RESERVED JUDGMENT
WITH REASONS

Case No. 2600510/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr K Sliwka

Respondents: 1. Staffline Group PLC
2. Wm Morrison Supermarkets PLC

HELD AT: Manchester **ON:** 23, 24, 25 and 26 January 2017

BEFORE: Employment Judge Franey
Ms L Atkinson
Mrs S J Ensell

REPRESENTATION:
Claimant: In person
1st Respondent: Miss C Johnson, Consultant
2nd Respondent: Miss I Ferber, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaints of direct disability discrimination, discrimination arising from disability, a breach of the duty to make reasonable adjustments and victimisation brought against the first respondent fail and are dismissed.

2. The complaint of unfair dismissal brought against the first respondent fails and is dismissed.

3. The complaints of direct disability discrimination, discrimination arising from disability, a breach of the duty to make reasonable adjustments, harassment related to disability and victimisation brought against the second respondent fail and are dismissed.

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Employment Judge Franey

13 February 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

14 February 2017

FOR THE TRIBUNAL OFFICE

[AF]

REASONS

Introduction

1. By a claim form presented on 16 January 2016 the claimant brought complaints against his former employer, the first respondent ("Staffline"), of unfair dismissal, disability discrimination, victimisation and harassment. As an employment business Staffline had assigned him to work at an abattoir owned by the second respondent ("Morrisons"), and the claimant alleged that he had been subjected to discriminatory treatment by colleagues in relation to toilet breaks which he needed because of gastric problems which rendered him a disabled person. He alleged that Staffline had not done anything when he lodged a grievance, and that this had caused him to resign in November 2015. He said his resignation amounted to a constructive unfair dismissal. He also complained about annual leave issues, the refusal of Morrisons to give him a direct permanent contract, and the handling of a complaint about him made by a colleague shortly before he resigned.

2. Staffline lodged its response form on 23 February 2016. It resisted the complaints on their merits. It said it was unaware of any medical problem until 15 September 2015, and denied that the claimant had been refused any toilet breaks. The claimant had been about to be given an outcome to his grievance when he chose to resign. Staffline denied that the claimant was a disabled person at the material time.

3. The complaints were clarified at a preliminary hearing before Employment Judge Slater, at which stage Morrisons were joined to the proceedings as second respondent because it became evident that a number of people alleged to have behaved in a discriminatory way were employees of Morrisons not of Staffline.

4. Morrisons filed a response form on 13 July. It too denied any discriminatory treatment of the claimant. It was for Staffline as his employer to handle the grievance even though Morrisons had assisted with the investigation.

Issues

5. Employment Judge Slater provided in Annex A to her Case Management Order two tables showing the complaints pursued against Staffline and Morrisons respectively, identifying the type of complaint. In Annex B she set out the legal issues which arose in relation to each type of complaint. At the outset of the hearing the parties confirmed that those annexes remained accurate.

6. It followed that the legal issues for this Tribunal to determine were as set out in the attached Annex, which is drawn almost entirely from the Case Management Order of Employment Judge Slater (save for the victimisation issues which had inadvertently been omitted). There were complaints of disability discrimination against both respondents and an unfair dismissal complaint against Staffline.

Evidence

7. The parties had agreed a bundle of documents which ran to more than 330 pages. Any reference in these reasons to page numbers is a reference to that bundle unless otherwise indicated.

8. The claimant gave evidence himself but did not call any other witnesses.

9. Staffline called Monica Oslizlo, the Contract Manager who worked on site at the abattoir, and Jaz Heer, the Regional Manager who dealt with the claimant's grievance.

10. Morrisons called two line leaders who were the claimant's immediate supervisors, John Turner and Ian Paton, and Mike Dean who was the team manager to whom they reported. Morrisons also planned to call Greg Atkinson, the Senior Operations Manager who dealt with the claimant's grievance, but due to food poisoning Mr Atkinson was too ill to attend the Tribunal. The Tribunal read his witness statement but attached less weight to it than if he had been called to give evidence. In his place, however, Morrisons called Samantha Russell, a Human Resources ("HR") Administrator who had some knowledge about how the grievance was handled by Morrisons.

11. All of the witnesses had prepared a written witness statement which stood as evidence in chief.

Relevant Legal Principles – Disability Discrimination

Jurisdiction

12. The complaints of disability discrimination were brought under the Equality Act 2010. Section 39(2)(d) prohibits discrimination against an employee by subjecting him to a detriment. Section 39(3) prohibits victimisation. Section 39(5) applies to an employer the duty to make reasonable adjustments.

13. Section 40(1)(a) prohibits harassment of an employee. Conduct which constitutes harassment cannot also constitute a "detriment" (section 212(1)), meaning that it can only be pursued as a harassment complaint.

14. Section 41 contains equivalent provisions prohibiting such treatment of a contract worker by a principal. It was agreed that Morrisons was a principal and the claimant a contract worker.

15. By section 109(1) an employer is liable for the actions of its employees in the course of employment. Neither respondent relied upon the defence in section 109(4).

Disabled Person?

16. Section 6 defines a disability as follows:

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

The section goes on to provide that any reference to a disabled person is reference to a person who has a disability.

17. The word "substantial" is defined in section 212(1) as meaning "more than minor or trivial".

18. There are some additional provisions about the meaning of disability in Schedule 1 to the Act. Paragraph 2 provides that the effect of an impairment is long-term if it has lasted for at least 12 months or is likely to last for at least 12 months, and that:

> "**If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."**

19. Under paragraph 5 of Schedule 1,

> **"an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if**
>
> **(a) measures are being taken to treat or correct it, and**
>
> **(b) but for that, it would be likely to have that effect."**

20. Section 6(5) of the Act empowers the Secretary of State to issue guidance on matters to be taken into account in decisions under section 6(1). The current version dates from 2011.

Burden of Proof

21. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

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

The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

22. Consequently it is for a claimant to establish facts from which the Tribunal can reasonable conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has

been no contravention by, for example, identifying a different reason for the treatment.

23. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden or proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct Disability Discrimination

24. Direct discrimination is defined in section 13(1) as follows:

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

25. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> **"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."**

26. Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person's abilities. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability.

27. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

Discrimination arising from disability

28. Section 15 of the Act reads as follows:-

> **"(1) a person (A) discriminates against a disabled person (B) if –**

> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability".**

Reasonable Adjustments

29. The duty to make reasonable adjustments is defined in Section 20, Section 21 and Schedule 8. The duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20).

30. That duty appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(3):-

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

31. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **Environment Agency –v- Rowan [2008] ICR 218** and reinforced in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632.**

32. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial".

33. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

34. Schedule 8 explains how this applies to an agency worker. Under paragraph 6 the duty applies to the principal. For the employing agency which the duty is modified by paragraph 5. It only applies if the PCP is applied by or on behalf of most of the principals to whom the worker is or might be supplied. The resulting substantial disadvantage must be the same or the similar in the case of each of

those principals, and the adjustments required are those which it would be reasonable for the agency to take if the PCP were applied by it or on its behalf. The principal does not have to make adjustments which it is for the employing agency to make.

Harassment

35. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (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.**

36. Chapter 7 of the EHRC Code deals with harassment. Paragraph 7.9 says that:

> **"Unwanted conduct "related to" a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic."**

37. Paragraph 7.10 says that a connection with a protected characteristic may arise even where the employer knows that the worker does not have the protected characteristic himself. Further, the intention of the alleged harasser is not determinative: **Hartley v Foreign and Commonwealth Office UKEAT/0033/15** (27 May 2016).

Victimisation

38. Victimisation in this context has a specific legal meaning defined by section 27:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because--**
>
> **(a) B does a protected act, or**

(b) A believes that B has done, or may do, a protected act.

39. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why".

40. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC [2013] ICR 337** (House of Lords).

Relevant Legal Principles – Constructive Unfair Dismissal

41. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

42. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

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

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

44. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

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

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

46. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

47. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P emphasised the importance of Tribunals recognising the stringency of the test (see paragraphs 12-15).

48. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial.

49. Further, a last straw may have the effect of restoring to relevance an earlier breach over which an employee did not resign. In **Lochuak v London Borough of Sutton EAT 0197/14** the EAT (Langstaff P) said:

> **"It may be that an employee puts up with a breach of contract which is, properly analysed, repudiatory because he would prefer to retain his employment rather than be cast adrift on the labour market. In such a case he might very well spend a period of time without taking any action, or actually take positive steps which would indicate that he wished the contract to continue notwithstanding the breaches which had occurred. But they would remain breaches. A failure to elect to treat a contract as repudiated does not waive such breaches. It merely declines to make the choice. If a later incident then occurs which adds something to the totality of what has gone before, and in effect resuscitates the past, then the Tribunal may assess, having regard to all that has happened in the meantime - both favourable to the employer and unfavourable to him - whether there is or has been a repudiatory breach which the employee is now entitled to accept. If so, and if the employee resigns at least partly for that reason, it will find in that case that there has been a constructive dismissal."**

50. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4.** If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause.

47. If it is established that the resignation should be construed as a dismissal under section 95(1)(c), the employer has the burden of showing a potentially fair reason for dismissal before the general question of fairness arises under section 98(4).

Relevant Findings of Fact

51. The purpose of this section of our reasons is to summarise the broad chronology of events to put our decision into context. Findings of fact relevant to our decision on whether the claimant was a disabled person, and any disputed findings of fact crucial to the matters for which the claimant sought a remedy, will be addressed in the discussion and conclusions section.

Staffline

52. Staffline is an Employment Agency which employs around 600 employees. It supplies its employees to work for clients in the food industry. Its standard terms of employment appear in a contract at pages 70-85, which includes at page 83 a grievance procedure to be used by an employee who has a grievance or complaint about his work or about those with whom he works. It provides for there to be a meeting and for Staffline to inform the employee of its decision and the right of appeal.

Morrisons

53. Morrisons is a major retail supermarket which also operates an abattoir in Colne branded as Woodhead Brothers. There are approximately 800 people working at that site, including directly employed staff and agency workers supplied by Staffline. One department deals with pork boning within which there are a number of production lines. Each line has a line leader, under the supervision of the team manager. Each individual production line has between eight and 12 workers on it at any one time. The site runs a shift system and it is important that unnecessary halts to production are avoided.

The Claimant

54. The claimant was employed by Staffline in May 2013. He signed an application form that day at page 87. In the section marked “health assessment” there appeared a series of questions about the applicant’s health condition. They included questions about diarrhoea or stomach pain in the last seven days, and whether there was any health related condition which required adjustments to the selection process. The claimant did not give a positive answer to any of those questions and it was not evident from his application form that he had any medical condition.

55. In fact the claimant had suffered from a stomach complaint since 2012 and was taking medication to control it at the time he commenced employment. We will return to those findings of fact in the section of our reasons which deals with whether he was a disabled person at the material time.

56. On appointment the claimant was assigned by Staffline to work for Morrisons in the Colne abattoir, and within a short period he had been a trimmer, which requires knife skills. He primarily worked on the leg lines trimming fat off meat to enable it to be further processed down the line. He worked the morning shift, beginning work at 6.00am and finishing at 2.00pm.

57. On the day he started employment with Staffline he signed a form at page 88 which made clear that his coordinator on site was Monica Oslizlo, and which said that holiday requests had to be signed for and agreed in the site office. In practice, however, agency staff would get their holiday request approved in writing by the local manager before passing a copy to Ms Oslizlo so that she could keep a record of when staff would be taking holidays. Morrisons operated a "first come first served" approach, so that the sooner a request for annual leave was made, the more likely it could be accommodated.

Annual Leave Issue – Summer 2015

58. There appeared in the bundle between pages 180 and 189 a transcript of a discussion which took place on 20 August 2015. The claimant met Ms Oslizlo and her colleague Mr Pilat. The discussion about annual leave appeared on page 184 onwards. A number of issues were raised including the need for the claimant to get his son from Poland for the start of the school year. On page 188 the note recorded Mr Pilat asking Ms Oslizlo to email the claimant's line manager given that the holiday had been refused but the claimant needed it. Later that day Ms Oslizlo's colleague, Mr Sereika, sent an email to Mr Dean asking whether holidays could be authorised for 3 and 4 September so that the claimant could pick up his son from Poland. The email said that the holiday request had been declined. The response came on 25 August from Mr Dean at page 190. It said:

> **"The reason this holiday was declined is due to the fact we are fully booked for holidays on knife skilled colleagues. You would have to supply a replacement knife user in order for us to grant these holidays. The school holidays get fully booked at least six months in advance so people requiring this time at short notice are likely to be refused."**

59. The allegation that Staffline should have challenged Morrisons over this position was the first allegation of breach of trust and confidence and we will return to it in our conclusions[1].

60. The claimant had also submitted a request for some annual leave in February 2016. He was concerned that his annual leave forms had gone missing. The second allegation of breach of trust and confidence against Staffline was that Ms Oslizlo did nothing about this when he told her. We will return to that in our conclusions.

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[1] The refusal of the request by Morrisons formed the first allegation of discrimination arising from disability according to the Case Management Order, but in the course of his evidence to our hearing the claimant confirmed that he was not saying this had anything to do with his medical condition. Accordingly it was not pursued as an allegation of disability discrimination against Morrisons.

Toilet Breaks

61. The morning shift began at 6.00am and the production lines ran continuously until 9.25am, when there was a 35 minute break for breakfast. Production resumed between 10.00am and 12.25pm, when there was a 20 minute break. The lines ran for a final time between 12.45pm and 2.15pm. Overtime could extend the shift to 2.45pm.

62. Staff were expected to use the toilet during break times if at all possible, but a toilet break during production could be accommodated as long as there was a person available to cover. If that was not possible a toilet break would mean that production was halted. Morrisons was keen to avoid that. It could take some time to arrange cover, sometimes as long as 20 minutes if another person had just gone on a toilet break. It was difficult for a toilet break to take less than 20 minutes because the operative would have to remove all personal protective equipment and then go some way across the site to the toilet before coming back and putting the equipment back on. Taking a toilet break was not simply a matter of a minute or two away from the workstation.

63. The claimant maintained that he had no problem with taking toilet breaks until September 2015. The recollection of Morrisons' witnesses was that his request for toilet breaks outside formal break times became more frequent around that time, and indeed occurred on a daily basis. Mr Paton and Mr Turner spoke to Mr Dean about the claimant's toilet breaks in late August 2015 because of the increased frequency of such requests. Mr Dean had suggested to the claimant that he should avoid going to the toilet outside break times, being unaware that there was any medical issue affecting the claimant.

11 or 12 September 2015

64. The claimant alleged that the first instance of harassment related to his disability occurred on 12 September 2015[2]. He alleged that Ian Paton three times refused to allow him a toilet break and said, "You can go shit your pants". We will return to that in our conclusions.

14 September 2015

65. It was common ground that on 14 September the claimant and Mr Dean discussed his need for breaks. There were no notes kept of this discussion. The claimant said that during this meeting he informed Mr Dean of his stomach problems and that the medication he had been prescribed was the reason for the level of breaks requested. Mr Dean denied this and said that there was no reference in that discussion to any medical condition, but rather that the claimant blamed the problem on drinking coffee before starting work. It was common ground, however, that Mr Dean made a comment to the effect that having so many breaks was not really fair on other colleagues, and that Mr Dean said his children could manage to make trips to the toilet in break time so therefore the claimant should be able to do the same.

[2] Although when he first raised it with Ms Oslizlo on 15 September he said it happened on Friday 11 September.

The claimant alleged that this was an instance of disability related harassment and we will return to that issue in our conclusions.

15 September 2015

66. On 15 September 2015 the claimant spoke to Monica Oslizlo about the position. She did not know but he was recording their conversation and a transcript with some annotations by the claimant appeared at pages 202-206. He told her there were serious problems about going to the toilet. He mentioned three specific incidents. They included what he said had happened on 12 September (page 203) and what had happened on 14 September (page 203). He explained to Ms Oslizlo that he took tablets for gastric reflux and that a side effect was that he needed to use the toilet. He mentioned that he had been given these tablets after having a stomach ulcer and that they were preventative. He had been on the tablets since he started working at the abattoir but there had not been any problem until two weeks ago (page 204). Ms Oslizlo and the claimant discussed whether to put in a complaint or take a different approach of informing Morrisons of the medical problem, and it was agreed that the claimant would get some medical evidence. She also advised him about how to go about applying for a permanent contract so he would be directly employed by Morrisons (page 205).

67. It appears that Ms Oslizlo decided on the latter approach to the respondent because at page 207 she sent an email the same day to Mr Atkinson and Mr Dean explaining that the claimant had stomach ulcers and now needed to take medication daily which required him to visit a toilet between 7.00am and 7.30am. She said that proof from his doctor had been requested.

68. Mr Dean replied on 16 September at page 207 as follows:

> **"I had a conversation with [the claimant] on Monday [14 September] regarding him needing to go to the toilet at this time each day. At no point in the conversation did he mention the [medical condition in your email]. I asked specifically if he had a medical condition such as diabetes.**
>
> **[The claimant's] actual comments were: he is healthy as he does not smoke or drink alcohol, therefore his body works well and he is regular in when he requires the toilet. His pleasure is coffee and therefore by drinking often he requires to go to the toilet at this time each day.**
>
> **I explained to [the claimant] the issues colleagues leaving the shop floor causes and explained that as a manager I would not expect this each day but [it] is acceptable as a one off. I explained the two breaks we have each day and offered advice of trying for the toilet before coming to the shop floor, which would therefore retrain his body cycle/clock.**
>
> **If every member of staff in the department did the same as [the claimant] the department would be unable to function."**

Medical Evidence

69. The medical evidence was provided on 22 September from the claimant's General Practitioner, Dr Biskupiak (page 209). In its entirety the letter said:

> **"This letter serves to confirm that Mr Sliwka suffers from a gastric problem for which he needs to take Lansoprazole 30mg in the morning. This medication improved his symptoms dramatically. Unfortunately the common side effect of this medication is diarrhoea. He needs to visit the toilet frequently.**
>
> **I would appreciate it if you would allow his toilet breaks to be more flexible.**
>
> **Please do not hesitate to contact us if you require more information."**

70. On 24 September the claimant gave a copy of that letter to Ms Oslizlo and on 30 September he gave a copy to Mr Dean.

30 September 2015

71. However, the claimant alleged there were further problems on 30 September. He alleged that Mr Turner insisted that he take a toilet break when he did not need one, and that Mr Dean told him he would not be allowed a toilet break later in the shift. This was a further allegation of discrimination/harassment against Morrisons and we will return to it in our conclusions.

72. Immediately after the shift ended the claimant spoke to Ms Oslizlo again. The transcript of their conversation, approved by the claimant, appeared at pages 228-232. As before it was a discussion conducted in Polish of which the transcript was a translation. The claimant explained (page 228) what had been said to him that day about toilet breaks. He confirmed (page 230) that he had been able to go to the toilet about 20 minutes later but he was still aggrieved that he had been told he would not be able to go. On page 232 the transcript recorded the claimant asking Ms Oslizlo if she would come to a meeting with him to translate for him as his English was not great.

73. That meeting did not happen, but Ms Oslizlo did speak to Mr Dean and Mr Dean confirmed that special arrangements had been made so that the claimant could have toilet breaks as required. His perception was that the claimant became less tolerant of having to wait for a toilet break once he had supplied the doctor's letter. However, there will still situations where the claimant had to wait a few minutes until a colleague became available to cover him to ensure that production was not halted.

Permanent Contract

74. Periodically vacancies for permanent contracts would arise and all agency workers who had been there for more than 26 weeks would be eligible to apply. An application form had to be completed. The claimant applied after speaking to Ms Oslizlo on 15 September. Mr Dean scored each application against certain criteria, which included attendance, attitude to work and attitude to other people. The vacancies were allocated to those agency workers who applied with the highest scores. Those who were unsuccessful had their applications kept on file for when the nest round of vacancies arose. The scoring records were not retained by Morrisons.

75. The claimant was informed on 21 September he had been "skipped over" to the next round of vacancies. On 6 October 2015 the claimant spoke to Ms Oslizlo

about it. The transcript appeared at page 234. The claimant said he had been told by Mr Dean that he would not be getting a contract if he needed the toilet breaks. The reason for the refusal of a permanent contract formed an allegation of disability discrimination against Morrisons and we will return to it in out conclusions.

Claimant's Grievance

76. On 12 October 2015 the claimant submitted a grievance letter in identical terms to both respondents. That addressed to Staffline appeared at pages 216-217, and that addressed to Morrisons at pages 214-215. He said he had been humiliated, bullied and discriminated against. The main problems were described as:

> **"Blocked holidays (every time for Mark Dean submission of an application for leave is negative)**
>
> **Cancelled contract**
>
> **Problems with access to the toilet (despite a letter from your GP)**
>
> **Unequal treatment**
>
> **Paying attention for someone's bad work"**

77. The letter then set out a chronology of events which included references to the comments alleged to have been made by Mr Paton on 12 September and 30 September, and reiterated his allegation that on 6 October he had been told by Mr Dean that he did not get a contract because he went to the toilet.

Morrisons' Response to Grievance

78. Mr Atkinson was appointed grievance manager for Morrisons. He acknowledged the grievance by a letter of 14 October at page 237 and invited the claimant to a meeting on 20 October at which Gaynor Kitson of HR would take notes. The notes of the meeting appeared at pages 242-246. The claimant signed them to confirm that they were an accurate record, although in his oral evidence to this hearing he said that he felt he had no option but to sign those notes. They recorded a discussion about his need for breaks, that he had been refused his permanent contract because of going to the toilet too much, and about the comment he alleged had been made by Mr Paton on 12 September. The claimant was accompanied by his colleague, Mr Reman, who said (page 245) that Ms Oslizlo had done nothing when concerns had been raised with her.

Staffline's Response to Grievance

79. HR at Staffline's Head Office asked Ms Oslizlo to comment on the grievance letter. In an email on 15 October at page 239 she said she had been made aware of some of the issues mentioned in the letter. She confirmed that once the medical position was raised special arrangements had been made. However, the claimant had been not entirely happy because his line managers did not do exactly what he wanted. He was having to go to the toilet at 6.50am not 7.00am. She said she could not influence the decision not to give him a permanent contract.

80. By a letter the following day at page 241 Ms Oslizlo acknowledged the grievance and invited the claimant to a meeting on 22 October. He objected to her dealing with the grievance and by email of 30 October Ms Oslizlo asked the Regional Manager, Mr Heer, to deal with it (page 247).

81. Mr Heer held a grievance meeting with the claimant on 3 November 2015. Notes signed by the claimant appeared at pages 250-255. He chose not to be accompanied at the hearing. There was a discussion about the medication and about the annual leave issue. According to the note the claimant said he had been told that he could not have annual leave due to too many people being off at the same time: he was too late in booking his holiday. There was also a discussion about toilet breaks. He said he had been told ten times every day that he could not go to the toilet. He said that the alleged comments had been witnessed by others but he could not remember their names. He could remember the identity of people to whom he had mentioned the comments but he did not think they would say anything because they were afraid for their jobs. On page 253 the notes recorded the claimant saying that he had mentioned these matters to Ms Oslizo but he did not have any complaints about her. At the end of the meeting he reiterated that Mr Dean had said he did not get the permanent contract because he goes to the toilet.

82. After the meeting Mr Heer spoke to Mr Atkinson. He learned that Mr Atkinson would be able to provide copies of statements from line managers on 11 November.

83. That day Mr Atkinson interviewed Mr Dean, Mr Paton and Mr Turner. He then interviewed Mr Dean again more briefly. The notes of his interviews appeared between pages 257 and 270. Mr Dean denied having said that the claimant was not getting a permanent contract because he went to the toilet. He said there were concerns about the claimant's performance, and that the claimant was negative when challenged about anything. Mr Paton said communication was difficult with the claimant and denied having made any comment about the claimant going to "shit your pants". Mr Turner denied having demanded that the claimant go to the toilet at a particular time but said he might have suggested it if the production line stopped for some other reason.

84. Copies of those interview notes were provided to Mr Heer the same day, and he held a meeting with the claimant on 12 November. Mr Heer's notes of the meeting appeared at pages 271-273. They recorded that the claimant refused to sign the notes because he walked out. The claimant recorded the meeting without telling Mr Heer, and the transcript of his recording appeared at pages 274-278. Mr Heer put to the claimant what had been said in the interviews Mr Atkinson had conducted. According to the transcript the claimant was saying it was discrimination but Mr Heer pointed out that the witnesses denied this. There was discussion of the annual leave point. The meeting ended abruptly.

<u>13 November 2015 – Parkinson Complaint</u>

85. On Friday 13 November 2015 a colleague, Andrea Parkinson, complained to Mr Dean about how the claimant had spoken to her. Notes signed by her appeared at pages 280-282. She had a disagreement with the claimant about whether he was

leaving too much fat on the items coming down the line. She said she had been upset by a comment by the claimant that she should get back in the packing room. She thought she had been doing her job very well that week.

86. Mr Dean also interviewed a Polish colleague, Mr Balmas. His signed interview notes appeared at pages 284-285. He confirmed that the claimant said to Ms Parkinson that she would be better off going back to packing.

87. Mr Dean sent the claimant home the same day. He notified Staffline by email that afternoon at page 290. He provided copies of the two witness statements.

88. The claimant alleged that this was a false complaint which was an act of disability discrimination for which Morrisons was liable, and we will return to that in our conclusions. He believed that Mr Dean had said it was alleged he had used the word "whore". He explained in cross examination that he decided to resign at this point. He composed a resignation letter in Polish over the weekend but it took until Friday 20 November to get it translated into English so he could provide it to Staffline.

Monday 16 November 2015

89. The claimant attended for work as usual the following Monday. Mr Atkinson was surprised at this and emailed Ms Oslizlo to ask why that was so (page 290). So that he did not work with Ms Parkinson he was put into a different department. No-one from Staffline spoke to him about this.

90. That morning Mr Heer sent an internal email about the grievance (page 293). He gave a summary of what had happened on 12 November. He explained that the claimant had walked out of the meeting. His email included the following sentences:

> **"[The claimant] said he was not given the contract due to him being Polish. Morrisons are discriminating against me. I did point out to him that 50% of staff were Polish on the shop floor."**

91. During the afternoon Ms Oslizlo emailed Mr Atkinson. She had read the statements and said that neither of them confirmed that the claimant had been rude or used any vulgar words. She asked why it had been classed as an incident. Mr Atkinson responded about two hours later (page 289). His email mentioned the fact that the claimant felt he had the right to tell a colleague to go back to packing, and that he had said:

> **"I will take it off with a knife."**

92. He asked whether the claimant thought he was running the operation and said he was losing patience and had spoken to Mr Heer about "SSOR".

93. We were satisfied this was a mistaken reference to "some other substantial reason" or "SOSR", being a shorthand reference to a procedure by which Morrisons could inform Staffline that a particular worker was no longer to be assigned to it. Mr Heer confirmed that any discussion with Mr Atkinson had been in general terms and

he did not recall the claimant personally having been mentioned. In any event no steps were taken to pursue that prior to the claimant's resignation.

Week of 16 November 2015

94. The claimant alleged that during the week of 16 November when he was working in a different department some colleagues, "Andrew" and "Matthew", made comments to him such as "hurry up, best run before you shit yourself". This was his final allegation of harassment against Morrisons and we will return to it in our conclusions.

95. On Thursday 19 November Ms Oslizlo handed to the claimant a letter from Mr Heer at page 295. He invited him to a meeting on 24 November 2015 to resolve his grievance. She handed the letter to him in a sealed envelope.

96. He brought it back the next day and said he was not accepting it but instead was resigning. His resignation letter appeared at page 296. In its entirety it read as follows:

> **"I am writing to inform you that I am resigning from Staffline Group PLC with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract.**
>
> **I feel that I am left with no choice but to resign in light of all of the following:**
>
> - **Discrimination because of my illness**
> - **The lack of any reaction to my employer for discrimination**
> - **Blocked holidays**
> - **Cancelled contract**
> - **Problems with access to the toilet (despite a letter from your** [sic] **GP)**
> - **Lack of response to my complaint lodged on 12/10/2015**
> - **Humiliation, psychological bullying and unequal treatment**
>
> **I consider this to be a fundamental breach of the contract on your part.**
>
> **The last straw overflowed event** [sic] **of 13/11/2015 when my desire to help another co-worker complex [**sic**], manager Mark Dean (the person to which I made the above-mentioned complaint) reacted bringing the case to office personnel and Staffline. Reasons for his reaction but I do not know I can guess.**
>
> **I feel and I'm humiliation, psychological bullying and unequal treatment [**sic**]. This situation cannot bear mentally, my loved ones suffer from it as well.**
>
> **You don't leave me no choice as to my reaction.**
>
> **At the same time please pay me the equivalent for overdue holiday. I would ask as soon as possible send me P45.**

I appreciate the time and energy which you have invested in training me. I believe that the skills which I have learned will serve me well in the future."

Submissions

97. At the conclusion of the evidence each party made an oral submission.

Second Respondent's Submission

98. On behalf of Morrisons Ms Ferber firstly addressed the question of disability. She suggested that there was no medical evidence to support the claimant's account of the symptoms from which he would suffer according to his disability witness statement at page 59. The GP had not said anything about the level of pain or the symptoms even in the questionnaire reply to Staffline (page 60). There was insufficient information for the Tribunal to be satisfied that the claimant was a disabled person.

99. Ms Ferber then addressed each of the allegations made against her client in the table annexed to the Case Management Order. She accepted that the comments allegedly made by Mr Paton on 12 September 2015 could be related to disability, but invited us to conclude on the facts that it had simply not been said. He did not know the claimant had a medical condition and a comment of that kind made no sense. As for the allegation against Mr Dean on 14 September, the words used were broadly in agreement but there was no evidence that it had the proscribed effect on the claimant's environment. Even if it did, subjectively it was not reasonable for it to have that effect given that Mr Dean did not know (on his case) that the claimant had a medical condition.

100. In relation to toilet breaks, Ms Ferber emphasised that the respondent's knowledge came only from the GP letter at page 209 which did not say that a toilet break had to be allowed urgently or immediately. It was about the frequency of such breaks not the urgency. Therefore even if there was a substantial disadvantage her client did not have any knowledge of it. Further, it was clear that the claimant was allowed breaks throughout the period once cover was arranged, and the significance of the GP letter had only been to reassure management that there was a genuine reason for the extra breaks he needed. It was submitted that there had been no failure to make reasonable adjustments.

101. The discussion on 30 September was said to be a misunderstanding by the claimant of what he was being told. The refusal of the permanent contract was not in any way related to disability: the reasons given by Mr Dean for scoring the claimant related to performance and conduct, and it was denied that any comment linking that issue to toilet breaks had been made on 6 October. The scoring had been done before Mr Dean knew that the claimant had a medical problem.

102. The claimant was not given an outcome to his grievance simply because he was an agency worker, although that fact had not been appreciated at first and the matter had not been directly communicated to the claimant. There was no disability discrimination.

103. The alleged false complaint of 13 November was a genuine complaint. Mr Dean had emphasised how upset Ms Parkinson had been. There was no evidence to support the conclusion of the claimant that he had been "set up". That was speculation.

104. Finally, in relation to the alleged comments in the final week of employment the claimant had not identified precisely who he was complaining about and Mr Dean had done his best to investigate. There was insufficient evidence to support a finding in favour of the claimant, particularly where the alleged perpetrators (whoever they were) would not have known that the claimant had a medical problem, making that kind of comment inexplicable.

105. Accordingly we were invited to dismiss all the complaints against Morrisons.

First Respondent's Submission

106. On behalf of Staffline Miss Johnson reiterated what had been said about disability by Ms Ferber, and also emphasised that the claimant had been keen to restrict the questions put to his GP in the case management process.

107. Turning to the matters identified in the table annexed to the Case Management Order, Miss Johnson emphasised the difficult position that her client was in; it wanted to keep its employees happy but also had to be sensitive to the needs of a major client. The annual leave issue had been raised by email and there was no breach of trust and confidence in the fact that it was not pursued any further after that. It had been raised with Staffline too late for skilled knife operative cover to be arranged so that the claimant could have that leave. Similarly with the allegation about missing annual leave forms, all Staffline could do was advise the employee to put them in once again.

108. In relation to toilet breaks Miss Johnson submitted that Ms Oslizlo had done all she could. When the claimant first told her there was a medical issue she informed Mr Dean immediately before medical evidence was obtained, and then took the matter up once the GP report arrived. Mr Dean told her that arrangements were in place. She had tried to protect the claimant by not copying the medical report to Morrisons herself because of the reference to diarrhoea, which could have resulted in the claimant being excluded from work. The day-to-day organisation of the shift was a matter for the line leaders and Mr Dean, not a matter for Ms Oslizlo. There was a difficult balancing act to be undertaken and no unlawful conduct.

109. In relation to the permanent contract the evidence showed that Staffline had done what it could to help the claimant, but it had no say over who was awarded a permanent contract or not. The position was clear from Ms Oslizlo's email of 15 October at page 239.

110. In relation to the grievance the position was simply that the claimant would have been given a written outcome to the grievance which would have addressed all the points made had he not aborted the process by walking out of the meeting on 12 November and then resigning rather than attend the meeting planned for 24

November. It was unfortunate that Staffline's HR Department had decided not to issue a written confirmation to the claimant of the position after he resigned, but that was not in any way disability discrimination. Indeed, the claimant had decided to resign over the weekend of 14 and 15 November, having misconstrued what had been said to him on 12 November about not being given copies of the statements taken by Morrisons.

111. Finally in relation to the move on 16 November that was not a move of departments but simply a move within the same department and therefore not something which Staffline knew about. There was no reason for Ms Oslizlo to know about it and therefore not possible for her to have spoken to the claimant about it. It was in any event only a temporary move pending the investigation into the allegations made against the claimant.

112. Miss Johnson therefore invited us to dismiss all the complaints against Staffline.

Claimant's Submission

113. The claimant began his submission by emphasising that he was not a lawyer, and then identifying a number of instances where there was incomplete evidence due to the respondents. He mentioned the lack of any written evidence of what happened about the issue in September from Mr Balmas, the absence of any CCTV which would have shown managers speaking to him, and the absence of any telephone records to back up claims made by the respondents about speaking to each other on the telephone. The scoring allegedly conducted by Mr Dean in September 2015 was missing, as was any note of the discussion he had with Mr Dean on 13 November about the Parkinson complaint when he was told that it was alleged he had used the word "whore".

114. Having made those preliminary points the claimant then addressed the issues for the Tribunal to determine. He invited us to accept his evidence about the pain and symptoms he would suffer from if he stopped taking his medication. He said that Ms Oslizlo should have done more about annual leave as she knew how important it was to him to be able to get his son from Poland. More could have been done about the missing leave applications, and the only record of any action by Ms Oslizlo over toilet breaks was the one email which got an unsympathetic response from Mr Dean. He invited the Tribunal to conclude that there had been no telephone discussions after that between Ms Oslizlo and Mr Dean.

115. The claimant was critical of Ms Oslizlo for not reacting when he told her on 6 October that Mr Dean had said that there was no permanent contract because of toilet breaks, and he emphasised how unsatisfactory the handling of his grievance had been. There was no misunderstanding: on 12 November Mr Heer had told him there would be no written answer to his grievance. The later reference to "SOSR" showed that in fact the grievance was being swept under the carpet because he was going to be managed out. That was also evident in the fact that there was no discussion with him about the move on 16 November 2015.

116. As for his case against Morrisons, he accepted that the harassment allegation on 12 September was one person's word against another, but emphasised again that CCTV would have shown him having a discussion with Mr Paton that day. As for 14 September Mr Dean accepted the words he used. The events of 30 September made no sense in that Mr Turner maintained that the claimant had been aggressive when he called Mr Dean over but that he did not tell Mr Dean that. He invited us to conclude that this event had happened as he alleged. It was also his case that toilet breaks had not been allowed as and when he needed them but he had been made to wait for excessive periods.

117. In relation to the permanent contract he emphasised that here was no evidence of any concerns about performance or behaviour prior to the grievance interviews of 11 November, and the real reason was what Mr Dean told him on 6 October. Morrisons should have dealt with his grievance: it would be a ridiculous situation where he had to bring a grievance to the agency as his employer but his employer was not allowed to interview the people about whom he was complaining.

118. In relation to the complaint on 13 November he invited us to conclude that he had been set up by being made to work between Ms Parkinson, who did not like him, and Mr Balmas with whom he had had the disagreement in September, and that Mr Balmas owed Mr Dean a favour from that meeting because no action had been taken against him over the September incident. The suggestion that he had used the word "whore" had no basis and was a false allegation. Once he was moved he was subjected to the comments that he alleged even though he did not know whether the perpetrators knew of his illness.

119. For those reasons the claimant invited the Tribunal to uphold all his complaints.

Discussion and Conclusions - Introduction

120. The List of Issues annexed to this judgment and reasons sets out the legal issues for the Tribunal to determine under each separate head of claim against each respondent. Had all parties been legally represented the List of Issues would have been used during the hearing. However, as the claimant was representing himself in practice the hearing was based on the tables set out in the Case Management Order of Employment Judge Slater, which served as a framework for the oral evidence and for legal submissions at the conclusion of the hearing. We decided to take the same approach in our deliberations, although we had regard to the List of Issues to ensure that all the points which needed to be addressed were covered.

121. Further, we decided to deal with the constructive unfair dismissal complaint last, and instead to deal with the allegations under the Equality Act 2010 first. In broad terms, therefore, the Tribunal began by considering whether the claimant was a disabled person under the Equality Act 2010, then moved to consider each of the factual matters on which allegations of discrimination were made, dealing with Morrisons and then Staffline, and then finally considered the constructive unfair dismissal complaint against Staffline That explains why the structure of our conclusions differs from the List of Issues.

Discussion and Conclusions - Disabled Person?

122. The first matter the Tribunal considered was whether the claimant was at the material time a disabled person within the meaning of the Equality Act 2010. The factual information before us was found in the claimant's disability witness statement at page 59, a medical report from his GP of 23 May 2016 at page 57, and a questionnaire completed by the GP at pages 60-63. There was also a questionnaire from the claimant at pages 66-67 which added a little more detail to the impact statement.

123. We were satisfied that the claimant had a physical impairment in the form of a stomach condition. The GP confirmed a diagnosis of dyspepsia, epigastric pain, bloating and heartburn (page 60). The phrase "gastric problem" was used on page 57.

124. In assessing whether the impairment had a substantial adverse effect on the ability to carry out normal day-to-day activities the Tribunal was required to ignore the effect of measures such as medication. The question for us was how the claimant would be if he ceased to take the Lansoprazole taken once a day which was a lifelong prescription. In cross examination the claimant was not challenged by either respondent on the account he gave at page 59, and we accepted it. We found as a fact that if he ceased to take the medication he would be left with a daily severe pain in his stomach which would leave him incapacitated for a period of 4-6 hours. The claimant described in his statement how he would have to "just lie down and wait" until the level of stomach acid fell and he could resume his normal activities. That period of incapacity would be likely to recur each day and is therefore treated as continuing. In our judgment it was not minor or trivial and therefore substantial.

125. Finally, that adverse effect was long-term. The symptoms began in 2012 and we accepted the evidence that they would return now if medication were no longer taken. Without medication, therefore, they would have lasted for well over 12 months.

126. The Tribunal therefore concluded that the claimant was at the material time a disabled person by reason of a gastric problem.

Discussion and Conclusions - Disability Discrimination – Morrisons

127. The Tribunal then addressed the allegations of harassment, discrimination or victimisation by Morrisons.

<u>Annual Leave 4 September 2015</u>

128. In the course of his oral evidence the claimant accepted that the refusal of his request for annual leave on 4 September 2015 had nothing to do with his medical problem and therefore the complaint that this was discrimination arising from disability was no longer pursued.

11 or 12 September 2015 – alleged Paton comment

129. This allegation of harassment turned significantly on a dispute of fact about whether Mr Paton made a comment to the effect that the claimant could "go and shit your pants". It is necessary to put this into context.

130. The claimant had moved to the leg lines as a skilled knife trimmer at the start of 2015. His role could only be covered by someone who also had knife skills. There was no trace of his need for toilet breaks becoming a problem until late August when Mr Paton and Mr Turner consulted Mr Dean about it. It seemed that the difficulty of providing cover became more acute in the summer months when others were on holiday. However, it was clear that as at 12 September no one had been informed that the claimant had a medical reason for the toilet breaks which he needed.

131. The Tribunal had no evidence other than the allegation made by the claimant and the denial from Mr Paton. Neither of the witnesses gave their evidence in a way which enabled the Tribunal to say that they were not being truthful. Mr Paton admitted that there was a discussion when interviewed by Mr Atkinson but it was clear he did not accept having used that language.

132. The claimant did not mention this incident to Mr Dean when they spoke on Monday 14 September, the first working day after this alleged incident. He first raised this allegation on Tuesday 15 September when he spoke to Ms Oslizlo (page 203)[3]. He said that he asked Mr Paton if he could go to the toilet and was told not, and when he asked what he was supposed to do the answer was "now make shit".

133. The allegation was repeated in his grievance at page 214, and he related the incident to Mr Atkinson again at their meeting on 20 October as recorded at page 243. Although there were some differences in the precise wording he ascribed to Mr Paton, we disregarded these as we were satisfied they could be explicable by the language difference.

134. Equally, however, Mr Paton was consistent in his denial that the conversation occurred. He was first informed of this when interviewed by Mr Atkinson on 11 November, and the note at page 261 recorded him denying having said the claimant could not go to the toilet (rather, he said he asked the claimant to finish some other work first), and when asked why the claimant would make the allegation he said he did not know. In cross examination he told our hearing that he had not used those words and never would.

135. The claimant was concerned by the absence of any CCTV footage. It appeared that by the time he made a formal request for this it had been destroyed, being automatically overwritten after 30 days. However, the unchallenged evidence from Morrisons' witnesses was that the footage showed images only, not sound, and

[3] Although the claimant said this happened on 12 September in his grievance at page 214, he told Ms Oslizlo in their meeting that it happened the previous Friday –i.e. 11 September.

therefore at best would only have shown a discussion between the claimant and Mr Paton, not assisting with what might actually have been said.

136. The claimant relied on the delay between his grievance of 12 October and the interviews on 11 November as evidence of collusion, meaning that the responses gained by Mr Atkinson were not genuine. We rejected that. The delay was explained by the fact that Mr Atkinson mistakenly thought he had to deal with the grievance, and met the claimant on 20 October, before being told by his manager that the grievance was for Staffline to address as they employed the claimant. The delay was explained by the matter being passed back to Ms Oslizlo, and her asking Mr Heer to deal with it by email of 30 October at page 247. Mr Heer then asked Mr Atkinson to interview Morrisons' staff before meeting the claimant on 12 November. Those interviews were carried out by Mr Atkinson on 11 November. The passage of time did not support the claimant's case on this point.

137. Ms Ferber relied on the fact that Mr Paton did not know that the claimant had a medical problem as making it less likely that he would have made a comment of this kind. We rejected that argument. It might be thought that a comment of this kind was more likely if the manager did not know about a medical problem than if he did.

138. We also took into account our concern about the claimant's denial of having been given the grievance invitation letter the day before he resigned. We accepted the evidence of Ms Oslizlo that he was handed the letter on 19 November 2015 but then brought it back the following day. She made an endorsement to that effect on 20 November on the letter itself (page 295). His denial of this caused us to doubt his reliability, although of course the fact a witness is wrong about one matter does not mean he is wrong about everything.

139. Putting these matters together we concluded that the claimant had failed to prove that the comments were made by Mr Paton. It was simply one person's word against another's. Both witnesses were broadly consistent but the claimant had not been a reliable witness as to the letter of 19 November. Nor had he mentioned this to Mr Dean on 14 September. There was a discrepancy in his account of the date it happened. Accordingly the balance of probabilities favoured Mr Paton's account. The Tribunal concluded that the comment had not been made.

140. Had we found as a fact that the comment had been made by Mr Paton we would have found that it constituted harassment related to disability. It would have been unwanted conduct for the claimant, and even though Mr Paton did not know of the disability the comment would have been related to it because the need for the toilet was a consequence of medication the claimant took because of his disability. We were also satisfied that even a single comment of that kind would have created an intimidating or offensive environment for the claimant, being a comment made by a manager on the shop floor about a personal and embarrassing matter which would have indicated a lack of regard by the manager for the wellbeing of the employee.

14 September – Mark Dean

141. It was common ground that the claimant and Mr Dean had a discussion on 14 September and that Mr Dean made a comment about his own children and toilet breaks in the course of that discussion. However, there was a potentially significant dispute of fact as to whether the claimant informed Mr Dean in that discussion that there was a medical reason for his toilet breaks. On the balance of probabilities we concluded this had not been mentioned by the claimant. When the claimant spoke to Ms Oslizlo the next day (page 203) he told her that when Mr Dean asked him if he had a problem, his reply was that he did not have a problem. He did not tell Ms Oslizlo that he had explained the medical position to Mr Dean.

142. The email exchange on page 207 occurred a day or so after that discussion. Ms Oslizlo emailed Mr Dean to tell him of the medical position, and Mr Dean's reply was adamant that no medical problem had been mentioned by the claimant. In his oral evidence to our hearing Mr Dean was very clear that he had specifically asked the claimant if there was a medical reason (having in mind diabetes or something similar) but was told this was not the case. There was no record of this conversation kept by the claimant.

143. Accordingly we found that the medical position had not been mentioned by the claimant on 12 September 2015.

144. The comment which Mr Dean accepted he made was that his children could manage trips to the toilet in (school) break times and therefore the claimant ought to be able to do the same. The claimant's first account of that discussion was in his meeting with Ms Oslizlo the following day, the English translation of the Polish transcript appearing at page 203. There the claimant said:

> **"He told me that his kids can hold it when they need a toilet."**

145. The precise wording remained unclear but the gist of the comment was plain. The claimant alleged it was disability-related harassment.

146. We were satisfied that this comment was unwanted conduct. The claimant did not want to be unfavourably compared with a child in relation to control over his need for toilet breaks.

147. The second question was whether the comment was related to the claimant's disability. As explained above we were satisfied that Mr Dean did not know that there was a medical reason for the situation. Indeed, he had been assured just the opposite by the claimant. It appeared to Mr Dean that the cause was the drinking of coffee before the shift started. However, even though Mr Dean did not know it, the need for toilet breaks was a consequence of the medication the claimant took for his disability. In that sense the comment was related to his disability.

148. We were satisfied that Mr Dean did not have the purpose of creating an intimidating, hostile or degrading atmosphere for the claimant. The question was whether his comments had that effect in any event. We noted that the claimant did not refer to this comment in his formal grievance of 12 October at page 214. Further,

Mr Dean told us in evidence that the claimant did not show any signs of being embarrassed or upset by the discussion. Finally, we noted that under section 26(4) the Tribunal must have regard to whether it is reasonable in all the circumstances for the conduct to have the proscribed effect. We were satisfied it was not reasonable for this comment to have that effect in this case. From Mr Dean's perspective there was no good reason why the claimant could not modify his coffee intake to avoid disrupting the shift by an unnecessary toilet break. Although a comment effectively comparing the claimant to a child might have been ill advised, in the context of a manager concerned to minimise disruption to production it could not reasonably be seen as having the effect of creating a humiliating or offensive environment, particularly when the discussion occurred in a side area away from the main production area.

149. For those reasons we rejected the contention that this discussion amounted to unlawful harassment of the claimant.

Toilet breaks – reasonable adjustments

150. The Tribunal had a good deal of evidence about the practice in relation to toilet breaks. We concluded that the position was as follows. Prior to the claimant reporting any medical issue on 15 September, management were unaware that there was a medical need behind his request for breaks outside formal break times. Nevertheless, we concluded that efforts were made to accommodate those breaks when a request was made. A toilet break would take at least 20 minutes, and if someone else had just gone on a break it might mean waiting for 20 minutes before the claimant could go.

151. The position became more difficult in the summer of 2015 when people were on annual leave and it was therefore more difficult to arrange cover. Concerns had been expressed about the effect of these breaks by Mr Turner and Mr Paton at the end of August. However, the claimant confined his allegation to the period after he reported his medical position to the respondents. Although he maintained it had been reported to Mr Dean on 14 September, for reasons set out above we concluded it was reported the following day. In that period, when the respondent knew that the claimant had a disability, we were satisfied that the position in relation to toilet breaks remained the same. The claimant was still not granted a toilet break immediately on request, but had to wait until cover could be put in place so that the production line was not halted unnecessarily.

152. Applying the legal framework to those findings of fact we concluded as follows.

153. Firstly, Morrisons had applied a provision, criterion or practice that outside formal break times, a toilet break would only be permitted once cover had been arranged.

154. The next question was whether that PCP put the claimant at a substantial disadvantage, meaning a disadvantage that was more than minor or trivial. We noted that the medical position did not change in mid September; all that changed was the

respondent's knowledge of it. The GP report did not say that the claimant would need to go to the toilet urgently. The claimant himself told Ms Oslizlo on 15 September (page 204) that he would need to go to the toilet between 7.00am and 7.30am. He did not say that he needed to go to the toilet at very short notice, and that a brief delay would be impossible. Further, there was no evidence of the claimant suffering from an episode of incontinence when denied a break on request. Putting these matters together we concluded that the disadvantage to the claimant in having to wait up to 20 minutes before a toilet break was not a substantial disadvantage. He would know when his toilet break should happen and was able to make his request in good time to avoid any difficulty. Accordingly the duty to make reasonable adjustments to the PCP had not arisen.

155. Even if we were wrong about that the complaint would still have failed because neither respondent knew or could reasonably have known of a substantial disadvantage to the claimant. It was not made clear to the respondents that he needed to be able to go immediately. The medical evidence did not mention that requirement.

156. Further, even if that had been a substantial disadvantage known to the respondents we were satisfied that allowing him to take a toilet break on demand would not have been a reasonable adjustment. There were very good reasons why the production line had to be kept in operation as far as possible, and allowing a skilled knife operative to leave the line immediately without cover being arranged went beyond what would have been reasonable for Morrisons given the nature of the work and the fact that others would be unable to carry on with their work if the production line came to a halt.

157. For those reasons we rejected the complaint of a breach of the duty to make reasonable adjustments.

<u>30 September 2015 Turner/Dean comments</u>

158. The claimant alleged that he was subjected to harassment, direct discrimination, and discrimination arising from his disability on 30 September 2015 in that Mr Turner approached him and insisted that he go to the toilet, but when the claimant said he did not need to go at that time Mr Turner said there would not be a break later in the shift. When the claimant refused to go he alleged Mr Turner called Mr Dean over and that Mr Dean reiterated that there would be no toilet break later in the shift.

159. Mr Turner explained that this occurred on a day when the production line stopped for some other reason shortly before 7.00am, and being aware of the claimant's needs he approached the claimant and suggested the claimant should take a break now. His evidence was that the claimant became aggressive when refusing this, so Mr Turner involved Mr Dean but did not tell him about the aggression, simply about the toilet break issue. The claimant suggested that it was simply implausible that Mr Turner would not have told Mr Dean he was being aggressive if that were true, but we rejected that. We were satisfied that the line leaders, Mr Turner and Mr Paton, wanted to be seen to be managing the workforce

themselves rather than running to Mr Dean each time there was a problem. Further, it would not have been in the interests of the claimant for Mr Dean to have been informed that he had responded inappropriately.

160. More broadly the Tribunal found as a fact that the claimant had misunderstood what had been said to him, failing to appreciate that this was a helpful step by his line leaders. It was much less disruptive for him to take a toilet break whilst the line was stopped for other reasons than for a toilet break later on to require them to find cover. Mr Turner and Mr Dean were simply pointing out that it would be easier to have a break at that stage than later on. We rejected the case that there was a any ban on a break later on in that shift.

161. Accordingly this did not constitute a detriment, and therefore the complaints of direct discrimination and of discrimination arising from disability failed. We also rejected the contention that it could amount to disability related harassment. If it was unwanted conduct that was a misunderstanding on the claimant's part, and in all the circumstances it was not reasonable for him to view this treatment as creating an intimidating, humiliating or offensive environment for him.

162. The complaints in relation to this matter therefore failed.

Refusal of permanent contract

163. Although the scoring sheets had not been retained and produced by Morrisons, Mr Dean explained that the process for assessing which agency workers would be offered a permanent vacancy was done by means of scores against a series of criteria. Those applicants with the highest scores would be offered the available vacancies and the remaining applications kept on file for next time round. Importantly, Mr Dean explained that by the time of the incident on 23 September Mr Balmas had been given a permanent contract in the same exercise as that in which the claimant made his application.

164. Although Mr Dean said that he would have completed the scoring for the claimant some six weeks before mid September, we concluded from the contemporaneous documentation that could not have been correct. The claimant was not aware that he had to complete an application form until he spoke to Ms Oslizlo on 15 September (page 205). He submitted his application two days after that, as confirmed by Mr Atkinson when he interviewed Mr Dean on 11 November (page 256). The claimant was informed on 21 September that his application had not been successful and that he was "skipped" over to the next set of vacancies. Accordingly we concluded that Mr Dean must have scored the claimant between 16 and 21 September.

165. In that period, Mr Dean was aware that there was a medical reason for the claimant's toilet breaks. The question was whether that had influenced his scoring of the claimant.

166. We took account of the claimant's allegation that on 6 October Mr Dean told him that he would not get a permanent contract if he was going to the toilet. That

was something which the claimant said he had reported to Ms Oslizlo that same day. An English translation of the recording of the discussion in Polish appeared at page 234, but it was unclear whether the claimant had made those comments to Ms Oslizlo or to the third person present in that discussion, to whom he immediately pointed out Ms Oslizlo. Mr Dean denied having made any such comment. There was no corroborating evidence of any kind. We found that it had not been said by Mr Dean.

167. Despite the absence of any records, the Tribunal concluded that Mr Dean scored the claimant at a lower level than other applicants because of concerns about the claimant's behaviour. Mr Dean was able to give examples when cross examined. He explained that in dealing with “blue leg meat” the claimant had been removing meat not just the membrane, and Mr Dean had asked Mr Paton to show the claimant what to do. He took longer to get up to speed than others. Mr Dean also gave an example of how the claimant would regularly question why he was being asked to move to a different role on the production line when the need arose. It meant the managers were drawn into giving him an explanation, when time did not really permit that.

168. We rejected the claimant's argument that there cannot have been such concerns because nothing had been put to him in writing. It is entirely possible for such matters to be managed informally by the line leaders and by Mr Dean without reaching formal disciplinary proceedings, but still to be a genuine consideration when the suitability of a candidate for a permanent contract is assessed.

169. Accordingly we concluded that the refusal of the permanent contract was not connected in any way to toilet breaks or the underlying disability and the complaints of disability discrimination failed.

Outcome to grievance

170. When the claimant lodged his grievance he sent it not only to Staffline but also to Morrisons. Mr Atkinson thought that Morrisons ought to deal with it. He invited the claimant to a meeting on 20 October. However, we accepted the evidence of Ms Russell that subsequently Mr Atkinson and the HR officer, Ms Kitson, were questioned by their manager, Mr Leckey, as to why they were dealing with a grievance from an agency worker. They were told to pass the grievance to Ms Oslizlo at Staffline. That happened, but there was then a further delay whilst Ms Oslizlo arranged for Mr Heer to deal with it when the claimant objected to her involvement.

171. Mr Atkinson became involved once again when he conducted on behalf of Mr Heer the interviews with the managers on 11 November.

172. We were satisfied that it should have been explained to the claimant that Morrisons could not deal with his grievance because he was not their employee. He was entitled to think that they would deal with it once it had appeared that Mr Atkinson had taken it up. To that extent his concern was understandable. However, we were satisfied that this was a consequence solely of his status as an agency

worker and had nothing to do with his disability. The complaints of direct disability discrimination and discrimination arising from disability failed.

173. Further, the position would have been exactly the same had his grievance not contained an allegation of a breach of the Equality Act 2010. The fact he made such an allegation had no material influence on the decision to let Staffline deal with the grievance. The complaint of victimisation therefore failed as well.

<u>False complaint – 13 November 2015</u>

174. This allegation had two elements. The first was that the complaint was a false one which management had set up by deliberately putting the claimant to work between Mr Balmas, with whom he had had a disagreement in September in which he maintained Mr Balmas had threatened violence against him, and Andrea Parkinson, who was a person the claimant believed did not like foreigners and did not like him. We rejected that contention. Mr Dean explained that he did not know there had been any threat of violence in the September incident between the claimant and Mr Balmas. Neither of them had complained about the other: management had seen them arguing and had intervened. He was unaware of any reason for Ms Parkinson not to like the claimant and the claimant did not put any reason for him to know that to him in cross examination. We were satisfied that there was no attempt to set the claimant up or to make his working environment difficult.

175. Further, we accepted the evidence of Mr Dean that Ms Parkinson was genuinely upset when he interviewed her. She signed the notes of which the typed transcript appeared at page 279. It made clear how she was upset, that the claimant had said to her that she should return to the packing department (which was less skilled) and he would use his knife to do the work which she was meant to do with the machine. Accordingly we rejected the contention there was any false complaint by Ms Parkinson or any complaint engineered by management.

176. The second element arose out of the claimant's understanding that when he was first spoken to by Mr Dean on the day in question he was told that it was alleged that he had called Ms Parkinson a "whore". It appeared that the claimant believed it was put to him in a brief initial meeting with Mr Dean and a representative of Staffline, although he did not specify who that was in paragraph 23 of his witness statement. His belief that this was part of the allegation explained why the email from Ms Oslizlo on 16 November at page 289 made the point that neither of the statements from Ms Parkinson and Mr Balmas said that the claimant had been rude to her and that he had not used any vulgar words. The claimant alleged that the "whore" insult had been falsely introduced by management and that this was unlawful.

177. However, Mr Dean and Mr Atkinson both denied that any such allegation had been made. There was no trace of it in the written statements taken from Ms Parkinson and Mr Balmas. On balance we concluded that this was a misunderstanding by the claimant, which he passed on to Ms Oslizlo, hence her email at page 290.

178. Further, even if that word had been used by management, there was no evidence from which we could conclude that it was in any way related to his disabling medical condition.

179. The allegation that there was disability discrimination by Morrisons in relation to the complaint of 13 November 2015 therefore failed.

Week commencing 16 November

180. The claimant alleged that he was subjected to harassment relating to his disability in comments made by his new colleagues in the work area to which he had been moved. However, he was unable to be specific as to who those colleagues were. He named them as "Andrew and Matthew", but did not identify their surnames or whether they were employees of Staffline or Morrisons.

181. Morrisons investigated this once the claim form was received and Mr Dean explained in his witness statement how Andrew Webb and Matthew Redmond, who worked in the intake/bone chiller section in November 2015, had no knowledge of the claimant working there, no knowledge of his condition and would not have made comments of that kind. Similar enquiries had been made of two Polish employees, Andrzej Czarnowski and Matteuesz Pluwak, who both denied that the claimant had worked in their department or that they had made such comments.

182. Without some evidence as to the identity of the individuals concerned, and whether they were employees of Staffline or Morrisons, the Tribunal concluded that the case had not been proven against either respondent and therefore this allegation failed as well.

183. It followed that all the allegations of disability discrimination, harassment and victimisation brought against Morrisons failed and were dismissed.

Discussion and Conclusions – Complaints against Staffline

184. In this section of our reasons we address each of the six matters which formed the basis of complaints against Staffline. After determining the relevant facts we consider whether the events amounted to disability discrimination, and/or whether they amounted in isolation to a breach of trust and confidence. It was also necessary after that exercise to consider whether taken together they amounted to a breach of trust and confidence.

Leave application

185. The claimant first raised with Staffline the problem about being refused annual leave for 4 September in a meeting on 20 August. The transcript of the recording appeared at pages 180-189. It was agreed that Ms Oslizlo would take that up by email with Morrisons, and she did so the same day at page 190. The response from Mr Dean came back after the weekend. He explained that the holidays were fully booked for knife skilled colleagues and that Staffline would have to arrange a skilled replacement in order for that holiday to be granted. Ms Oslizlo explained that it was too short notice to arrange a skilled replacement. The matter could have been

resolved had the claimant come to Staffline earlier about the need for holiday on those dates.

186. We concluded that there was reasonable and proper cause for Staffline to take no further action. Morrisons was a major and important client. The position had been queried once and a proper response obtained. It was pointless to challenge it further unless a replacement could be found. Accordingly in isolation the failure to write a further letter did not amount to a breach of trust and confidence. It was entirely understandable and proper that Staffline took it no further.

Missing annual leave requests

187. It was not clear at all when the claimant informed Staffline that annual leave forms he had submitted to Morrisons had been lost. His witness statement (paragraph 5) asserted that a request made in July 2015 for annual leave in February 2016 had not been the subject of any response. In the meeting on 20 August (page 184) there was discussion of forms having been supplied, but the discussion moved on to the specific request for 4 September 2016. In the absence of any clear complaint from the claimant with specific details if was difficult for Staffline to do anything about it, and in any event there would be reasonable and proper cause for simply suggesting to the claimant that he submitted the forms again if they had been lost. In those circumstances the failure of Staffline to do anything further fell a long way short of being a breach of trust and confidence.

Toilet breaks

188. The allegation against Staffline was that from 15 September it failed to do enough to enable the claimant to take toilet breaks as and when he required. It was evident that Staffline was unaware that there was a medical issue until 15 September. Action was then taken promptly to notify Morrisons that there was a medical issue (page 207) as a holding measure whilst medical evidence was obtained. Ms Oslizlo followed that up with a telephone call to Mr Dean on 16 September. We rejected the claimant's argument that such calls could not have occurred without a copy of the telephone bill to confirm it. We accepted the evidence of Mr Dean and Ms Oslizlo about that.

189. When the GP letter at page 209 arrived, Ms Oslizlo had a meeting with the claimant on 30 September. She learned that the claimant had already given a copy of the report to Mr Dean. She had been planning not to do that because of the reference in it to diarrhoea, which would be a particular concern in a food environment. In any event Mr Dean confirmed in his witness statement (paragraph 43) that he and Ms Oslizlo then spoke to confirm the arrangements going forward in the light of the medical evidence.

190. More specifically, when the claimant first reported the problem on 15 September he made reference to the problem in getting toilet breaks and to the comments which he said had been made. The transcript on page 204 recorded a discussion between himself and Ms Oslizlo about whether to put in an official

complaint or take a different approach by obtaining medical evidence. The latter approach was the one that was chosen.

191. It followed that Staffline had done all it reasonably could to ensure toilet breaks for the claimant. Morrisons was notified immediately of the medical problem and medical evidence was obtained fairly swiftly. Staffline then contacted Morrisons to discuss the arrangements required and these were agreed. We rejected the contention that this could amount to a breach of trust and confidence. There was reasonable and proper cause for Staffline to deal with it in this way.

192. Further, we rejected the contention there was any failure to make reasonable adjustments in this respect. We addressed that in relation to Morrisons above. This allegation of disability discrimination failed.

Permanent contract

193. The claimant alleged that the failure of Staffline to challenge Morrisons over the refusal to give the claimant a permanent contract was a breach of trust and confidence, direct disability discrimination, discrimination arising from disability and/or victimisation.

194. Morrisons was a client of Staffline. Ms Oslizlo explained at the time (page 239) and in evidence to our hearing that Staffline had no influence over Morrisons in that respect. Further, she was aware that there were some concerns about the claimant's behaviour. She had been copied into emails about the incident between the claimant and Mr Balmas on 23 September (page 212). She had also noticed an increase in his level of absence from work since May 2015. She regarded his behaviour and attitude towards other workers as below the level required, and had been dragged into defending him.

195. In those circumstances her decision not to challenge Morrisons over the refusal to give him a permanent contract was entirely understandable and reasonable. Accordingly we concluded that the decision not to challenge Morrisons on this issue did not breach trust and confidence.

196. In reaching that conclusion we rejected the contention that she was aware that the claimant was saying that Mr Dean told him he would not get a permanent contract with the toilet breaks. The transcript of the discussions on 6 October at page 234 was very unclear, and it did not establish that the claimant had made his comments to Ms Oslizlo as opposed to the third party involved. Her evidence was that she did not recall this allegation having been raised by the claimant. We found it had not been raised with her.

197. Nor was the failure to challenge Morrisons less favourable treatment because the claimant was a disabled person or for a reason which arose in consequence of his disability. The reason was because of the commercial relationship between Staffline and Morrisons. It had nothing to do with the allegations he made by way of protected acts on 15 and 30 September 2015. The disability discrimination and victimisation complaints therefore failed.

No grievance outcome

198. The next allegation was about a failure to respond to the part of the grievance where the claimant complained about what had happened, and not giving him a written outcome.

199. Upon receipt of the grievance of 12 October Staffline invited the claimant to a meeting with Ms Oslizlo (page 241). That meeting had to be delayed because the claimant wanted a different person to deal with it. Ms Oslizlo arranged for Mr Heer to deal with it (page 247). The meeting occurred on 3 November. The note showed that there was a discussion about the points raised and it was clear that Mr Heer was going to come back to the claimant with the outcome.

200. Mr Heer then spoke to Mr Atkinson and asked him to interview the employees of Morrisons. This was done on 11 November. Mr Heer came to the abattoir the following day and was handed the statements before his meeting with the claimant. He told the claimant he had not read them. His intention was to go through them with the claimant during the meeting.

201. The transcript of that meeting at page 274 onwards recorded a discussion about whether the claimant would get answers on papers. It appeared on page 277. The transcript showed Mr Heer saying:

> **"You won't get answers on paper but you'll get it on the statement, that's what the statements are."**

202. Mr Heer explained that he thought that the claimant was asking for a copy of the witness statements taken by Mr Atkinson, which he was not prepared to provide, but that he was going to provide a letter. The claimant said that he was not asking for copies of the statements but for a written outcome to his grievance.

203. It is clear from a reading of the transcript that there were communication difficulties between the claimant and Mr Heer. This discussion was conducted in English. Discussions with Ms Oslizlo had been conducted in Polish. The claimant genuinely thought he was being told that he would not get any answer on paper, but we were satisfied that was not a statement that here would be no written outcome at all to the grievance. Staffline's own procedure at page 83 said that after the grievance meeting the company would inform the employee of the decision and notify the employee of the right of appeal. It was implicit that this would be by way of written notification if it occurred after a grievance meeting had taken place.

204. That meeting ended abruptly when the claimant walked out. Mr Heer was unable to bring it to a conclusion.

205. We accepted that Mr Heer caused a letter to be prepared and handed to the claimant on 19 November at page 295 inviting the claimant to a further meeting on 24 November to resolve the matter. His intention was to give the claimant the outcome to his grievance then. The claimant denied ever having received this letter, but we rejected that. We accepted the evidence of Ms Oslizlo that he was handed the latter but then brought it back the following day. She made an endorsement on

page 295 to that effect on 20 November. The claimant handed it back with his resignation. Mr Heer explained that all the grievance papers were passed to Staffline's HR department but that no letter of outcome was issued.

206. It is possible to be critical of Staffline for the way this was handled. It is a surprise that Mr Heer had not read the documents prior to meeting the claimant, although there were practical reasons why that was so. It also appeared that he had already accepted at face value what Mr Atkinson told him about there not having been any discrimination against the claimant, as he made this point to the claimant in the meeting on 12 November a number of times. However, the position, we concluded, was that Mr Heer was intending to address all the matters in the grievance and that he would have provided a written outcome had the process gone to its conclusion. It was remiss of Staffline not to provide a written outcome even once the claimant resigned. However, at the point where the claimant made his mind up to resign (the weekend of 14/15 November) there was no breach of trust and confidence in the failure to provide a written outcome since the process was not yet complete. It was the claimant who effectively prevented it being brought to a conclusion by resigning his employment.

207. We therefore rejected the contention that the absence of any written outcome to the grievance, or any formal response to all the aspects raised in it, amounted to any form of disability discrimination. It was simply a reflection of the fact that the procedure could not be completed because the claimant resigned his employment.

16 November 2015 move

208. The claimant alleged that Staffline was guilty of disability discrimination and a breach of trust and confidence in not talking to him about the move which occurred on this date.

209. He described it as a move of department but in fact that was not so. It was a move of workstations within the same department. We accepted the evidence of Ms Oslizlo that this was a matter on which Morrisons did not need to consult Staffline as it involved no change to the details of his contract or his assignment. It was in any event a temporary move to separate him and Ms Parkinson whilst her complaint was being investigated. If Staffline did not know of the move it cannot be criticised for not talking to him about it.

210. Accordingly in isolation this could not amount to a breach of trust and confidence.

211. In any event it occurred after the claimant had already decided to resign because he had written his resignation letter in Polish before being told of the move. It was not a reason for his resignation in any event.

212. Nor did it constitute any form of disability discrimination or victimisation. The reason Staffline did not speak to the claimant was because it did not know of the move. It was not because of disability, or because of something arising in consequence of it. Nor was it because of any protected act. This allegation failed.

213. It followed that all the allegations of a breach of the Equality Act 2010 by Staffline failed and were dismissed.

Constructive Dismissal – cumulative effect?

214. We decided that none of these matters in isolation breached trust and confidence. However, as a matter of law there can be a breach of trust and confidence in a series of individual events even if none of them in isolation are serious enough to destroy or seriously damage trust and confidence. The Tribunal can take into account the cumulative effect of such matters although the test remains an objective one. We therefore considered the overall sequence of events.

215. Looked at cumulatively, however, these matters still in our judgment fell a long way short of being sufficiently serious to breach trust and confidence. Staffline could not be faulted in our judgment for the position it took in relation to the annual leave matters, the toilet breaks, the permanent contract and the move on 16 November 2015. It could be criticised for not dealing with the grievance in a different way, but the failure to give the claimant a written outcome was a failure which arose after he had resigned. The fact he had not had a written outcome prior to his resignation, and the fact that he wrongly believed that there would be nothing in writing at all, did not amount to a breach of trust and confidence. There was no breach of trust and confidence by Staffline.

216. Without such a breach the resignation cannot be a dismissal. The complaint of constructive unfair dismissal also failed and was dismissed.

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Employment Judge Franey

13 February 2017

ANNEX - LIST OF ISSUES

A: Unfair dismissal – Employment Rights Act 1996

1. Did the first respondent, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties in any or all of the following respects?

1.1 Early Summer 2015	The respondent should have written a further letter to Morrisons supporting the claimant's application to take leave on 4 September
1.2 Summer 2015	The respondent did nothing when claimant informed Monika Oslizlo about annual leave requests which had gone missing.
1.3 15 September 2015 to end of employment	The respondent did not do enough to enable the claimant to take toilet breaks as and when required.
1.4 October 2015	The respondent did not challenge Morrisons over their refusal to give the claimant a permanent contract.
1.5 12 November 2015	Not giving the claimant the outcome of his grievance in writing and not responding to the part of his grievance where he complained about what the respondent had failed to do.
1.6 16 November 2015	Not talking to the claimant about the move to work in a different department.

2. Was any such breach a reason for the claimant's resignation?

3. Did the claimant affirm any breach by conduct/delay?

4. If the claimant was constructively dismissed, was the reason for dismissal a potentially fair one?

5. If the dismissal was for a potentially fair reason, did the respondent act reasonably or unreasonably in all the circumstances in dismissing the claimant for that reason?

B: Disability discrimination – Equality Act 2010

Disabled Person section 6

6. Was the claimant disabled at relevant times within the meaning of the Equality Act 2010?

    a. Did he have a physical impairment?

    b. Did the impairment have an adverse effect, which was more than minor or trivial, on his ability to carry out normal day to day activities?

    c. Was the adverse effect long term – lasting at least 12 months, likely to last at least 12 months or the rest of the person's life?

Direct discrimination section 13

7. Did the respondent subject the claimant to a detriment in relation to any or all of the following respects?

    First respondent

7.1 October 2015	Respondent not challenging Morrisons over their refusal to give the claimant a permanent contract.
7.2 12 November 2015	Not giving the claimant the outcome of his grievance in writing and not responding to the part of his grievance where he complained about what the respondent had failed to do.
7.3 16 November 2015	Not talking to the claimant about the move to work in a different department.

    Second respondent

7.4 30 September 2015	John Turner insisting the claimant take a toilet break when he did not need one and Mark Dean telling him he would not be allowed a toilet break later in the shift.
7.5 6 October 2015	Refusing the claimant a permanent contract with Morrisons
7.6 20 October 2015 onwards	Not giving the claimant an outcome to his grievance.
7.7 13 November 2015	A colleague making a false complaint against him.

8. Did either respondent treat the claimant less favourably than it treated or would have treated others in the same material circumstances?

9. If so, was this less favourable treatment because of the protected characteristic of disability?

Discrimination arising from disability section 15:

10. Did either respondent know or could they reasonably be expected to know that the claimant had the disability?

11. If so, did either respondent subject the claimant to a detriment in any of the following respects?

First respondent

11.1 October 2015	Respondent not challenging Morrisons over their refusal to give the claimant a permanent contract.
11.2 12 November 2015	Not giving the claimant the outcome of his grievance in writing and not responding to the part of his grievance where he complained about what the respondent had failed to do.
11.3 16 November 2015	Not talking to the claimant about the move to work in a different department.

Second respondent

11.4 Summer 2015	Refusing to allow the claimant to take holiday on 4 September 2015.
11.5 30 September 2015	John Turner insisting the claimant take a toilet break when he did not need one and Mark Dean telling him he would not be allowed a toilet break later in the shift.
11.6 6 October 2015	Refusing the claimant a permanent contract with Morrisons
11.7 20 October 2015 onwards	Not giving the claimant an outcome to his grievance.
11.8 13 November 2015	A colleague making a false complaint against him.
11.9 w/c 16 November 2015	Colleagues, Andrew and Matthew, making comments such as “Hurry up, best run before you shit yourself.”

12. If so, in any of those respects was the claimant treated unfavourably because of something arising in consequence of his disability?

13. If so, can the relevant respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Breach of Duty to make reasonable adjustments Sections 20 and 21, and Schedule 8 para 5

14. Did the second respondent apply a provision, criterion or practice ("PCP") that outside formal break times, a toilet break would only be permitted once cover had been arranged?

15. If so, did that PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

16. (In relation to the complaint against the first respondent) Was it a PCP applied by or on behalf of all or most of the principals to whom the claimant was or might be supplied?

17. Could either respondent reasonably be expected to know that the claimant had a disability and was likely to be placed at the disadvantage?

18. If so, did either respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage? The claimant contends that the reasonable adjustment would have been to have allowed him a toilet break immediately on request.

Harassment section 26

19. Did the second respondent engage in unwanted conduct related to the protected characteristic of disability which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant in any of the following respects?

19.1 12 September 2015	Ian Paton refusing toilet breaks and saying "You can go shit your pants".
19.2 14 September 2015	Mark Dean telling the claimant that he had a young child and she was able to stop herself needing the toilet so the claimant should be capable of doing so.
19.3 30 September 2015	John Turner insisting the claimant take a toilet break when he did not need one and Mark Dean telling him he would not be allowed a toilet break later in the shift.
19.4 w/c 16 November 2015	Colleagues, Andrew and Matthew, making comments such as "Hurry up, best run before you shit yourself."

Victimisation section 27

20. It being agreed by the respondents that the claimant did a protected act when he spoke to Monica Oslizlo on 15 and 30 September 2015, and when he lodged his grievance on 12 October 2015, was he subjected to a detriment by either respondent in any of the following respects?

First respondent

20.1 October 2015	Respondent not challenging Morrisons over their refusal to give the claimant a permanent contract.
20.2 12 November 2015	Not giving the claimant the outcome of his grievance in writing and not responding to the part of his grievance where he complained about what the respondent had failed to do.
20.3 16 November 2015	Not talking to the claimant about the move to work in a different department.

Second respondent

20.4 20 October 2015 onwards	Not giving the claimant an outcome to his grievance.

21. If so, did the respondent subject the claimant to that detriment because of his protected act?