she now alleges, and she made no complaint about him at the time, for example in her appeal against his decision (see below), telling us she was more concerned with overturning it. The Claimant told us that Mr Munir stared at her in a car park near the Tribunal on day 1 of this Hearing, intimidating her, and that on day 2 he also stepped into a lift with her at the Tribunal offices. Mr Munir accepted in his evidence that he had noticed the Claimant in the car park, but denied staring at her, and said it was Mr Hardie who stepped towards the lift, not him; Mr Hardie concurred with that account.

50. Mr Munir described what he did during the second hearing on 8 June when as scoffing, but the minutes record both him and the Claimant referring to him as laughing, and so we concluded that is what he did, in an ironic or sarcastic way based on his view that he could not accept what he was being told. As to the remaining alleged behaviour (shouting or raising his voice, banging the table, rolling his eyes, saying he could sack the Claimant and so on), the Claimant's account was to some extent supported by the contemporaneous evidence that she did not want Mr Munir to call her after one of the hearings. She also submitted that her account is supported by her having a panic attack whilst in one of the meetings with Mr Munir, but the minutes very much indicate that this was during the first hearing on 8 June, when she says that his approach was acceptable, not in the second hearing where she says things took a turn for the worse.

51. We concluded that Mr Munir's questioning of and statements to the Claimant at the second hearing on 8 June was at times brusque to say the least and in fact bordered on inappropriate. This included him saying to the Claimant, "your point is not valid in the slightest", "I am not here to discuss past experiences, I am here to discuss the grievance raised against you and my expectation is that all questions asked are answered truthfully and are facts not based on hearsay. I will ask the question again", and "Can you explain to me why Stephen would feel humiliated and violated by the aggressive way you confronted him if you believe that you did not do this?". In the last of these extracts from the notes, Mr Munir was evidently providing an important factual conclusion before he had heard all of the evidence. He adopted a similar approach towards Mr Cooper when

questioning him about the Claimant's grievance, for example asking him what the Claimant taking a smoking break had to do with him.

52. We concluded on balance however that, notwithstanding this approach, Mr Munir did not bang his fists, raise his voice to an inappropriate level, roll his eyes, call the Claimant a liar, or tell her he could sack her. We reached that conclusion for the following reasons:

52.1. The fact that the Claimant smoked and talked with him during breaks in the hearings.

52.2. The absence of the alleged offending comments from the minutes, though we accepted that they were not a verbatim record.

52.3. The fact that the Claimant attended further meetings with Mr Munir after 8 June without evident concern.

52.4. The fact that Mr Munir checked on the Claimant after the panic attack in the first hearing on 8 June, as someone who experiences them himself.

52.5. The fact that the Claimant did not say in her email exchanges with Ms Thompson that she did not want a call from Mr Munir because of how he had behaved.

52.6. The fact that she did not refer to his alleged behaviour in her appeal against his decision.

52.7. The fact that the Claimant says Mr Munir referred to being a manager for 30 years, which undermined her case on this point.

53. Given those conclusions, we thought it unnecessary to dwell long on what the Claimant says happened between her and Mr Munir during this Hearing, in the car park and near the lifts. We were inclined to the view that her concerns were genuinely perceived but that whatever Mr Munir did was not intended to be intimidating as the Claimant alleged.

54. On 9 June 2023, Mr Munir interviewed Amber Matthews (who said Mr Cooper was disgruntled because the Claimant was taking a smoking break), Tracey Siverns (who said this is what Ms Matthews had relayed to her), Martyna Zecek (who was nearby but said she did not witness any physical contact between the Claimant and Mr Cooper) and Stacy Llewellyn. On 23 June he interviewed Mr Delemere, who said the Claimant had told him she had pushed Mr Cooper – page 652. There was also the statement from Helen Aston. None of the witnesses said to Mr Munir that there was physical contact between the Claimant and Mr Cooper. Mr Munir met Mr Cooper himself on 23 June (see pages 654 to 667), discussing his and the Claimant's grievances. He met the Claimant again on 10 July (pages 720 to 722) when he asked her a few more questions, mainly focused on her desired outcome, and held a similar meeting with Mr Cooper on 14 July (pages 733 to 735).

55. The Claimant and Mr Munir met again on 20 July (pages 762 to 766). She says that at this meeting she asked for the statements that he read out to her, but they were not provided. She also says Mr Munir only read parts of the

statements, and did not read Helen Aston's at all. Mr Munir told us he read all of them. The minutes show that:

55.1. He read "from" Ms Zecek's statement, which indicates that it is likely he only read part of it.

55.2. He read all of Ms Siverns' statement, after the Claimant asked him to do so.

55.3. After he referred to Ms Matthews' statement, the Claimant asked if she could read the statements before she left. He replied, "No, everything will be made available to you that I use depending on my decision at the end of the investigation". He read out two pages of Ms Matthews' nine-page statement.

55.4. He read all of Ms Llewellyn's statement.

55.5. He did not read Ms Aston's or Mr Delemere's statements at all.

55.6. He also asked questions from Mr Cooper's grievance.

56. Mr Munir concluded on 21 July 2023 (what he said to the Claimant orally is at pages 770 to 771 and his decision letter is at pages 772 to 773) as follows:

56.1. Mr Cooper had not forcefully knocked the Claimant out of the way. There was only the Claimant's word against Mr Cooper's and the police were not pursuing the matter due to a lack of evidence, which the Claimant had accepted.

56.2. There had been an argument during which Mr Cooper spoke inappropriately, so that this part of the Claimant's grievance was upheld.

56.3. There had been shouting by both parties. Mr Munir says he thought the Claimant refused to take any responsibility for the incident (NM23), though she accepted calling Mr Cooper "bullying scum".

56.4. There had been no breach of duty by the leadership team at the store.

57. At the hearing but not in the outcome letter, Mr Munir also stated that he would be forwarding the case to a disciplinary manager who would contact the Claimant regarding next steps.

58. The Claimant says Mr Munir referred her to a disciplinary manager because of how she had left the store, with customers hearing her being distressed and upset. It is agreed (NM36) that Mr Munir asked her about this during their discussions, but he told us that the referral to a disciplinary manager was solely related to the Claimant's conduct towards Mr Cooper, which was not in line with the Respondent's values (NM118). The best evidence of what Mr Munir was thinking at the time he made the referral is his contemporaneous note at pages 770 and 771. The whole narrative of those notes concerns the altercation between the Claimant and Mr Cooper. It was thus clear to us that it was Mr Munir's view of the Claimant's behaviour during that altercation that merited referral to a disciplinary manager. The Claimant says his decision was related to disability because Mr Munir knew she was disabled, off sick and on medication, saw her panic attack and took advantage of her vulnerability. We will return to that in our conclusions.

59. Mr Munir's decision in respect of Mr Cooper's grievance is at pages 774 to 776. He found as follows:

59.1. There was no evidence that Mr Cooper had used his bodyweight to pass the Claimant.

59.2. An independent witness had said that Mr Cooper's behaviour was aggressive and in the Claimant's personal space.

59.3. Mr Cooper was to be referred to a disciplinary manager. He was later given "disciplinary counselling" – page 1230 – for "inappropriate behaviour" towards the Claimant.

60. The Claimant told us her grievances were not taken seriously because Ms Thompson was conflicted on the basis that she was aware of the Claimant's historic concerns about Mr Cooper, though she also told us she felt comfortable sharing with Ms Thompson what had happened because they got on well. She also said the grievances were not taken seriously because nothing was upheld and she was threatened with disciplinary action. It is clear, for example from Ms Thompson's email to the Claimant of 15 August 2023 (page 842), that the Respondent intended to follow a disciplinary process once the grievances were dealt with and the Claimant was well enough, but this was superseded by her resignation.

Our conclusions about 26 May 2023

61. Having considered all of the evidence in relation to the altercation between the Claimant and Mr Cooper on 26 May, our factual conclusions were as follows.

62. First, we concluded that the Claimant and Mr Cooper came into physical contact and invaded each other's space, though we would not characterise this as assault and certainly not as body slamming. We did not think either that Mr Cooper forcefully moved the Claimant out of the way in a calculated manner, but rather that he was blocking her path and that he being larger than her she may have been pushed back as they came into contact. We reached this conclusion for the following reasons:

62.1. Mr Cooper told us he was not angry with the Claimant, but that was belied by the evidence. First of all he was clearly angry with the Claimant before he saw her at the canteen door, over the cigarette break issue. Secondly, as we have already said, he was close to Ms Bibi and would not have been pleased at the Claimant returning to work when Ms Bibi had left. Thirdly, Tracey Siverns said during Mr Munir's investigation that his face "looked like thunder". We did not think therefore that he was as careful about his conduct as he would have had us believe.

62.2. The Claimant's reaction – her asking colleagues whether she saw Mr Cooper assault her, her statements to colleagues as she left the store that this is what he had done, and her reporting the matter to the police.

63. Whilst we have noted that the Claimant said to Paul Delemere that she had pushed Mr Cooper, and did not say that Mr Cooper had forcefully moved her with his body, she did say she had been assaulted and she was clearly distressed.

We did not think therefore that what Mr Delemere accurately reported about his conversation with the Claimant on 26 May undermined our conclusions.

64. We also concluded that Mr Cooper said to the Claimant words to the effect that she was disgusting and he could not stand to look at her. His loyalty to Ms Bibi, the fact that he agreed he said two things on that day he did not mean – that he would be bringing a grievance about the smoking breaks and that the Claimant got people sacked – and the fact that it was a heated situation, means that it is more likely than not that these comments were made.

Our factual conclusions about viewing of CCTV

65. As to the CCTV, on the balance of probabilities we concluded for the following reasons that both Mr Cooper and Ms Bibi viewed it, as the Claimant alleged:

65.1. First, Mr Cooper's text to the Claimant of 6 April 2023 (page 411), in which he said "the evidence is damning", strongly supports this conclusion. We noted, as did Ms Thompson, that he also said in the message that he did not have all the facts, but we could not see how he could have ventured his conclusion about the evidence without having seen it himself, particularly bearing in mind that he is a trade union representative (albeit not the Claimant's) and thus familiar with disciplinary cases and the evidence needed to pursue them. His explanation of his words, namely that it was what the rumours were saying, was one we found wholly unconvincing. The Claimant's text to him said, "I know you saw what you saw". His reply did not deny doing so.

65.2. Secondly, it was around this time that Ms Bibi changed her story. One of the pieces of CCTV footage the Respondent told us it had looked at was Ms Bibi giving the swipe card to Ms Crutchley. The change of story suggests that Ms Bibi watched the CCTV at around this time and saw that it implicated her.

65.3. The Claimant says Mr Cooper and Ms Bibi told her they had viewed it. We saw no reason to doubt that given what we have just said.

65.4. Mr Cooper says it would have been inappropriate to view the CCTV. Agreeing it was inappropriate to watch it clearly does not mean he did not do so.

Grievance appeals

66. The Claimant appealed Mr Munir's decision on 24 July 2023 (page 791). She said that she disagreed with the decision "to reject the assault" and to reject her case about lack of duty of care by managers. She asserted she was a victim of assault, had a diary of concerns she had raised about Mr Cooper before, had a grievance about "breaching GDPR" ongoing, and that her complaints had not been taken seriously.

67. Mr Hardie was appointed to hear the appeal. On 3 August 2023 (page 807), he wrote to the Claimant saying that she needed to clearly set out the grounds, and which parts of Mr Munir's decision she was appealing. He set out the grounds for appealing from the Respondent's Appeals Policy, telling us he was trying to help the Claimant structure her case. He then went on to say:

67.1. There was no evidence of a physical assault. If the Claimant had further evidence on this matter, she should disclose it.

67.2. Her diary of concerns about bullying, harassment and victimisation was a new point and could not be added.

67.3. The separate grievance was irrelevant to the appeal.

67.4. If the Claimant did not reply with further information by 9 August, he would assume she no longer wished to appeal.

68. The Claimant replied the same day (page 806) saying that just because there was no CCTV of the assault did not mean it had not happened, her record of previous concerns about Mr Cooper was mentioned during the investigation and was relevant, and there were witnesses. Mr Hardie says at RH19 that this did not cover what he had requested. In oral evidence he said he was not sure whether he replied. We concluded that he did not.

69. Mr Hardie told us he needed more detail because he had to understand who he should speak to before he discussed the case with anyone. He also wanted to understand if there was any evidence which Mr Munir did not take into account, for example further developments with the police. He did not arrange an initial discussion to obtain further details from the Claimant, telling us that timescales were tight. He also told us that he would have "dug out" more details if he had met the Claimant and that after emailing her on 7 September 2023 after his return from leave (page 875), the next step would have been to meet with her.

70. In an email of 21 August 2023, the Claimant indicated she would be appealing Ms Thompson's decision as well, saying no more than "I reserve the right to appeal the decision". Mr Downs asked her for specific grounds of appeal by 28 August, saying (page 848), "I have been passed on your email of appeal, however there is no basis of appeal stated in your email, this needs to be clearly stated based on Procedure, Fact and Severity". He then set out the relevant parts of the Appeals Policy.

71. The Claimant replied on 23 August (page 851) stating that she was preparing the grounds of appeal which she would send by 28 August. She also requested documents she had "been advised" to ask for, , but later acknowledged that this was a mistake on her part as her request related to her appeal to Mr Hardie. On 28 August (page 849), she wrote to Mr Downs stating that the grounds of appeal were "PROCEDURE: Unfair/biased. //FACT: Inconsistencies/questionable. //SEVERITY: Outcome considered threatening". She added that the time taken to conclude the grievance had been unduly long.

72. On 29 August, Mr Downs replied (page 859) that in order to hear the appeal he needed clear details, setting out where the Claimant believed procedure had not been followed and clear examples of inconsistencies. As to her comment that the outcome was threatening he said that the appeal was "not there to go through the grievance points again". He asked for the details by the end of the day. The Claimant wrote further to him accordingly (pages 861 to 862). She said (amongst other things) that Ms Thompson was biased, CCTV had been viewed without authorisation, 13 weeks was a long time to deal with her grievance, and the outcome was victimisation. She also wanted the allegations that she had acted fraudulently or maliciously and the threat of disciplinary action withdrawn.

73. On 31 August, Mr Downs wrote to the Claimant again (pages 865 to 868) stating that she had not properly set out her appeal as the points raised did not fit the Policy criteria. He nevertheless addressed what the Claimant had raised as follows, telling us it was the right thing to do given what the Claimant had said about her mental health, notwithstanding that she had not provided what he had requested:

73.1. No evidence of favouritism by Ms Thompson had been provided.

73.2. The breach of confidentiality point was "not stated in any context in the grievance outcome letter" (he could not explain that comment when asked about it in evidence). Mrs Hughes was entitled to view the footage when investigating and Mr Cooper had not done so. Mr Downs told us there was no evidence at all that Mr Cooper had viewed it, emphasising that the appeal is not a rehearing of the grievance and there was no new evidence put forward to suggest otherwise.

73.3. Given what needed to be considered, 10 weeks was not an unreasonable time to deal with the Claimant's grievance.

73.4. The threat of disciplinary action was not relevant to the appeal and was under a separate process.

73.5. He ended by saying, "the appeal window has expired and there is no further right to appeal".

74. The Claimant says it was very difficult to understand the wording Mr Downs wanted. She had been off work for a few weeks, had a lot else going on (including her other grievance) and was experiencing panic attacks. She told us that it seemed Mr Downs had taken sides against her and offered her no leeway or understanding as to how ill she was and how difficult it was to write an appeal. She says people with anxiety and depression have constant fear that they will not be right whatever they do. Mr Downs for his part was keen to emphasise that the Claimant told him in a phone call she did not want to pursue her appeal, being focused on the appeal to Mr Hardie. He referred us to her email of 25 August 2023 at page 853 in which she said, "This is the only appeal request I have made …". This was why he did not arrange a hearing, notwithstanding the Claimant's email of 29 August.

Grievance minutes and statements

75. The Claimant says it took several requests for the Respondent to send her minutes of her grievance hearings:

75.1. On 2 August 2023 (page 825) she asked Ms Thompson for the investigation notes relating to Mr Cooper's complaint against her and copies of statements and of notes from her meetings with Ms Thompson. On 4 August, Ms Thompson provided the minutes of her meetings and directed the Claimant's other requests to be made to Mr Hardie.

75.2. On 7 August (pages 819 to 820) the Claimant emailed Mr Hardie. Mr Hardie replied the next day to say the documents could be collected or posted. Arrangements were then made to post them, Mr Hardie asking a colleague to do so (page 818).

75.3. On 13 August (page 829) the Claimant emailed Mr Hardie again saying she had only received one set of minutes from her meetings with Mr Munir and requesting the other set. Mr Hardie was between roles at this point and says email problems mean he may not have replied. There is no evidence he did.

75.4. On 14 August (page 842) the Claimant asked Ms Thompson for the outcome of her meeting with Mr Munir. Ms Thompson replied attaching it the next day, together with the notes of the meeting.

75.5. On 15 August (page 840), the Claimant requested from Ms Thompson notes of her meeting with Mr Munir on 20 July. She asked for them again, from Mr Hardie, on 8 September after her resignation (874 to 875). Mr Munir told us his understanding was that the Claimant would only get the witness statements he had collated when she was called to a disciplinary hearing following on from his recommendation. He accepted on reviewing the Investigations Policy (page 293) during his oral evidence however that this was wrong.

Resignation

76. The Claimant resigned on 5 September 2023, she says due to the Respondent's lack of action to address her concerns which left her feeling isolated and vulnerable. Her email to Ms Thompson is at page 871. It included the following:

76.1. Receiving Mr Downs' decision closing the appeal was the final straw.

76.2. Over the preceding 13 weeks there had been a failure to consider reasonable adjustments.

76.3. Mr Downs' decision whitewashed the whole appeal procedure, when she had said she would explain her grounds of appeal in person at a hearing.

76.4. She had been subject to bullying, harassment, victimisation and discrimination.

76.5. She had been labelled a malicious liar and threatened with disciplinary action, after raising her concerns.

76.6. She had to protect her mental health and take the heartbreaking decision to leave.

77. The Claimant told us that the tone of Mr Downs' letter, which is what she relies on as the last straw, was not appropriate for the following reasons:

77.1. She could not understand how he could agree that Mr Cooper did not access the CCTV footage.

77.2. He had reached that conclusion without hearing her account.

77.3. The last line of the letter, in which he said there would be no further appeal and the appeal window had closed, was particularly harsh.

77.4. The comments about Mr Cooper did not need to be included in the letter.

78. The Claimant says that no-one would have returned to work where someone who had assaulted them remained in place and management were not providing support.

Time limits

79. ACAS Early Conciliation for Claim 1 took place from 29 May to 7 July 2023, with the Claim Form being presented on 18 July 2023. For Claim 2 it took place from 3 October to 14 November 2023, with the Claim Form being presented on 30 November 2023. As the List of Issues shows, the Respondent contended that two complaints are out of time.

80. The Claimant's explanation for not bringing her protected disclosure detriment complaint sooner is that her grievance about Mr Cooper and his about her did not conclude until late July 2023. As to the comments of Mr Cooper, Mrs Kwarteng and Ms Smith, the Claimant says these were mentioned in her original Claim when she said she was "being treated unfairly". She emphasised she had not made a claim before and thought that what she written said was sufficient. In her submissions she referred to her mental health as a reason for putting in the complaint late. We could not take that into account as it was not raised in evidence.

Law

Burden of proof

81. Section 136 of the Equality Act 2010 ("the Act") provides as follows:

"*(1) This section applies to any proceedings relating to a contravention of this Act.*

(2) If there `are facts from which the court [which includes employment tribunals] *could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

82. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] ICR 931**, updating and modifying the guidance that had been given by the Employment Appeal Tribunal ("EAT") in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205**. Claimants bear the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the relevant respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage*".

83. At the first stage, the Tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts. In a harassment case, the first stage of the burden of proof is particularly relevant to establishing that the unwanted conduct was related to the protected characteristic, here disability.

84. Unreasonable behaviour is not of itself evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

85. If the burden of proof shifts to a respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden, it is necessary for a respondent to prove that the treatment was in no sense whatsoever on the prohibited ground. That would require that the explanation be adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

86. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases, it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination.

87. **Hewage** was considered by the EAT in **Field v Steve Pye and Co (KL) Ltd and others [2022] EAT 68**. The EAT said that where there is significant evidence that could establish that there has been discrimination, it cannot be ignored. In such a case, where a tribunal moves straight to the "reason why" question it could only do so on the basis that it has assumed the claimant has passed the stage one threshold, so that the burden was now upon the respondent in the way described above. The EAT went on to say that if at the end of the hearing the tribunal concludes that there is nothing that can suggest that discrimination has occurred and the respondent has established a non-discriminatory reason for the impugned treatment, there would be no error of law in just answering the "reason why" question, but in fact the complaint would fail at the first stage. If having heard all of the evidence the tribunal concludes that there is some evidence that could indicate discrimination, but nonetheless is fully convinced that the impugned treatment was in no sense on the prohibited ground, it is permissible to reach a conclusion at the second stage only, but there is much to be said for properly grappling with the evidence and deciding whether it is sufficient to switch the burden of proof. Particular care should be taken if the reason for moving to the second stage is to avoid the effort of analysing evidence

that could be relevant to whether the burden of proof should have shifted at the first stage.

Section 15

88. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and another [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others.

89. What caused the unfavourable treatment requires consideration of the mind(s) of the alleged discriminator(s) and thus that the reason which is said to arise from disability be more than just the context for the unfavourable treatment. In other words, the Tribunal is not to ask whether, but for what arose in consequence of disability, the Claimant would have been unfavourably treated – **Robinson v Department for Work and Pensions [2020] EWCA Civ. 859**. There need only be a loose connection between the unfavourable treatment and the alleged reason for it however (in other words it may be an indirect, rather than a direct connection), and it need not be the sole or main cause of the treatment, though the reason must operate on the alleged discriminator's conscious or unconscious thought processes to a significant extent (**Charlesworth v Dronsfield Engineering UKEAT/0197/16**). By analogy with **Igen**, "significant" in this context must mean more than trivial.

90. Whether the reason for the treatment was "something arising in consequence of the Claimant's disability" could describe a range of causal links and is an objective question, not requiring an examination of the alleged discriminator's thought processes – **City of York Council v Grosset [2018] EWCA Civ. 1105**.

91. The approach to complaints of discrimination arising from disability was considered in detail by the EAT in **Pnaiser v NHS England [2016] IRLR 170**:

"*(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is

simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises …

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act … the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
…

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

…
(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that caused the unfavourable treatment."

Indirect discrimination

92. Section 19 of the Act provides that indirect discrimination occurs when a person (A) applies to another (B) a PCP that is discriminatory in relation to a relevant protected characteristic of B's. This is the case when, according to section 19(2):

"*(a) A applies, or would apply, [the PCP] to persons with whom B does not share the [relevant protected] characteristic [here, the Claimant's disability or disabilities],*

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim".

93. Section 23 of the Act, which deals with comparators, must be taken into account when determining the question of "group disadvantage" posed by section 19(2)(b). Section 23 says, "*On a comparison of cases for the purposes of …section 19 … there must be no material difference between the circumstances relating to each case*".

94. The Claimant bears the burden of proof in respect of the first three steps in section 19(2).

95. In relation to the second and third steps (individual and group disadvantage), we considered the decisions in **Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27** and **Allen v Primark Stores Limited [2022] EAT 57**, in addition to **Ryan v South-West Ambulance Service NHS Trust [2021] ICR 555** and drew from them the following principles:

95.1. It was for the Tribunal to determine the pool which should be used to determine whether section 19(2)(b) (group disadvantage) is satisfied. See also **Grundy v British Airways plc [2008] IRLR 74** in which the Court of Appeal held that provided it tested the allegation in a suitable pool, a tribunal could not be said to have erred in law even if a different pool with a different outcome could legitimately have been chosen.

95.2. The EHRC Code states, "*In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively*" – paragraph 4.18.

95.3. The pool must test the particular discrimination complained of.

95.4. More than one pool may be perfectly logical and therefore permissible.

95.5. Section 23 requires that those in the pool must not be in materially different circumstances – see above.

95.6. The required link to establish indirect discrimination is not between the protected characteristic and the group and individual disadvantage but between the PCP and those disadvantages.

95.7. It is not necessary to establish why the PCP causes the disadvantage – the reasons for such disadvantages, if identifiable, can be many and varied and are often innocuous.

95.8. Not every member of the disadvantaged group needs to suffer the disadvantage.

95.9. The individual and group disadvantage must correspond.

96. In **Pendleton v Derbyshire County Council [2016] IRLR 580** the EAT did not read "particular disadvantage" for these purposes as requiring any particular level or threshold of disadvantage. The term was "apt to cover any disadvantage" There will need to be some basis on which to conclude that this is the case, though in **Homer v Chief Constable of West Yorkshire [2012] ICR 704** Baroness Hale noted that "*the new formulation [in the Act] was not intended to make it more difficult to establish indirect discrimination: quite the reverse … It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply [with the PCP] and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the*

characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages".

97. **Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] IRLR 729** dealt with the question of judicial notice. First, there are two broad categories of matters of which judicial notice may be taken: facts that are so notorious or so well-established to the knowledge of the court or tribunal that they may be accepted without further enquiry; and other matters that may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources. Secondly, the court or tribunal must take judicial notice of matters directed by statute and of matters that have been so noticed by the well-established practice or precedents of the courts. Thirdly, the court or tribunal has a discretion and may or may not take judicial notice of a relevant matter and may require it to be proved in evidence. Finally, the party seeking judicial notice of a fact has the burden of convincing the tribunal that the matter is one capable of being accepted without further inquiry.

Justification and knowledge of disability

98. For reasons that will become clear from our analysis below, we need say nothing about the law on justification of discrimination arising from disability or indirect discrimination, nor about knowledge of disability.

Harassment

99. Section 40 of the Act renders harassment of an employee unlawful. Section 26 defines harassment as follows:

"*(1) A person (A) harasses another (B) if –*

(a) A engages in unwanted conduct related to a relevant protected characteristic [here, disability], and

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …

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

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect".

100. The Tribunal was thus required to reach conclusions on whether the conduct complained of was unwanted, if so whether it had the requisite purpose or effect and, if it did, whether it was related to disability.

101. It is clear that the requirement for the conduct to be "related to" disability entails a broader enquiry than whether conduct is because of disability as in direct discrimination. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to disability, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it.

102. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – required consideration of the alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before us. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the Claimant's perception of the impact on her (she must actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the conduct, and all the surrounding context. That much is clear from section 26 and was confirmed by the EAT in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724**. The words of section 26(1)(b) must be carefully considered; conduct which is trivial or transitory is unlikely to be sufficient. Mr. Justice Underhill, as he then was, said in that case:

"*A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That … creates an objective standard … whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …*

…We accept that not every racially [as it was in that case] *slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*…".

103. As already indicated, it was for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If she did, then it is plain that the Respondent could have harassed her even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c). Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be recognised that is not always easy to do so. Where there are several instances of alleged

harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met.

Victimisation

104. Section 39(4) of the Act says (as far as relevant) that:

"*An employer (A) must not victimise an employee of A's (B): …*

(d) by subjecting B to any other detriment".

105. Section 27 defines victimisation as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*

(a) B does a protected act …".

106. As to whether the Claimant did (or it was believed she would do) "any other thing for the purposes of or in connection with [the Act]" (section 27(2)(c)) this is to be given a broad interpretation – **Aziz v Trinity Street Taxis Ltd [1998] IRLR 204** – and does not require the Claimant to have focused her mind specifically on any provision of the Act**.** Section 27(2)(d) is to be similarly interpreted, and no express reference need be made to the Act, though the asserted facts must, if verified, be capable of amounting to a breach of the Act and what the Claimant does must indicate a relevant complaint. In **Fullah v Medical Research Council [2013] UKEAT/0586/12**, citing **Durrani v London Borough of Ealing [2013] UKEAT/0454/13**, the EAT held that it is not necessary to use the words "race discrimination" (as it was in that case) for there to be a protected act, as long as the context made it clear. Employers must know what it was constituted a protected act; there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies. See also **Kokomane v Boots Management Services Ltd [2025] EAT 38**.

107. No comparator is required for the purposes of a victimisation complaint, but the protected act must be the reason or part of the reason why the Claimant was treated as she was – **Greater Manchester Police v Bailey [2017] EWCA Civ. 425**. Again, this required consideration of the mental processes of the alleged victimisers and again the protected act need not have been the primary reason for the act in question, though it must have been more than a trivial influence upon it.

Unfair dismissal

108. Section 95(1)(c) Employment Rights Act 1996 ("ERA") provides that an employee is dismissed for unfair dismissal purposes if "*the employee terminates the contract … (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*". Widely known as "constructive dismissal", the test for establishing dismissal in these circumstances is that given in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**. It is not necessary to refer to this and subsequent approving authorities in detail. It is sufficient to say that they make clear that in order to establish constructive dismissal there must have been a repudiatory breach of contract by the Respondent – in other words, conduct going to the root of the contract or

which shows that the Respondent no longer intended to be bound by it; the Claimant must have resigned in response to that breach; and if the Claimant affirmed the contract after the breach, which may for example arise as a result of delay in resigning, constructive dismissal will not be made out.

109. The Claimant relied on the key implied term of trust and confidence. The term is implied into every contract of employment to the effect that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (**Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, Malik v BCCI SA (in liquidation) [1997] ICR 606**).

110. The Claimant argued that there was a series of issues which taken together destroyed her trust and confidence in the Respondent. Any breach of the trust and confidence term is fundamental and repudiatory (**Morrow v Safeway Stores plc [2002] IRLR 9**). Whether there has been a breach has to be judged objectively: in the **Woods** case, it was said that Tribunals must "*look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is that the employee cannot be expected to put up with it*".

111. It is also well-established that the matter which finally results in the employee deciding to resign (usually referred to as "the final straw"), does not have to be of itself a fundamental breach of contract, and in fact does not even have to be blameworthy behaviour by the employer at all. It must nevertheless be an act in a series whose cumulative effect is to breach the implied term, and must contribute something to that breach, however slight, although what it adds may be relatively insignificant. An entirely innocuous act will not be sufficient – **Omilaju v Waltham Forest London BC [2005] ICR 481**. **Omilaju** says in relation to final straw cases, "*The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term … The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term … it must contribute something to that breach, although what it adds may be relatively insignificant … If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach … there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect*".

112. Although the Respondent did not seek to argue that the Claimant had affirmed the contract, we note some important case law which remained relevant to our decision.

113. In **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ. 978**, at paragraph 55 of his judgement, Underhill LJ suggested five questions that should be asked by a tribunal in a constructive dismissal case: "*(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the [implied] term? (If it was, there is no need for any separate consideration of a possible previous affirmation …). (5) Did the employee resign in response (or partly in response) to*

that breach?".

114. The EAT considered **Kaur** in **Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589** and said:

"*32. This helpful guidance assists Tribunals to navigate through one particular possible permutation of the [branches] of the decision tree. Some other possible permutations are relatively straightforward. If the answer to Underhill's LJ question two is "yes", then the claim of constructive dismissal must fail. If the answer to question three is "yes" then the Tribunal should proceed to question five.*

33. As I understand it the parenthetical "if it was" following question four, conveys that it is an affirmative answer to that question that will also take the Tribunal to question five. However, what if the answer to question four is "no"? That is the scenario with which this ground of appeal in the present case is concerned. The answer is, that if the most recent conduct was not capable of contributing something to a breach of the Malik term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign".

115. In summary, it is not necessarily the case that a claimant was not dismissed where the last straw was entirely innocuous if they have not affirmed the contract where there was a prior fundamental breach.

Protected disclosures

116. For reasons which will be clear from our conclusions, it is not necessary for us to say anything about the law on protected disclosures.

Detriment

117.Section 47B of the ERA says, "*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure*". The test the Tribunal must apply in determining detriment complaints is whether any protected disclosure had a material influence on any conduct which the Claimant is able to establish amounted to a detriment. The question is not whether the protected disclosure was the reason or principal reason for that conduct.

118. Section 48(2) of the ERA says that in relation to such complaints, "*… it is for the employer to show the ground on which any act … was done*". The correct approach seems to be – see **Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust UKEAT/0047/19**:

"*Firstly, it will not necessarily follow, from findings that a complainant has made a protected disclosure, and that they have been subjected to a detriment, alone, that these must by themselves lead to a shifting of the burden under Section 48(2). The Tribunal needs to be satisfied that there is a sufficient prima facie case, such that the conduct calls for an explanation.*

Secondly, if the burden does shift in that way, it will fall to the employer to advance an explanation, but, if the Tribunal is not persuaded of its particular explanation, that does not mean that it must necessarily or automatically lose. If the Tribunal is not persuaded of the employer's explanation, that may lead the

Tribunal to draw an inference against it, that the conduct was on the ground of the protected disclosure. But in a given case the Tribunal may still feel able to draw inferences, from all of the facts found, that there was an innocent explanation for the conduct (though not the one advanced by the employer), and that the protected disclosure was not a material influence on the conduct in the requisite sense.

It was common ground before me, correctly, that material influence is indeed (or one of the synonymous ways it is expressed in some authorities – it is all the same test), the test which the Tribunal should be applying. I add that it needs to be borne in mind that, where the claim is of unfair dismissal, under section 103A of the 1996 Act, as the test there is "reason (or, if more than one, the principal reason)", there can be mixed reasons, but there cannot be more than one sole or principal reason … However, where the test in section 47B of the 1996 Act applies, it is possible for the Tribunal to find that more than one matter was a material or contributing influence or ground. In such a case, therefore, where it is argued, or the Tribunal considers, even if it is not any party's positive case, that one or more of a number of different influences may be at work, it will potentially be open to it to find that more than one of them was a material or contributing influence".

119. In summary:

119.1. The burden of proof lies on the Claimant to show that a protected disclosure was a ground for (a more than trivial influence upon) the detrimental treatment to which she was subjected. In other words, the Claimant must establish a prima facie case that she was subjected to a detriment and that a protected disclosure had a material influence on the Respondent's conduct which amounted to that detriment.

119.2. If she does, then by virtue of section 48(2) ERA, the Respondent must be prepared to show the ground on which the detrimental treatment was done. If it does not do so, inferences may be drawn against it – see **London Borough of Harrow v Knight 2003 IRLR 140, EAT**.

119.3. As with discrimination cases, inferences drawn by tribunals in protected disclosure cases must be justified by the facts it has found.

Time limits

120. For reasons which will be clear from our conclusions below, it is not necessary for us to say anything about the law on time limits.

Analysis

121. We dealt first with the protected disclosure detriment complaint, then the complaints under the Act, and then finally with the complaints of unfair dismissal and breach of contract.

Protected disclosure detriment

122. Although in her closing submissions the Claimant alluded to multiple protected disclosure detriment complaints, there was in fact only one. We found as set out above that Mr Cooper did not know of the Claimant's grievance of 22

May when filing his own grievance, and so could not have been influenced by it in any way.

123. That was sufficient to dispose of this complaint, which was accordingly not well-founded. We did not need to consider whether the 22 May grievance was a protected disclosure or deal with any time limit issue. We will come back to whether the grievance was a protected act when dealing with the victimisation complaints below.

Section 15

124. Again, the Claimant's closing submissions suggested that there were multiple complaints of discrimination arising from disability, but there were in fact just two, as the List of Issues makes clear. According to the case law referred to above, it is for the Tribunal to decide in which order to determine the relevant questions. We began with the question of what arose in consequence of the Claimant's disability.

125. We considered first therefore, whether the Claimant's need to leave work early on 11 March 2023 arose in consequence of her disability. At the time she made her decision to dismiss, Mrs Ince concluded that it did not, but she conceded in her evidence before us that it did. We agreed with that concession. The Claimant's history of struggling at work on Saturdays led naturally to this conclusion.

126. In relation to the second section 15 complaint, the question would be whether the Claimant's emotional response (crying/distress) to the events of 26 May 2023 arose in consequence of disability. We concluded that we did not need to decide whether it did, for reasons that will be made clear below.

127. The next two questions in relation to section 15 complaints are first, whether the treatment in question was unfavourable and secondly, if so, whether the reason for that treatment was the thing said to arise in consequence of disability. The thing said to arise from disability does not have to be a direct cause of the unfavourable treatment – only a loose connection is required. What we had to examine was the relevant person's decision-making to see if what arose in consequence of disability had an influence on them that was more than minor or trivial, consciously or unconsciously.

128. In relation to the first complaint it was agreed of course that Mrs Ince's dismissal of the Claimant was unfavourable treatment. The List of Issues is a little unhelpful in describing the treatment in question because it strays into the reason for the dismissal. It was clear nevertheless that the unfavourable treatment was the act of dismissal. It was equally clear to us however that the Claimant had not proven facts from which we could conclude that Mrs Ince dismissed her because of her stated need to leave early. Putting it another way, the reason for the dismissal was plainly something else entirely, for the following reasons:

128.1. The fact that the dismissal took place in the context of the Claimant leaving early for a disability-related reason is not sufficient – see **Robinson v DWP** referred to in our summary of the law.

128.2. Mrs Ince drew a clear distinction in her evidence between on the one hand the Claimant needing to leave and on the other the way in which she did so, that is without swiping out. She clearly thought the Claimant and her colleagues were in cahoots and that accordingly, the Claimant leaving without swiping out was a calculated act on her part.

128.3. Mr Delemere did say that the Respondent should have checked by a referral to OH whether the Claimant not clocking out was connected to her anxiety and depression, but he did not in any way reach a conclusion that it was.

128.4. Mrs Ince explicitly put the Claimant's mental health out of account in reaching her decision, because she did not think it was evidenced that this was an influence on the Claimant's actions on the day in question. That is a strong indication that she did not take into account anything arising from the Claimant's disability either.

128.5. Whilst in our view, Mrs Ince should have spoken to Sam Crutchley (she was not able to explain why she could not, and where ex-employees have relevant evidence to give to an investigation we cannot understand a blanket policy, if there was one, that says not to approach them) but nothing she did or decided in relation to the Claimant's dismissal was so unreasonable as to give rise to an inference that something arising from the Claimant's disability was taken into account at all. She reached conclusions she could logically reach, in line with the Respondent's Disciplinary Policy and Handbook, notwithstanding that Mr Delemere later reached a different one.

129. Accordingly, the Claimant was not dismissed because she needed to leave early; that was simply the context in which she did so. The complaint failed on that basis. We add as a footnote two comments on the Claimant's statement in evidence that her anxiety and depression was why she left without clocking out:

129.1. First, that is not what was agreed to be her case as set out in the List of Issues, so that the Respondent did not prepare its case on that basis. Even taking a flexible approach to the List, it would have been wholly unfair to the Respondent to decide the case on that basis.

129.2. Secondly, whilst asserted by the Claimant, it was not established on the evidence that her forgetting to swipe out was occasioned by or arose directly or indirectly from her disability. Her need to leave did, which is why she was dismissed; the failure to swipe out was a separate question.

130. Turning to the second complaint, the unfavourable treatment recorded in the List of Issues was in two parts. The first was Mr Munir treating the Claimant's part in the altercation with Mr Cooper as a potential disciplinary matter; the second is his treating her reaction to the altercation as a potential disciplinary matter, that is when she was leaving the store and customers heard her distressed and upset.

131. We did not accept the Respondent's argument that the referral to a disciplinary manager was not unfavourable treatment because Mr Cooper was also referred for disciplinary action. The question is whether the Claimant was put in a worse position by the referral than her colleagues, and she plainly was. This was not a high bar for her to surmount.

132. As to the reason for the referral, the Claimant's case reflected in paragraph 9.3.2 of the List of Issues was that Mr Munir made the referral because of her crying and exhibiting signs of distress – as we have said, this was about her being upset as she left the store. Whilst he did speak to her about this during the grievance investigation, his doing that is not the same as deciding to refer her to a disciplinary manager for this reason. As we have already said, we were in no doubt that she was referred because of her alleged aggression towards and comments to Mr Cooper during their altercation. That is what the contemporaneous note clearly shows. It is also entirely consistent with how Mr Munir treated Mr Cooper – he was referred for precisely the same reason.

133. Accordingly, the Claimant did not prove facts from which we could conclude that she was referred to a disciplinary manager because of the something she says arose in consequence of her disability – to quote the List of Issues (paragraph 9.2.2), "her emotional response (crying/distress) to the alleged assault on 26 May 2023". Putting it another way, the reason she was referred to a disciplinary manager was clear: she was referred because of her conduct during the altercation with Mr Cooper and not because of her behaviour in front of customers.

134. As already noted, how the unfavourable treatment was described in the List of Issues was in two parts. What is set out above deals with the second part; the first was, "Treating the Claimant's part in [what happened on 26 May] as a potential disciplinary matter". In relation to that, we repeat that the relevant thing said to arise in consequence of disability was as set out at paragraph 9.2.2 of the List of Issues, reflected in paragraph 9.3.2 also – the Claimant crying and exhibiting signs of distress. As already set out, that was not the reason she was (as the List puts it at paragraph 9.3.2) "threatened with disciplinary proceedings". The second part of this complaint failed on that basis.

135. For the avoidance of doubt, if the Claimant's case had been based on referring her to a disciplinary manager because her part in the altercation with Mr Cooper was something which arose in consequence of disability, it would have failed on two counts. The first is that the Claimant did not prove facts from which we could conclude that her behaviour towards Mr Cooper, including raising her voice and name calling, arose in consequence of disability. The second is that we would have found the referral to be plainly a proportionate means of achieving the Respondent's aims. The legitimacy of the aim of ensuring appropriate standards of conduct could not be sensibly contested. What Mr Munir did was a proportionate means of achieving it, in that it was only a referral to a disciplinary manager, no more – in other words, it was not itself a sanction. It was also, as noted above, entirely in line with his action in respect of Mr Cooper. Further, it can hardly be contested that the Claimant's alleged conduct could properly be said to require consideration in the disciplinary context. As it is, neither of those issues was properly before us, but they would not have affected the outcome if they had been.

Indirect discrimination

136. This complaint concerned the Respondent's appeals policy. It is accepted that it had the provision, criterion or practice ("PCP") of requiring employees to set out their appeals based on one or more of three criteria, namely procedure, fact or severity. The Respondent also accepted that it applied the PCP to the Claimant and everybody else.

137. The first question for us to consider therefore was group disadvantage, namely whether people with anxiety and depression were put at a particular disadvantage by the PCP when compared to people who do not have those disabilities. Although this does not require any particular level of disadvantage, it was for the Claimant to prove facts from which we could conclude that people with her disability were put at a particular disadvantage by the PCP compared to people without her disability. In our judgment, she did not prove facts from which we could reach that conclusion.

138. We will return below to the question of how the Claimant's grievance appeals were conducted, when we address the unfair dismissal case, but as the Respondent submitted, she simply did not produce any evidence, whether of a medical nature or otherwise, to support her case in this respect.

139. Nothing was put to us by either party in relation to the correct pools (that is groups of people) by which to test the effect of the PCP. The correct pool seemed to us to be either all employees of the Respondent or all employees of the Respondent who over a certain period presented appeals against the Respondent's disciplinary or grievance decisions. Whichever pool was adopted, we simply had no information which would demonstrate whether employees who had anxiety and depression were put at a particular disadvantage compared with people with other mental health disabilities or no disability at all.

140. Further, we accepted Ms Clayton's submission that we could not take judicial notice of group disadvantage, for at least two reasons:

140.1. We agreed with Ms Clayton that the Claimant at no point clearly articulated what the particular disadvantage for people with anxiety and depression is, other than to assert that there was one.

140.2. Our experience and understanding, from reading many OH and other medical reports in other cases and, in the case of the non-legal members based on their practical experience during their professional careers, anxiety and depression is not only variable at different times for any one individual, but varies considerably in its impact on different individuals. We did not think that what the Claimant asserted to be the particular disadvantage (which, as we say, was not precisely articulated) was so noteworthy as not to require further enquiry.

141. We dismissed the complaint on this basis. As a result, there was no need for us to consider the question of particular disadvantage to the Claimant – though as we have said we will come back to the actual impact on her of how the Respondent conducted her appeals in looking at her unfair dismissal complaint – nor did we need to consider justification.

Harassment

142. There were several complaints of harassment. We dealt with each in turn.

143. The first was Mrs Hughes and Ms Thompson not speaking to the Claimant. As set out above, we found that the alleged conduct in question was not made out by the Claimant. If it had been, it would very likely have been unwanted and had the effect of creating a hostile environment, but we would have concluded that she did not prove facts from which we could say that it was related to disability. If it had happened, it would have been related to the Claimant

remaining in employment and Ms Bibi not remaining in employment, and in Mrs Hughes' case quite possibly the Claimant's ethics complaint.

144. The second complaint was in two parts. The first was that Mr Cooper, Mrs Kwarteng and Ms Smith said that the Claimant was "putting it on" regarding her mental health. As our findings of fact make clear, the Claimant did not establish that this was said. That element of this complaint failed on that basis.

145. She did establish that Mr Cooper and Mrs Kwarteng, and quite probably Ms Smith, said that she should not be there. That was clearly unwanted conduct and clearly could have the effect of creating a hostile environment. The crucial question was whether it was related to disability. We determined that the Claimant had not proved facts from which we could conclude that it was. It was not inherently so related and we thought that what it was related to was clear, namely the loyalty of the relevant colleagues to Ms Bibi. It was relevant in this regard that they did not know of the Claimant's anxiety and depression, and that it is unlikely that as non-managerial employees they had seen Mr Delemere's decision letter in which he referred to the Respondent not taking the Claimant's health sufficiently into account when dismissing her. This part of the complaint failed accordingly.

146. The third complaint concerned Mr Cooper's conduct on 26 May 2023. It was not difficult to conclude that this was unwanted and that it could sensibly have had the effect of creating a hostile, or even an intimidating, environment for the Claimant; it might even have had the purpose of doing so. We did not need to consider that in detail however, because again the Claimant did not prove facts from which we could conclude that Mr Cooper's conduct was related to disability in any way. Rather, it was very obviously related to his annoyance at the Claimant taking extra breaks as he saw it, and/or related to his loyalty to Ms Bibi, as demonstrated by his comment in the heat of the moment that the Claimant gets people sacked. That unguarded comment reveals precisely what was in his mind at the time of the altercation. Moreover, as we have said, he did not know of the Claimant's anxiety and depression. This complaint too failed on that basis.

147. The fourth complaint was that the Respondent did not take the Claimant's grievances seriously. The Claimant said in submissions that she could not establish that what Ms Thompson did in investigating and deciding her grievance was related to disability. We agreed with that and this part of the complaint failed accordingly. As for Mr Munir, he could (and we think, should) have separated completely the hearing of the Claimant's grievance and Mr Cooper's grievance on 8 June 2023, notwithstanding that the Claimant agreed to them being dealt with together, given the sensitivity of the issues being explored. As already made clear, we also think the questions he asked and the points he put to the Claimant when exploring Mr Cooper's grievance on that date verged on the inappropriate. That said, we could not accept the basis on which this complaint was advanced, because we did not agree that Mr Munir did not take the Claimant's grievance seriously. He met with the Claimant multiple times, met with several witnesses, took statements and reached a reasoned decision. We could also see why his investigation took the time it did.

148. Putting aside for a moment his conduct on 8 June, which is the subject of the next complaint, it was also difficult to see how the way in which Mr Munir went about dealing with the grievance, or his decision, were related to disability.

The Claimant did not prove facts from which we could conclude that it was. That was another reason why this complaint failed.

149. The next complaint concerned Mr Munir's conduct, specifically that he laughed at the Claimant and intimidated her on 8 June. We have found that he laughed, but that he did not behave in the ways the Claimant otherwise alleged – banging the desk, rolling his eyes, raising his voice, calling her a liar and so on. We have also concluded that the nature in which he put Mr Cooper's grievance to the Claimant could sensibly have made her feel uncomfortable, but we could not describe it as intimidating. That element of this complaint failed in that the unwanted conduct in question was not established on the facts.

150. We were prepared to hold that Mr Munir's conduct in laughing at one of the Claimant's comments on 8 June was unwanted – Mr Munir himself accepted it was not appropriate – but it was clearly not related to disability. Whether analysed as the Claimant not proving facts from which we could conclude that there was a connection to disability, or on the basis that the Respondent proved that it was nothing whatsoever to do with disability, Mr Munir laughed because the Claimant was not prepared to give him the name of a relevant witness which he thought (we conclude genuinely) meant that her story in that specific respect could not be believed. This complaint too failed on that basis. It would have failed on the additional ground that Mr Munir laughing plainly did not have the purpose of creating a hostile environment given that we accepted it was an immediate and unconscious response to the Claimant's comments, and we did not think that as a one-off, relatively minor, if still regrettable occurrence, it could sensibly be said to have had the effect of creating such an environment for the Claimant either.

151. For the reasons we have given, all of the complaints of harassment failed.

Victimisation

152. The first question was whether the Claimant did one or more protected acts.

153. We dealt first with the more straightforward of the two, namely the grievance of 26 May 2023 (page 504). There was no reference in the record of the call to anything by which the Claimant indicated something that was capable of being a breach of the Act. She did describe what she said was a man assaulting her, but that was not enough to indicate that she was saying he did this because she was a woman or disabled or for any other unlawful reason. We thus concluded that this was not a protected act.

154. The grievance of 22 May 2023 was more difficult to assess (page 501). The Claimant said "I was a victim of bullying, harassment, victimisation and possible discrimination in the workplace". She gave no more details. We considered carefully the case law Ms Clayton referred to in her submissions, including **Fullah** at paragraphs 24 to 26, which we also flagged to the parties. The cases make clear that context is key. The Claimant did provide details of her disability to Mrs Ince in the dismissal hearing not long before her 22 May grievance, and Ms Thompson knew of her mental ill health, but we did not think that this was sufficient to mean that Ms Thompson knew she was complaining of some form of disability discrimination, as opposed for example to sex discrimination. What the Claimant set out was a broad assertion without any details to enable the Respondent to make any assessment of whether the Claimant was in fact

making a complaint to which the Act potentially related. Furthermore, all of the terms used by the Claimant can have a different meaning in common parlance than they do under the Act; she did not make clear how what she said in her general assertion was connected to the Act. We concluded for those reasons that the 22 May grievance was not a protected act either.

155. The victimisation complaints failed on that basis, but we went on to consider the detriments anyway, namely what the position would have been if one or both of the grievances had been protected acts.

156. The first detriment was Mr Cooper's conduct on 26 May 2023. Only the first grievance had been presented by then. He did not know about it, and so could not have been influenced by it.

157. The second detriment was Mr Cooper's grievance of 27 May 2023. At the time he presented it, he did not know about either grievance that the Claimant had presented and so again cannot have been influenced by them. In any event, the reason he presented his grievance was very obviously his view of how the Claimant had treated him on 26 May and nothing else. The Claimant herself told Mr Munir that Mr Cooper put in his grievance because he knew she was on a final written warning, in other words he was trying to see her dismissed. That is very different to saying that he put in his grievance in response to hers.

158. The third detriment was the Respondent not taking the Claimant's grievances seriously and delaying too long in dealing with them. Leaving aside for a moment the mention of disciplinary action by both grievance officers (which we will come to below), it will already be clear that:

158.1. We concluded that Mr Munir did take the Claimant's grievance seriously and did so across an understandable timescale, so that the detriment on which this part of the complaint relies was not established on the facts.

158.2. As for Ms Thompson, we were satisfied that she too took the Claimant's grievance seriously, in that she met with the Claimant on more than one occasion, did not rush into her decision, met two other witnesses and issued conclusions on the complaints themselves that were understandable. We did not accept that she delayed unduly either.

159. In short, nothing that either grievance officer did in terms of the steps they took to investigate the Claimant's complaints, and their decisions, could be said to be so unreasonable or without explanation as to merit an inference of victimisation.

160. As to Mr Munir's conduct on 8 June, we were able to go straight to the reason why question. He laughed at the Claimant not because of the nature of the complaint she was bringing but because of his view of the evidence she was or was not bringing in support of it. We have found that he did not intimidate her.

161. We have already made clear that Mr Munir did not threaten the Claimant with disciplinary action because of how she reacted to her altercation with Mr Cooper when she was leaving the store. He did refer her for disciplinary investigation in relation to her part in the altercation, but that was nothing to do with her having brought a complaint of any description, but because of how he concluded she had conducted herself on 26 May.

162. Ms Thompson did refer in her decision letter to various aspects of the Claimant's conduct in bringing her grievance. We will come back to this in detail in our decision on the unfair dismissal complaint, but it is clear that she did not as such threaten disciplinary proceedings, though she got very close to it by characterizing at least two elements of the Claimant's case as potentially gross misconduct. Strictly speaking therefore, the Claimant did not establish the specific detriment on which she relied. If that were too literal an interpretation of the complaint, in any event Ms Thompson very obviously did not make these statements because of the nature of the complaints the Claimant was pursuing but because of the way in which she pursued them. That is a distinction that tribunals have to make very carefully, but it was in our view appropriate to make it in this case.

163. In summary, the Claimant did not prove facts from which we could conclude that, had she done a protected act, this influenced the alleged victimisers to subject her to the relevant detriments to a more than minor or trivial extent. All of the complaints of victimisation would have failed for that reason also.

Unfair dismissal

164. We first had to analyse what the Claimant said, and what we have found, the Respondent did or did not do which she says was a reason for her resignation. We took each of the ten matters in section 3.1 of the List of Issues in turn.

165. Whilst we found that there was a cooling of relationships, Mrs Hughes did not ignore the Claimant. Even though this meant that they only spoke about work-related matters and when required, given that the Claimant herself contributed to the change in relationship, as we also found, this could not be said when objectively assessed to have contributed to a breach of the duty of trust and confidence.

166. We found that Mr Cooper and Ms Bibi viewed the CCTV footage related to 11 March 2023. The Claimant described this as a breach of confidentiality and/or data protection regulations. As confirmed by Ms Clayton on day 1 of this Hearing, the two parts of the footage that involved the Claimant showed first, her handing over something to Ms Crutchley and, secondly, her leaving the store. We are not experts in data protection but it could well be said that viewing the footage was processing of personal information relating to the Claimant. Neither Mr Cooper nor Ms Bibi were involved in investigating the Claimant's alleged misconduct, and indeed Ms Bibi was personally implicated in what had happened, as she well knew. The information was plainly regarded by the Respondent as confidential because Ms Thompson told us that the disc on to which it was copied was locked away and password protected, so that as already set out we could not accept Ms Clayton's submission that Mr Cooper and Ms Bibi entitled to view it anyway given their roles in security. They had no place to do so, as Mr Cooper acknowledged. Accordingly, whether characterised as a breach of confidence or of data protection regulations or not, it was wholly inappropriate for Mr Cooper and Ms Bibi to view the footage, and particularly given that Ms Bibi was senior to the Claimant, this could be said, objectively assessed, to contribute to a breach of the implied duty of trust and confidence.

167. We found that Mr Cooper did verbally abuse the Claimant and stop her from entering the canteen, and the Respondent did not seek to argue that his conduct

was in some way outside the course of his employment. We concluded that being physically and verbally confronted by a colleague in the workplace, which Mr Munir concluded was in breach of the Respondent's values, could sensibly be said to contribute to a breach of the implied term, notwithstanding the Claimant's own part in the incident.

168. The next element of the Claimant's case was about Helen Aston's conduct on 26 May. We did not think she can be criticised for not carrying out interviews with witnesses on the day as this was properly the remit given to Mr Munir once the relevant grievances were raised. We did think however that Ms Aston can be criticised for not speaking with the Claimant at all, whether when she saw her on arriving at the store, when she knew the Claimant was waiting in the warehouse, or indeed when she saw her sitting outside afterwards. We did not think it a sufficient explanation to say that the Claimant knew she could speak to her, when Ms Aston knew from Mr Delemere what the Claimant had alleged and how serious that allegation was. This failure on her part could also contribute something, perhaps relatively small in isolation but still something, to undermining the Claimant's trust and confidence in the Respondent.

169. The proven conduct of Mr Munir in the grievance context in the second meeting of 8 June was twofold: first his laughing in response to the Claimant refusing to disclose the identity of a witness; and secondly the way in which he put Mr Cooper's grievance to the Claimant. Particularly given that the Claimant had a panic attack in the first meeting on that date, requiring a 25-minute break, it was both insensitive and unnecessary to question her about such matters during the second meeting in the brusque and confrontational way that Mr Munir adopted. The Claimant was entitled to expect impartial and professional handling of all grievance investigations to which she was a party. At that particular meeting, she was not afforded that kind of approach. Mr Munir's conduct could also contribute something, not sufficient of itself to breach the implied term, but still something, to undermining the Claimant's trust and confidence in the Respondent and its processes.

170. Mr Munir's selectively reading from statements and not providing them to the Claimant when he plainly relied on them in reaching his decision, deprived her of the opportunity to comment on them before he did so and was in breach of the Respondent's Investigations Policy as he fairly admitted. That too could make some contribution to a breach of the implied term, further undermining the Claimant's trust in the Respondent and its processes. The meal the Respondent made of providing her with some of the documentation subsequently could also sensibly lead the Claimant to the conclusion that it was not being transparent with her.

171. We have already made clear that we did not think it fair to say the Respondent did not get to grips with the Claimant's grievances. As to the grievance outcomes, i.e., the actual decisions in respect of the Claimant's complaints, whilst she disagreed with them, we could not agree with her that they were in some way improper. The conclusions were ones we may – and in some respects have – disagreed with on the evidence presented to us, but that is not the point. They were conclusions Ms Thompson and Mr Munir could properly reach. We will deal below with the question of failure to get to grips with her complaints at the appeal stage and the appeal outcomes.

172. The next aspect of the Claimant's case related to Ms Thompson's comments on the Claimant's conduct in pursuing her grievance. We have already made clear that strictly speaking, Ms Thompson did not threaten disciplinary action, but it would be an injustice to the Claimant's case, and a wooden adherence to the wording of the List of Issues, not to consider her criticisms of what Ms Thompson said about her conduct more broadly. She said four things:

172.1. The first was that she was unclear whether the Claimant intended to mislead her by saying she had contacted the Respondent's data protection team. This is the least troubling of the four statements, in that at least it was couched in terms of Ms Thompson wondering something rather than stating something about the Claimant's conduct.

172.2. The second related to what was said by Mr Delemere. Ms Thompson effectively stated that the Claimant had misquoted and fabricated evidence. We could not understand that conclusion and it was completely unnecessary to make such a statement based on a simple reference to something Mr Delemere had stated in a hearing rather than in writing.

172.3. The third related to what the Claimant had said about Mrs Ince concluding her mental health did not exist. Ms Thompson described this as a false allegation. Again, we could not see why that conclusion was necessary nor could we see that it was well-founded. Of course, what the Claimant asserted did not fully reflect what Mrs Ince had said, but the point the Claimant was making was obvious, namely that what she had said to Mrs Ince about her mental health had not been taken into account or, as Mr Delemere found, not followed up.

172.4. The fourth thing was the comment about the Claimant's allegation regarding her relationship with Mrs Hughes, which was said to have been made with malicious intent. To our minds, Ms Thompson was completely unable to explain to us the basis on which that statement was made.

173. Taking them overall, we were in no doubt that the last three of these comments, unnecessary, unfounded and heavy-handed as they were, could have contributed to a breach of the implied term.

174. As for the grievance appeal to Mr Hardie, there were a number of difficulties with his approach:

174.1. He wanted further explanation of the grounds of appeal before being willing to consider it, even though he agreed the Claimant had satisfied one of the three grounds set out in the Respondent's Appeals Policy.

174.2. He asked the Claimant for more information and yet at the same time gave her a decision.

174.3. He was not able to explain to our satisfaction why he would not permit her to put forward her diary in evidence.

174.4. We do not understand why he needed more detail in writing so that he could know who he should speak to, when talking to the Claimant would have secured that information.

174.5. It was confusing to say the least that he told us that his email of 7 September 2023 indicated he would have sat down with the Claimant to get more information, when nothing had changed whilst he was away on holiday since his earlier exchanges with her seeking more information in writing. Ms Clayton submitted that the email shows he was going to hear the appeal and that what had changed was it had by then become clear he was not going to get anything further from the Claimant, but those are glosses on his evidence; he said neither of those things. And, of course, whatever he wrote on 7 September is not relevant to whether the Claimant was constructively dismissed.

175. As for Mr Downs' decision:

175.1. Clearly the Claimant's first email was not sufficient – all she said was that she intended to appeal.

175.2. Mr Downs cannot be criticised for making clear the appeal was not a rehearing. It is well established that it did not have to be in order to be fair.

175.3. We did not understand however how he could say that the breach of confidentiality point was "not stated in any context in the grievance outcome letter", when it was clearly front and centre to the grievance dealt with by Ms Thompson which was the subject of the appeal.

175.4. We did not understand either how Mr Downs could conclude the appeal had been withdrawn, when on 25 August when the Claimant sent the email at page 853, she had been given until 28 August to clarify her grounds and wrote further to Mr Downs on 29 August.

175.5. He too therefore sent her a decision without hearing from her.

176. The case put forward by the Claimant was that the tone of Mr Downs' letter was the final straw. There was nothing in tone of the letter that we thought inappropriate, although its contents clearly fall within the Claimant's complaint about the grievance appeal outcomes. We concluded that both appeal officers failed to get to grips with her complaints, the outcomes were therefore flawed and that this could sensibly be said to contribute to a breach of the implied term. It was noteworthy in this regard that Mr Delemere got to grips with the Claimant's appeal against dismissal, and heard it, when the appeal to him was no more comprehensive than those submitted to Mr Hardie and Mr Downs.

177. Looking at the Respondent's conduct as a whole: two of her colleagues, one more senior than her, surreptitiously involved themselves in a serious matter concerning her that they had no right to engage with; one of those colleagues verbally abused and physically confronted her; a human resources officer failed to speak to the Claimant about her serious allegations regarding that incident when the matter had been referred to her on the day; the way in which one of the grievance officers, Mr Munir, conducted one of the meetings with the Claimant about that same incident was unnecessarily confrontational and did not show impartiality; the other grievance officer, Ms Thompson, made three unnecessary and unfounded statements about the Claimant's conduct of the grievance presented to her; Mr Munir reached a decision without giving the Claimant opportunity to comment on all of the relevant evidence first; and both grievance appeal officers failed properly to address her appeals. Regardless of the merits of the Claimant's grievances and appeals, taken overall we did not think the

Claimant could reasonably and sensibly be expected to put up with the Respondent's conduct, which may not have been calculated, but was clearly likely, to seriously undermine trust and confidence. We did not see how the Respondent had reasonable and proper cause for its conduct. Breach of the implied term of trust and confidence is always a fundamental breach of contract.

178. The last straw – the tone of Mr Downs' letter – was innocuous but the **Williams** case means that we were required to consider everything else that went before it, given that it was not argued that the Claimant had affirmed the contract following those other matters said to give rise to the cumulative breach. It could also be said that chronologically, the final matter of which the Claimant validly complained was the content of the same letter (that is, as opposed to its tone), but even if we were to adopt a strict application of paragraph 3.1.1.7 of the List of Issues in terms of dates, as just stated the Respondent did not seek to argue that there had been an affirmation of the contract prior to Mr Downs' final letter. However analysed therefore, there was thus a fundamental breach of contract and the contract was not affirmed thereafter.

179. Did the Claimant resign in response to the breach? Ms Clayton submitted that she resigned:

179.1. To do more care work. In our judgment, that was speculation; she had done both jobs for several years.

179.2. To avoid a disciplinary case. That too was speculation; had that been the case, she would likely have resigned more quickly after 20 July when Mr Munir told her he was referring her to a disciplinary manager.

180. In any event, the breach only has to be a reason for the resignation and it plainly was. The Respondent did not seek to argue that the contents of the resignation letter did not marry with the ten matters on which the Claimant says she relied to leave. In any event, in our view there was a sufficiently broad correlation between them to render any such argument invalid. The Claimant was therefore dismissed.

181. It was not argued that there was a fair reason for dismissal, as confirmed by Ms Clayton on day 1 of this Hearing. The complaint of unfair dismissal was therefore well founded, as was the complaint of breach of contract (wrongful dismissal) because the Claimant was dismissed without notice.

Summary

182. In summary:

182.1. The Claimant's complaint that she was subjected to a detriment on the ground that she made a protected disclosure was not well-founded and was dismissed.

182.2. The Respondent did not contravene section 39 of the Act by:

182.2.1. Discriminating against the Claimant because of something arising in consequence of her disability.

182.2.2. Discriminating against the Claimant by applying to her a provision, criterion or practice which was discriminatory in relation to her disability.

182.2.3. Victimising the Claimant.

182.3. The Respondent did not contravene section 40 of the Act by harassing the Claimant related to disability.

182.4. The Respondent dismissed the Claimant and did so unfairly. Her complaint of unfair dismissal was therefore well-founded.

182.5. The Claimant's complaint of breach of contract (wrongful dismissal) was also well-founded.

182.6. There will be a further Hearing to determine remedy for unfair dismissal and breach of contract, details of which have been provided to the parties separately.

Employment Judge Faulkner
Approved on: 15 December 2025

Notes

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties in a case.

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Schedule – List of Issues

1. Henderson v Henderson

1.1. Should the Claimant be debarred from bringing complaints that were only identified in her Second Claim, but could have been brought in her First Claim?

1.2. The Respondent withdrew its application to strike out any such complaints on this basis.

2. Time limits

2.1. Given the date the Claim Form was presented and the dates of Early Conciliation, any complaint in the Second Claim about something that happened before 4 July 2023 may not have been brought in time.

2.2. The Respondent submitted that the following complaints were out of time:

2.2.1. The complaint of protected disclosure detriment.

2.2.2. To the extent that they occurred prior to 4 July 2023, the complaints set out at paragraphs 11.1.1 and 11.1.2 below.

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

2.3.1. Was the complaint made to the Tribunal within three months (plus Early Conciliation extension) of the act to which the complaint relates?

2.3.2. If not, was there conduct extending over a period?

2.3.3. If so, was the complaint made to the Tribunal within three months (plus Early Conciliation extension) of the end of that period?

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

2.3.4.1. Why were the complaints not made to the Tribunal in time?

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

2.4. Was the whistleblowing detriment complaint made within the time limits in the Employment Rights Act 1996? The Tribunal will decide:

2.4.1. Was the complaint made to the Tribunal within three months (plus Early Conciliation extension) of the act complained of (27 May 2023)?

2.4.2. If not, was it reasonably practicable for the complaint to be made to the Tribunal within the time limit?

2.4.3. If it was not reasonably practicable for the complaint to be made to the Tribunal within the time limit, was it made within such further period as the Tribunal considers reasonable?

3. Unfair dismissal

3.1. Was the Claimant dismissed?

3.1.1. Did the Respondent do the following things:

3.1.1.1. From April 2023 until she resigned, the Claimant's line manager ignoring her (paragraph 21 of the Particulars of Claim).

3.1.1.2. On 5 April 2023, breach of the Claimant's confidentiality (described in paragraphs 16/23 of her Particulars of Claim).

3.1.1.3. On 26 May 2023, being verbally abused by Steve Cooper and being stopped from entering the canteen (paragraph 24 of the Particulars of Claim).

3.1.1.4. On 26 May 2023, HR's failure to speak with her about that incident and their failure to speak to all available witnesses (paragraph 26 of the Particulars of Claim).

3.1.1.5. On 8 June and 20 July 2023, the conduct of Nahiam Munir in the grievance meeting (paragraph 30 of the Particulars of Claim).

3.1.1.6. In August 2023 the Respondent's reluctance to supply her with grievance minutes and statements (paragraphs 34 and 38 to 42 of the Particulars of Claim).

3.1.1.7. Between 21 July 2023 and 14 August 2023, the negative grievance and appeal outcomes and the failure to get to grips with her complaints (paragraphs 49 and 51 of the Particulars of Claim).

3.1.1.8. On 14 August 2023, threatening her with disciplinary action (paragraph 45) for fabricating parts of her complaints and refusing to withdraw the threat (paragraph 51 of the Particulars of Claim).

3.1.1.9. On 21 and 28 August 2023, imposing such a high bar on appealing a grievance (paragraph 46 of the Particulars of Claim).

3.1.1.10. On 31 August 2023, the tone of the outcome letter (paragraph 49 of the Particulars of Claim) – the Claimant said that this was the final straw.

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

3.1.2.1. Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent.

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

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

3.1.4. Did the Claimant affirm the contract before resigning? Ms Clayton confirmed that this was not argued by the Respondent.

3.2. Ms Clayton also confirmed that the Respondent did not seek to argue that any dismissal was fair.

4. Remedy for unfair dismissal

4.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

4.1.1. What financial losses has the dismissal caused the Claimant?

4.1.2. Has the Claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

4.1.3. If not, for what period of loss should the Claimant be compensated?

4.1.4. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

4.1.5. If so, should the Claimant's compensation be reduced? By how much?

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

4.1.7. Did the Respondent unreasonably fail to comply with it by failing to provide the Claimant with all necessary information and / or undue delay?

4.1.8. If so, is it just and equitable to increase any award payable to the Claimant? By what proportion, up to 25%?

4.1.9. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

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

4.1.11. The statutory cap of fifty-two weeks' pay applies.

4.2. What basic award is payable to the Claimant, if any?

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

5. **Wrongful dismissal / Notice pay**

5.1. If the Claimant was entitled to treat herself as constructively dismissed, what was the Claimant's notice period?

5.2. Did the Claimant take reasonable steps to replace her lost earnings during what would have been her notice period, for example by looking for another job?

5.3. If not, for what period of loss should the Claimant be compensated?

6. Protected disclosure

6.1. Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Claimant says she made a disclosure on 22 May 2023 in her first grievance alleging unspecified breaches of privacy and GDPR in relation to use of the Respondent's CCTV.

6.1.1. Did she disclose information?

6.1.2. Did she believe the disclosure of information was made in the public interest?

6.1.3. Was that belief reasonable?

6.1.4. Did she believe it tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation?

6.1.5. Was that belief reasonable?

6.2. If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's employer.

7. Detriment (Employment Rights Act 1996 section 47B)

7.1. Did the Respondent do the following things:

7.1.1. Steve Cooper raising a retaliatory grievance against the Claimant on 27 May 2023?

7.2. By doing so, did it subject the Claimant to a detriment?

7.3. If so, was it done on the ground that she made a protected disclosure?

7.4. Was this complaint presented out of time and / or does it fall foul of the rule in Henderson v Henderson? As noted above, the Respondent abandoned the latter point.

7.5. Was the protected disclosure made in good faith?

7.6. If not, is it just and equitable to reduce the Claimant's compensation? By what proportion, up to 25%?

8. Disability

8.1. The Respondent conceded that the Claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the Claims were about, namely depression and / or anxiety.

9. Discrimination arising from disability (Equality Act 2010 section 15)

9.1. Did the Respondent treat the Claimant unfavourably by:

9.1.1. Dismissing her on 2 May 2023, without giving adequate consideration to her disability related mitigation / reason for leaving her shift early? The Respondent

accepted that dismissal was unfavourable treatment.

9.1.2. Treating the Claimant's part in / reaction to her alleged assault on 26 May 2023 as aggressive and / or a potential disciplinary matter as stated to her on 20 July 2023?

9.2. Did the following things arise in consequence of the Claimant's disability:

9.2.1. Her stated need to leave work early on 11 March 2023?

9.2.2. Her emotional response (crying / distress) to the alleged assault on 26 May 2023?

9.3. Was the unfavourable treatment because of any of those things?

9.3.1. Did the Respondent dismiss the Claimant because of her need to leave early?

9.3.2. Did the Respondent threaten disciplinary proceedings because of the Claimant's crying / exhibiting signs of distress?

9.4. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

9.4.1. The economic and operational requirements of the business.

9.4.2. To ensure that appropriate standards of conduct for the Respondent's colleagues were maintained.

9.4.3. The health, safety and welfare of the Respondent's colleagues.

9.4.4. To ensure that colleagues employed by the Respondent do not act in a way which could cause serious reputational harm to the Respondent.

9.5. The Tribunal will decide in particular:

9.5.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims?

9.5.2. Could something less discriminatory have been done instead?

9.5.3. How should the needs of the Claimant and the Respondent be balanced?

9.6. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

10. Indirect discrimination (Equality Act 2010 section 19)

10.1. A "PCP" is a provision, criterion or practice. The Respondent accepted that it had the following PCP:

10.1.1. Requiring employees to set out appeals with particularity (i.e. to set out their grounds of appeal based on procedure (a suggestion that the correct procedure has not been followed), fact (an allegation that the facts the decision

were based on are incorrect or relevant information was not considered) or severity (a suggestion that the severity of the sanction is not comparable to the original allegation or is inconsistent with previous decisions) (paragraph 54.2 of the Particulars of Claim).

10.2. The Respondent accepted that it applied the PCP to the Claimant.

10.3. The Respondent accepted that it applied the PCP to other employees who were not disabled, or would have done so.

10.4. Did the PCP put disabled employees at a particular disadvantage when compared with others in that those struggling with their mental health would find it harder to comply?

10.5. Did the PCP put the Claimant at that disadvantage?

10.6. Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were the economic and operational requirements of the business by ensuring that internal appeal procedures are managed appropriately and proportionately.

10.7. The Tribunal will decide in particular:

10.7.1. Was the PCP an appropriate and reasonably necessary way to achieve those aims?

10.7.2. Could something less discriminatory have been done instead?

10.7.3. How should the needs of the Claimant and the Respondent be balanced?

11. Harassment related to disability (Equality Act 2010 section 26)

11.1. Did the Respondent subject the Claimant to a hostile working environment on her return to work in May 2023 particularised as follows:

11.1.1. Susan Hughes and Jemma Thompson not speaking to her?

11.1.2. Steve Cooper, Jilly Kwarteng and Abigail Smith making comments that she:

11.1.2.1. Was “putting it on” regarding her mental health?

11.1.2.2. Shouldn’t be there?

11.1.3. Being assaulted by Steve Cooper on 26 May 2023?

11.1.4. Jemma Thompson and Nahiam Munir not taking her complaints / grievances seriously?

11.1.5. Being laughed at and intimidated by Nahiam Munir in her grievance meeting on 8 June 2023?

11.2. If so, was that unwanted conduct?

11.3. Did it relate to disability? The Claimant links the conduct to her mental health

because, she says, it was her disability that was considered in mitigation in partially upholding her appeal against dismissal.

11.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

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

12. Victimisation (Equality Act 2010 section 27)

12.1. Did the Claimant do protected acts as follows:

12.1.1. Her grievances of 22 and 26 May 2023 which she says raised complaints of disability discrimination?

12.2. Did the Respondent do the following things:

12.2.1. Steve Cooper assaulting her on 26 May 2023?

12.2.2. Steve Cooper raising a counter grievance on 27 May 2023?

12.2.3. Jemma Thompson and Nahiam Munir not taking her grievances seriously / delaying too long?

12.2.4. Being laughed at and intimidated by Nahiam Munir in her grievance meeting on 8 June 2023?

12.2.5. Also on 20 July 2023, Nahiam Munir threatening the Claimant with further disciplinary proceedings regarding her part in / reaction to the alleged assault?

12.2.6. On 14 August 2023, Jemma Thompson threatening the Claimant with further disciplinary proceedings for fabricating parts of her grievances?

12.3. By doing so, did it subject the Claimant to a detriment?

12.4. If so, was it because the Claimant did a protected act?

12.5. Was it because the Respondent believed the Claimant had done, or might do, a protected act?

13. Remedy for discrimination or victimisation

13.1. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

13.2. What financial losses has the discrimination caused the Claimant? Was it part of any successful constructive dismissal claim? If not, did it nonetheless lead to financial losses?

13.3. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

13.4. For what period of loss should the Claimant be compensated?

13.5. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

13.6. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

13.7. Is there a chance that the Claimant's employment would have ended in any event? Should her compensation be reduced as a result?

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

13.9. Did the Respondent unreasonably fail to comply with it by not properly responding / delays?

13.10. If so, is it just and equitable to increase any award payable to the Claimant?

13.11. By what proportion, up to 25%?

13.12. Should interest be awarded? How much?