EMPLOYMENT TRIBUNALS

Claimant **Ms S J Kent**

Respondents **W M Morrisons plc ("Morrisons") Mr Kelly Heads (" Mr Heads")**

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 8th & 10th-12th OCTOBER 2018
Deliberations 6th November 2108

EMPLOYMENT JUDGE GARNON
Members: Mr EA Euers and Mr M Brain
Appearances
For Claimant Mr D Robinson-Young of Counsel
For Respondent: Mr V Phipps of Counsel

JUDGMENT

1. The claims of direct discrimination, harassment and breach of contract in respect of non-payment of bonus are not well founded and are dismissed.
2. The claim of unlawful deduction of wages is adjourned to the same date as the remedy hearing.
3. The claims of unfair and wrongful dismissal , discrimination as defined in sections 15, 19 and 20/21 of the Equality Act 2010 (EqA) are well founded . Remedy will be decided on a date to be fixed. The parties are to send to the Tribunal an agreed time estimate for such hearing and all unavailable dates for the period January – March 2019 by 30th November 2018

REASONS (Bold print is our emphasis and italics are quotations)

1. Introduction and Issues

1.1. By a claim form presented on 9 April 2018, the claimant brought complaints of unfair constructive dismissal, unauthorised deduction from wages ,breach of contract (notice pay and unpaid bonus profit share) and disability discrimination. The respondents defend the claims. They arise out of alleged conduct by Mr Heads , the claimant's line manager, which, taken together with Morrisons handling of her complaints and its failure to ensure reasonable adjustments were made, she says amounted to disability discrimination and a fundamental breach of contract entitling her to resign which she did on 26 February 2018 in response to that alleged treatment. She alleges at the time of her resignation she was owed holiday pay and bonus.

1.2. The respondent does now admit the claimant had at all material times a disability as defined in section 6 of the EqA , REM Sleep Disorder. The respondents do not accept they knew of her disability and its effects at all material times and deny Mr Heads acted towards the claimant in the way she alleges.

1.3. Both representatives submitted a list of issues attached to their agenda for a case management hearing. An allegation of victimisation had been withdrawn. Employment Judge Johnson said it should not be difficult to deal with the claims for wages and unpaid bonus , a list of issues should be agreed and a copy included at the front of the hearing bundle. One was not. In Price v Surrey County Council Carnwath LJ, observed
"*even where lists of issues have been agreed between the parties, they should not be accepted uncritically by employment judges at the case management stage. They have their own duty to ensure the case is clearly and efficiently presented.*

1.4. Rule 2 of the Employment Tribunal Rules of Procedure 2013 says the overriding objective is to enable Tribunals to deal with cases fairly and justly which includes, in so far as practicable in ways which are in proportionate to the complexity or importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings. The parties and their representatives must assist the Tribunal to further the overriding objective and in particular co-operate generally with each other and with the Tribunal.In Davies-v- Sandwell Metropolitan Borough Council Mummery LJ said *"The parties and their representatives are under a duty to co-operate with the ETs by sticking to relevant issues, evidence and law.* Lewison LJ said *.. If the parties have failed in their duty to assist the tribunal to further the overriding objective, the ET must itself take a firm grip on the case. To do otherwise wastes public money; prevents other cases from being heard in a timely fashion, and is unfair to the parties in subjecting them to increased costs ... An appellate court or tribunal (whether the EAT or this court) should, wherever legally possible, uphold robust but fair case management decisions.*

1.5 The parties draft list asks whether there is a term of mutual trust and confidence implied into the claimant's contract and whether a breach of it is repudiatory. The term is implied into every contract and a breach of it is always repudiatory. The list contains almost every claim that could be brought under the EqA by a disabled person and every possible issue that could arise in any such claim. Mummery L.J. said in Stockton Borough Council-v- Aylott "*In some cases no-one, including the claimant, is helped by a presentation to the ET of every possible permutation of the various forms of discrimination."* He was urging claimants to ask themselves what is to be gained by wringing from a given set of facts every possible cause of action.

1.6. We believe the real issues, broadly framed, are : -

1.6.1. Were the acts or omissions of the respondents, separately or cumulatively, a fundamental breach of Morrisons contractual obligations to the claimant, especially, but not limited to
(a) not affording to her an effective means of resolving grievances
(b) without reasonable and proper cause, conducting itself in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between Morrisons and the claimant?

1.6.2. If so, did the claimant resign, at least in part, in response to such breach without first affirming the contract?

1.6.3. If so, does the respondent show a potentially fair reason for its conduct?

1.6.4. If so, was the dismissal fair applying the test in s 98(4) of the Employment Rights Act 1996 (the ERA) ?

1.6.5. What remedy should be awarded for the unfair and wrongful dismissals?

1.6.6. At what point in time did the respondents know, or could they reasonably have been expected to know, the claimant was (a) disabled and (b) placed at a substantial disadvantage by the application to her of its PCP's?

1.6.7. Were the acts or omissions of either respondent, at least in part, because of the something arising in consequence of the claimant's disability including (a) inability to work flexible hours to suit the needs of the business and (b) sickness absence ?

1.6.8. In so far as any PCP placed her at a more than trivial disadvantage in comparison with persons who are not disabled, what steps would it have been reasonable for Morrisons or Mr Heads to take to reduce that disadvantage?

1.6.9. in so far as any PCP was applied to all managers, did it put the claimant and other disabled persons at a particular disadvantage? If so. does the respondent show applying that PCP was a proportionate means of achieving its legitimate aim of providing good service to customers?

1.6.10. Was any unwanted conduct by either respondent related to disability, and did it have the purpose or effect described in section 26. If the latter only, was it reasonable it should have that effect?

1.6.11. Did that conduct amount to dismissal? If not, does section 212 require the unlawful conduct be dealt with under section 40 rather than section 39?

1.6.12. In respect of any acts or omissions found proved under the EqA, does section 123 prevent the claim being dealt with?

2. Findings of Fact

2.1. We heard the claimant and her witnesses, Ms Maria Hodgson , Julian Kent , her husband, and Ms Tracy Knaggs . We read the signed statement of Jessica Hodgson . For the respondent we heard Mr Heads and Louise Weaver People Manager from August 2017 until she left the company on 17 September 2018.

2.2. The claimant was born on 17 September 1975. She worked for Morrisons from 1992 to 1999 and started work for it again on 4 May 2004. In 2015 she became Café Manager at the Tynemouth store, the largest in the region. This was not her first managerial role as she had held such in other departments since about 2006. The café is the first part of the store customers see on entering and sets the tone for the rest of the store.

2.3. As Café Manager, the claimant had overall responsibility for its running , from serving customers to hygiene, and from training staff to completing staff rotas. The café is open to the public 7 am to 7 pm Monday to Thursday, 7am -8pm Friday and Saturday and 10.30 am-5pm Sunday which is 80.5 hours per week. Work is needed to be done when

the store is closed to the public and some staff, including managers, will on occasions be rostered to work outside the store's opening hours.

2.4. The claimant was contracted to work 43 hours per week normally 4x 10 hour shifts and 1x8 hour shift of which 1 hour per day are unpaid breaks. A deputy, sometimes called the café coordinator, would cover when she was not there. In the kitchen she works with hot, heavy items and is responsible for 17 staff. Exhaustion potentially could cause her to be a danger to herself and others in that environment. She reported to Mr Heads directly or through Denise Burke, Duty Manager.

2.5. In Morrisons , persons who deal with HR are called " People Managers" . Until June 2017 in Tynemouth, that was Claire Grey who left then . For a short time the store was without a people manager and relied upon Jeanette Jones people manager at another store. Louise Weaver became the people manager in mid August 2017.People Managers can seek advice from the Employment Relations Team (ERT) at head office .

2.6. There are six senior managers in store in addition to Mr Heads including Mr Sean Chapman, Mr Ian Sutherland, Mr David Finlayson Ms Denise Burke and Ms Weaver. The terms " Store Manager" and "General Manager" are interchangeable. They are supposed to work in liaison with the people manager on anything to do with HR .We asked Mr Heads whether he would defer to a people manager on HR matters. He said he would, but we do not accept the opinion of any people manager would ever persuade him to take a course which was not in his view the best one to take operationally.

2.7. Mr Heads has been employed by Morrisons for 31 years. He was the deputy store manager at Tynemouth for 4 years some time ago when the claimant worked there. He had a good relationship with her then. He became acting store manager in November 2016 after the former general manager, Mr Rennie, became ill in October 2016. His full appointment was announced to the staff the following April on Mr Rennie leaving . All of about 22 managers report to him.

2.8. REM sleep disorder is a neurological impairment diagnosed in March 2017 but the claimant had the sleep disorder since September 2016. The disorder causes her to act out very vivid dreams whilst she sleeps so she is unable to obtain quality sleep without medication, and even with it sleeps badly. The resulting tiredness causes cognitive impairment. Medication has side effects and requires her to have a strict routine in the evening. She must not work after 7 pm so she can take her medication at home at 7.30 because she cannot drive after taking it. She normally goes to bed at about 9 pm.

2.9. When she notified Mr Rennie, in September 2016, he was supportive. She also informed Ms Grey. When Mr Heads came to the Tynemouth store its performance required significant improvements. In the run up to Christmas, he focussed on the busy period , but once Christmas was over, he , in his own words , "*set out in earnest*" to improve standards in all departments, of which the café was one. We find he had a single-minded determination to make the store 100% efficient, if he possibly could, and would not let anything divert him from that .

2.10. The claimant says she told him early on she had a sleep disorder though its precise diagnosis was not then known. During a conversation, he admits saying something like: "*is the vodka not helping*?" He says this comment was made light heartedly, in the

context of the claimant saying she was having a hard time as she had previously mentioned she liked going out for a drink. He says it was made shortly after him arriving at the store, but the claimant's diary in the bundle shows it being made on 7 March 2017. Whenever it was, Mr Heads denies it was with reference to any disability, and says the claimant had not mentioned any sleep issues at the time.

2.11. After Christmas, Mr Heads identified the café was not performing well. Hygiene was an issue, as was a poor closedown routine. The cleaning team gave feedback the store staff had not been completing daytime store cleaning tasks. Mr Heads says "*lack of leadership*" was a problem. We asked him to explain what he meant by a comment recorded in the notes of a later meeting he had with the claimant, that she should not "*default into colleague mode*". "Colleague" is the term for an ordinary member of staff working in the teams of which the claimant led one. He said he meant she should not herself do work colleagues could do but " manage" them ,ensuring they were trained and ordered to do it. The café was not the only area he identified as deficient. He says

*In order to ensure that the issues in the café were addressed effectively, I took **an active role** in managing Sam, as well as other managers around the store. I worked with Sam in respect of quality and results, **providing coaching and guidance**.*

and later

*Once I had identified that there were issues in the café, I had a number of informal conversations with Sam. We discussed mystery diner scores and the failing areas in the department. Hygiene was an area which was discussed on a daily basis as a result of the scorecard results and customer complaints. I **had conversations** with Sam weekly between January and March 2017, **held in the department as part of my coaching** of Sam. During those conversations, Sam mentioned that she had been having a hard time at the store as there had been staff shortages. She did not mention she had any issues with sleep at this time.*

We do not believe Mr Heads provided coaching or guidance. The claimant's evidence was clear and credible that he just criticised and blamed her. often in front of others, even for matters beyond her control such as stock not being delivered by the "bakery".

2.12. The claimant was friendly with Ms Grey so sent her texts to her private number. One on 14 March gives details of medical advice and future planned treatment . She had told Ms Grey of things she had done when "sleepwalking ". Ms Grey replied "*I hope you get sorted. **Must be awful***" . As people manager Ms Grey may not have shared the details with Mr Heads but should surely have told him the claimant had a problem.

2.13. Mr Heads spoke to the claimant about her hours. Her contract specified she work 5 **flexible** shifts scheduled over 7 days. It was the norm for all Café Managers across all Morrisons' stores to be in the café 12pm – 2pm, as shown in the "right time right place" guide. There was also an expectation all managers would not have three consecutive days off. Mr Heads says he had to tell the claimant **on numerous occasions** not to have more than 2 consecutive days off. She says that happened once in February/March 2017 and we have not been taken to any document in the vast bundle to show the contrary. She would normally have 1 day off in the week and a Sunday.

2.14. Between 12 and 2pm the "mystery diner" would come in , a person from an outside company who visits Morrison's cafés unannounced, and rates standards in various areas. The claimant mostly took her breaks either side of 12pm – 2pm , but occasionally took a short break in those times about once or twice a fortnight if the café was not busy. If she was not in the café during the 12-2 period, Mr Heads says she would be tannoyed "*occasionally*" by himself or other managers if her presence was required for things such as customer complaints, excessive wait time for orders and lack of control of the café team. Other managers would also be tannoyed . The claimant's case, supported by Ms Hodgson and Ms Knaggs, is she was tannoyed far more than other managers and not just between the hours of 12-2, but whenever she took a break. We accept that.

2.15. The claimant was in charge of creating the rotas for her department. A blank template would be sent to her, she would put times staff including herself were needed to work, and that would then be sent to the people manager and Mr Heads for approval. He says he "*explained*" to her it was crucial they were "*correctly*" created to ensure efficiency in the café, including her own hours. He and the People Manager would review this to ensure the right people were in the right place, **as they did with all other departments and alter her draft if he thought fit**. On the claimant's evidence, which we accept, there was no explanation. Mr Heads simply put in the hours he wanted the claimant and others to work .These would be entered on a computer system and the rota physically placed on the wall outside the personnel office . Even after that , there were occasions when Mr Heads would amend the rota again, sometimes in manuscript.

2.16. It will be seen later one of the shifts the claimant regularly proposed for herself was 8am-6pm, which was regularly changed by Mr Heads to 7am-5pm. We asked Mr Heads whether this did not send a signal the claimant may need to avoid early starts as well as late finishes. The claimant did not volunteer that until we asked a question which elicited the unsurprising information that, after a bad night, getting up at 6 am to be at work for 7 was much harder than getting up at 7 am to be there for 8. Mr Heads claimed not to have realised this. We accept he did not, because he did not want to acknowledge the claimant's disability at all, but he ought to have realised, and would had he troubled himself to ask why she kept submitting 8am start times when the norm is 7am .

2.17. The rotas were set 3 weeks in advance, except for Christmas and summer when they were set 10 weeks in advance. Mr Heads says , unlike with other departments, he would have to make changes as the claimant repeatedly did not rota herself or others "*consistent with our conversations and agreement*". We find there was no "agreement". Mr Heads says "*Given our conversations about the rotas and the **increased flexibility in staffing** I was expecting an improvement to the Café's performance. However nothing came to fruition. ... I decided to have a meeting with Sam.".*

2.18. The claimant kept a diary. Her entry for 7 March 2017 shows she had problems at the start of the day because somebody did not turn in for work. She phoned Mr Heads at 9.35 am telling him she had a GP appointment which she would take as her lunch break. He asked why she was going and she told him saying "*well you know I have a problem with my sleep*". He replied "*vodka not helping*?" This is far more credible than Mr Heads version that he made the remark within a few days of arriving in the store. Alcohol does help with sleep at least in some people. We find it more likely than not the claimant told Mr Heads she was having sleep problems well before 7 March but he did not see it as being **his** problem . Ms Grey and maybe Mr Rennie, either told him, or should have.

2.19. The diary documents a disagreement she had with a senior manager Mr Sean Chapman . and him being very curt in a phone call around about 1130. At 12:10 pm she received a phone call asking her to attend the training room. She could not leave the department at that time as somebody had left to go to the warehouse leaving her with no cook. She rang "admin" to ask them to pass on a message she would be at least five minutes. Her diary reads"*12.12 Sean phoned down and he sounded aggressive-Kelly wants YOU IN THE TRAINING ROOM NOW*" . The capital letters are as in the diary. She went and was immediately placed on a Performance Improvement Plan (PIP). The claimant thinks this was a punishment for having words with Mr Chapman because Hollie Goodman, another Team Manager, also had a disagreement with Mr Chapman and was put on a PIP at about the same time. We do not think the disagreement with Mr Chapman had much if anything to do with it, as we find Mr Heads was planning to do this anyway, mainly because of continued poor performance of the café but partly because she had taken time out to go the doctor that morning . At no point did the claimant say her performance was impaired by something arising in consequence of her disability--tiredness and an inability to concentrate. Indeed even during this hearing , she was reticent about saying that and would never have said it to Mr Heads for fear he would have used that against her. However, basic common sense would tell any store manager an exhausted team manager would not be as effective as she would normally.

2.20. When she met with Mr Heads, Ms Grey was also present. Mr Heads says the notes at page 86 show they "*discussed*" the poor standards observed by him and customers, then training and leadership, **agreed** the PIP and that he would "*play an inspectoral role to check standards were being met. Initially Sam was shocked her performance was being questioned but when we explained the process and the action plan she agreed to make the improvements with our support*." The claimant says no discussion or agreement took place , the PIP document was already completed when she entered the room and she was told to sign it . We prefer her evidence. Mr Heads says he told her a PIP " *.. is not a disciplinary measure but an agreement between the line manager and colleague to set objectives, timescales and implement support for the colleague. I must stress that, at this point, Sam had still* ***never mentioned to me*** *that she had any form of sleep issue, let alone a disability*". In our view this is untrue, she had told him three hours earlier . It is an example of information which was not important to Mr Heads simply not registering.

2.21. On 14 March the claimant saw a consultant . She cannot recall whether she sent a copy of his letter typed on 16 March to the respondent . Mr Heads is adamant he never saw any consultants letters or any letter from her GP until they appeared in the document bundle . One from her GP dated 7 April includes:

"*Mrs Kent started to have difficulties with her sleep back in September of last year. Her sleep symptoms have caused her to have a very poor sleep pattern since the symptoms began. She was referred to see a specialist with regards to her sleep in December of last year. Her symptoms have continued since then and she was seen by the specialist on 14th March this year. The consultant is arranging investigations and looking into this matter further for her*

Due to her poor sleep pattern this has resulted in Mrs Kent being ***extremely exhausted on a daily basis to the point that it is affecting her daily functioning. It will also have an impact on her ability to work hence the provided fit note****",*

A document in the bundle shows this letter and a sick note were attached to a letter the claimant submitted but we accept a point Mr Phipps raised in re-examination that by the time that letter reached Mr Heads, the attachments may no longer have been with it. They were probably detached and placed on file by Ms Grey, the other person to whom the letter was addressed. However, Morrisons as an organisation cannot credibly say it did not receive any information from the claimant's treating clinicians. Moreover, any manager taking care of the health and safety of staff would ask for more information of the effects fatigue was likely to have.

2.22. On 28 March 2017, Mr Heads says the claimant was not present in the café and people did not know what to do. The rota she created , in his words, was "*not fit for the business*" so was given back to her by Ms Grey to update 3 weeks earlier, that being the day she was placed on the PIP, but she had failed to make amendments . A photo at page 91 was taken by Mr Heads in the presence of Ms Grey and another senior manager showed poor stocking of the café shelf. Ms Grey called the claimant in to work to explain herself . She came in for a few hours ,went to her GP and rang in sick later in the day. Her first sick note was for 2 weeks.

2.23. Normally under Morrison's procedures, a welfare meeting would not take place until a person was absent for 4 to 6 weeks .On 31 March 2017, the claimant was made to attend a welfare meeting with Mr Heads and Ms Grey as note taker. Mr Heads justified holding one so soon because he said they did not know why the claimant had gone off work .Of course, a simple telephone call would have found that out. We think this is indicative of Mr Heads believing at that time, and for some time to come, the claimant went sick because of what happened on 28 March . As he put it later , in a different context, she "*did not like being challenged*".

2.24. At the start of the meeting, the first question Mr Heads asks is "*what's keeping you off work* ***separate to what discussed before***". He had no credible answer when Mr Robinson -Young asked **what** had been discussed before, The claimant provided a fact sheet for REM sleep disorder and told Mr Heads bout the medication and its effects saying lack of sleep was stopping her coming to work. Mr Heads asked how long she had been on the medication and she told him. Then he said again "*what's stopping you coming to work*". **She had just told him**. The note of her reply is "*lack sleep 3 hours a night, danger"*. The plain meaning is she felt she would, due to extreme fatigue, be a danger to herself and colleagues in a kitchen.

2.25. She requested a referral to Occupational Health (OH). Mr Heads says this was the first time she mentioned any issue about sleep to him , though he now knows she had some text exchanges with Ms Grey about sleep tests etc. earlier in the month. We have seen those texts in mid March which is when any HR professional taking care of the health and safety of staff , not only the claimant but those working alongside her, would have made an OH referral. They told the claimant she was not eligible for company sick pay as she was currently on a PIP. Morrisons has discretion in such circumstances. Mr Heads statement says the decision to withhold sick pay was made by Ms Grey, " *on advice from the handbook and myself*" . When we asked him why he later saw fit to make a decision on the claimant's complaint about it being withheld ,upholding this decision when he had advised upon it ,he changed his evidence to say all he had advised Ms Grey to do was ring the ERT and **they** told Ms Grey sick pay should be withheld. That is highly unlikely. If it happened we would expect to see some note of the conversation from ERT. Also, if Ms Grey, the claimant's friend, had done as the policy suggests and

considered the cause of ill health absence, which she knew from the texts, it would have been obviously genuine, so she was not "following the policy" . Someone exercised the discretion in a way unfavourable to the claimant. We believe it was Mr Heads.

2.26. Ms Grey referred the claimant to OH probably that day or the next. Absent from the bundle is the referral itself but the reply is addressed to Ms Grey . The date of a telephone OH review was 10 April. A letter dated 17 April goes into considerable detail about her symptoms, including trying to dismantle her daughters bed while sleepwalking. It explains the condition and the treatment she has received and confirms, although the medication appears to be helping in that she is no longer talking, walking or being aggressive in her sleep, she was still only sleeping 1- 3 hours a night. It then states

Mrs Kent reports due to this sleep disorder and significant lack of sleep it is it has affected her mood, she feels very low, she is emotional, she has no energy, she is fatigued, she cannot concentrate, she has stopped driving as she does not feel confident and safe to drive, she feels depressed but only due to this sleep disorder"

2.27. It concluded she was not fit to work due to her sleep disorder, but says she enjoys her work and would like to be back . In answer to specific questions, most selected from a menu, it says she will require adjustments when she is fit for work and may need a phased return but does not spell out what that phased return should be at that stage. An interesting feature is a " tailor made" question put by Ms Grey when she made the referral "*Sam has been suffering from REM* ***since December****. Some nights she is only getting three hours sleep. She is currently absent from work and management would like to know more about her condition and if any support can be given*"

The emboldened words , in our judgment , show the latest date Ms Grey became aware of her symptoms. The reply includes *"Due to the lack of quality of sleep the individual with this type of condition it can start to affect their function during the day".* Under the heading *"support"* it suggests weekly welfare **calls** while she is absent and OH reviewing her in 3 to 4 weeks time when she has seen her specialist again. No further referral was made until June despite 8 welfare meetings in 15 weeks of absence for which the claimant had to come to the store, all but one with Mr Heads. During none of them have we be taken to any request for the gist of her consultant's or GP's recommendations. These were not "welfare" meetings, the contact OH recommended could have been by telephone. They were Mr Heads way of putting pressure on the claimant whom he believed should be at work.

2.28. A series of specialist's reports in the bundle show the claimant was seen by the specialist on 4 April and a letter typed on 10 April. It said due to the reaction to her medication she is awake a lot of the night and as a consequence very tired. "*Work is unfortunately being rather difficult and not accepting her need to be off. Of course her job does involve hot kitchen apparatus and if she is significantly sleepy I think this would propose a risk* ". The claimant was seen again on 4 May, letter typed on 11 May confirming slow progress in finding the right medication for her.

2.29. On 13 April 2017 Mr Heads and Ms Grey received a letter from the claimant saying she thought the decision to withhold sick pay was not justified, as she had a good previous absence record, and did not commence sickness absence until well after the PIP was issued. She said the amount of contact she was required to maintain with the store whilst on sick was excessive. There was a scheduled welfare meeting for 15 April

2017. Mr Heads offered to deal with the complaint then , and the claimant accepted that. Ms Grey was in attendance as note taker. Mr Heads wrote following the meeting saying , he upheld Ms Grey's decision, and the contact required was reasonable. He offered her the right to appeal. He adds " *At this meeting, Sam also explained some of her sleep issues, though of course I had no idea that this could be a disability at this stage*". He says the OH report was the first correspondence that made him aware of her REM sleep disorder which he had not known about when he put her on a PIP or her company sick pay was withheld. Even if we believed that , it does not explain why, now he did know, he did nothing to change his decision . It took until June for a more senior manager to do that. He says the claimant mentioned in some welfare meetings she would need support with her hours, but the OH report did not include this as a recommendation. **This is very significant. It typifies Mr Heads approach which is that if an OH report does not spell out not only what needs to be done but that it is essential to do it, there is no obligation on him to do anything. The claimant's fatigue , though it could pose a risk to her and others, was, in his eyes, her problem , not his or Morrisons.**

2.30. It is beyond belief the extensive information the claimant had given to Ms Grey in her capacity as People Manager was not passed on by Ms Grey to Mr Heads. His repeated protestations of not knowing the claimant was disabled and of the symptoms she was suffering are simply not credible. The claimant does not explain herself well, she did not in the witness chair. She certainly would not **plead** with Mr Heads to make allowances for her fatigue because she was, with good cause, of the opinion , he was trying to "manage her out ". As she said of later events whenever she did try to see Mr Heads, who was careful in all situations where he was being observed by more senior people to say how much he wanted to assist her, he would either be "busy" , " on his lunch" or say words to the effect "*I don't want to hear problems, I want solutions*". He denied he would ever have said anything like that but he is actually minuted in a later meeting as saying team managers should not raise problems but provide solutions.

2.31. On 27 April 2017, the claimant submitted a letter addressed to 'HR Manager' , which was handled by Ms Grey , alleging the decision to withhold company sick pay did not follow company policies, and that Mr Heads believed she was on sickness absence because of her PIP, not her sleep disorder, which was causing her to be victimised by the management team. The evidence about what was a "grievance" and what was an appeal and the order in which they were dealt with was confusing and irrelevant . One letter alleged the store had *failed in its duty of care*. One month of absence viewed against her previous perfect attendance record and still Mr Heads **says** no alarm bells were ringing with him . Ms Grey wrote back and acknowledged her letter on 28 April 2017.

2.32. Ms Grey wrote on 6 May 2017 to arrange a long term sick review meeting " *to gain a further understanding of her illness*" . On 13 May 2017, it happened with Mr Heads, Ms Grey , the claimant and her trade union representative present. The claimant said her medication dosage had recently increased and she was starting to sleep better. They agreed to meet in two weeks' time to check on her progress. If Morrisons wanted to gain understanding one would expect them to ask what the specialist had said . They did not.

2.33. On 6 June 2017 Mr Adrian Farrage, described as an Appeal Manager, wrote to the claimant confirming the outcome of a hearing on 25 May 2017 that the decision to withhold company sick pay was unfounded as he believed her absence was due to her medical condition and not the PIP. He confirmed she would receive backdated company sick pay. It was agreed her other concerns would be addressed on her return to work.

2.34. On 16 June 2017, the claimant attended a further welfare meeting with Ian Sutherland, Manager in which she confirmed her medication had changed and she was struggling to sleep still. Mr Sutherland chaired this meeting because Mr Heads was on annual leave. The claimant said she felt supported by Mr Sutherland.

2.35. She was seen again by her consultant on 20 June by which time the medication had been changed, she was having no episodes of getting up overnight and her sleep quality had improved. An OH report dated 23 June refers to a telephone assessment on 16 June. It documents progress in finding the right medication but confirms she still has a disturbed sleep pattern and is getting very little sleep adding *" this is having a cumulative effect on her health and well-being where she is feeling fatigued and has difficulty concentrating. She is also finding that the lack of sleep and symptoms is having a negative effect on her mood which can be low at times"* It confirms she is keen to return to work but is not ready to yet. It says in response to a specific question phrased tersely *"Anticipated return to work date?"* that it would be difficult to say but when she returns she needs a phased return of 50% in the first two weeks followed by another two weeks 75% and *"if she completes this without any undue concern she should then be able to return to her normal substantive hours"*

2.36. The claimant was phased back into work on 13 July 2017 on reduced hours for 4 weeks and returned to her 48 hours, inclusive of lunch breaks, thereafter. She says Mr Heads " *refused to acknowledge* " the phased return. This overstates the position but he was certainly not happy with somebody not operating to 100% efficiency. She was taken off her PIP at this time. She had 2 weeks' holiday booked during her phased return so the weeks it applied were extended. She had to contact the stand in People Manager at another store Janette Jones on 2 August to ensure this would happen. She quotes Mr Heads saying " *we are all tired after a holiday* ", which she points out indicates he does not understand the difference between normal tiredness and what she was experiencing . In our judgment, he did not want to understand it.

2.37. Mr Heads said in reply to Mr Robinson-Young, he realised the claimant would need medication for long after her phased return but he asserted he did not know and could not reasonably be expected to know she had to finish at 7 pm. Mr Heads was questioned about why for the week commencing 18 September she had been rostered to work until 8 pm. He answered the rota had been done before he knew she could not work past 7 pm and was changed when she explained. However, he kept saying everything in OH report was about the phased return and not any subsequent period but there is no logic to that all, as her medication would be lifelong . In our judgment, at every point where an employer having the least care for the welfare and safety of staff would be making enquiries to find what needed to be done and ensuring it was, Mr Heads did as little as he was forced by OH recommendations to do , and always grudgingly.

2.38. Jayne Hunter, Store Manager at another store wrote to the claimant on 24 August 2017 inviting her to a grievance hearing, which took place on 6 September 2017 with Ms Hunter as chair, Ms Weaver as note taker and the claimant accompanied by Kelly Hyde, trade union representative. The grievance concerned her being put on a PIP without any prior conversations about performance; unfair treatment during her sickness absence due to excessive welfare meetings ,Mr Heads feeling her absence was not genuine, and a lack of support upon return to work. She confirmed her desired outcomes were a transfer to another store and/or a mediation with Mr Heads to rebuild a relationship.

2.39. Ms Hunter found there had been a "misunderstanding" regarding the PIP process, and it was at the informal stage and the decision was made on her return to work not to continue with the PIP. The claimant said she had known Mr Heads for over 20 years and was emotional that their relationship had broken down as she believed he did not believe she was genuinely sick. Ms Hunter arranged to speak to Mr Heads and Ms Weaver on 18 September 2017 to arrange a mediation. Morrison's would support the claimant to repair her relationship with Mr Heads and make her aware of café vacancies in local stores. The claimant's preferred option was plainly transfer and it overstates the position to say she was "happy" with the actions suggested. An outcome letter was sent on 16 October 2017 with the right to appeal within 10 days. Ms Hunter made enquires after the grievance hearing with Peter Farrell, Café Area Specialist, to see whether vacancies were available. None were. **We were given no credible explanation as to why only café vacancies were considered, the claimant had managed other teams and could again . We do not believe she ruled such vacancies out .**

2.40. On 5 October, Mr Heads recalls seeing the claimant in the canteen and asking if she was on her lunch or a break. He denies he shouted at or humiliated her in front of other staff. Maria Hodgson gave evidence under witness order. In late 2017 she frequently saw the claimant in this tears in the canteen or on the stairs. The claimant would go to the toilet to compose herself . Ms Hodgson attributed this to the behaviour of Mr Heads who she said had a bad attitude to all managers. She recalls one incident where he shouted across the canteen to the claimant "*what are you doing here*". This is probably the same incident. She said it was a standing joke that whenever the claimant or some other managers took their break, Mr Heads would tannoy for them or get someone else to .

2.41. The confusion as to which grievance stage was being dealt with continued, but on 23 October 2017, Colin Pearce, a **Regional** Manager, wrote to the claimant inviting her to a hearing which took place on 1 November 2017. The claimant and her representative attended. Ms Mags Gardner, **Regional** People Manager, was note taker. The claim form says this meeting took place because the phased return was not being followed and Mr Heads continued as before claiming not to know of the details of it. The claimant believes Mr Pearce told Mr Heads, and confirmed in writing, the excessive frequency of welfare meetings was unacceptable, as was his practice of changing the rotas and the way he addressed her in front of others. He continued just as before. The outcome letter of 18 November pages 249-250 is three pages long but the middle page which was originally missing was produced at the hearing before us .It includes " ***Kelly feels that there were performance issues which may have been caused by your illness*** *although you believe illness had no impact on your performance* " . This shows the claimant's reticence to admit poor performance but equally Mr Heads view both were connected .

2.42. The letter says repeatedly Mr Pearce had spoken to Mr Heads and Ms Weaver about steps they had taken which were in his view wrong including making the claimant speak to him as part of welfare meetings even though she had already spoken to the people manager and changing rotas without her knowledge . Mr Heads says he never had any conversation with Mr Pearce about rotas and hours. He also said Ms Knaggs, who has a disability affecting her walking, never raised a grievance about his treatment **of her**, but on the last day of the hearing, Mr Robinson-Young produced evidence she had. This point was not necessary for our decision on liability. Either Morrisons' senior managers say the right things in letters to the claimant, but fail to instruct Mr Heads

accordingly or Mr Heads is not telling the truth. We think it is the latter. Mr Heads protestation he did not know the effects the claimant's illness had on performance and why what he was doing was wrong is not credible . If he did not know, he ought to have.

2.43. Mr Heads and Ms Weaver attended a mediation on 3 November 2017 chaired by Ms Hunter, at the Whitley Bay store. At page 238 an entry shows the claimant saying she has to leave at 7 pm in order to take her medication at 7.30 . There were a couple of rotas on which she was on until 8pm, because these were set in advance. Mr Heads says "*At no point, once we had agreed Sam would not work past 7pm, was she placed on the rota to do so*". That begs the question of when they did "agree". Mr Heads told her he wanted to support her and she was a valued member of the team. He says in his statement he "*was apologetic toward the way she was feeling as my intention had been to support her*". That is what the minutes show . Saying "I'm sorry you feel like that " is not the same as "I'm sorry for what I've done" . At the end of the mediation, it was agreed the claimant would no longer report to him but to Denise Burke. Nothing he said would give any reassurance he was going to make any changes to what he did at all.

2.44. The Christmas rota would have been compiled in about October. It had the claimant doing 4 x 12 hour shifts in a single week including working on Christmas Eve which was a Sunday. We asked her how she would have taken to this before she was ill and she replied it would have been normal and perfectly manageable. She did not spell out to Mr Heads or Ms Weaver excessive working hours, such as in the week before Christmas 52 hours, could in itself be a problem but, frankly, it is self-evident.

2.45. Mr Heads says the claimant did the rota herself so cannot complain about it. The full truth is a meeting of all team managers was held as usual. During the Christmas period, all team managers are required to work an extra day and Morrisons has a 'Super Sunday ' where all of them are expected to support each other, come in to work stock to accommodate the business needs, and may have to stay until 8–10pm. The claimant would have had to "stick out from the crowd" at the manager's meeting not to agree to extra hours . Ms Weaver said she checked with the claimant it would not be too much for her , but this is not in her statement and we do not believe it happened before they were working together just before Christmas when Ms Weaver cannot have failed to notice the claimant was struggling.

2.46. To make matters worse managers are normally placed where they are most needed even if it is not their own department. The claimant says, and we accept, she was the only one placed on the busiest department, fresh food and pre-packed (FFPP) for irtually all of the 4x 12 hour shifts. Mr Heads seemed incapable of recognising whereas all managers should normally pull together to help out wherever needed in this busy period, different treatment needed to be afforded to a person with a disability.

2.47. Ms Weaver referred the claimant again to OH and received a letter from OH on 7 December 2017 stating she was fit enough to be in work but would require ongoing practical support in relation to her working times page 474-475. It specifically said she must not work after 7pm which is exactly what she had explained , with reasons, on 3 November. Ms Weaver's statement says **on receipt of this report** " *Accordingly, Sam's rota was adjusted to ensure that she did not work past 7pm. Myself, Kelly and Sam discussed the OH report together and agreed she would not work past 7pm.."* This shows that despite the clear evidence that step was needed, and according to Mr Heads was taken, in early November, it was not made "official " until it appeared in an OH report.

Until then the claimant was under the constant pressure of knowing Mr Heads could roster her to work until whatever time he chose.

2.48. The claimant's witness statement is wrong in that an event it says occurred on Sunday 10 December actually occurred on the 17th. Everyone had arranged , as is tradition, to meet after work at 6.30 pm for a meal even though their finish time was 7 o'clock. The café shut at 5pm Mr Heads does not acknowledge any such arrangement even though the claimant says it was agreed with the people manager. We believe it was. Mr Findayson stopped her as she was leaving and said she had to stay until 7pm.

2.49. The claimant worked on FFPP department with Ms Weaver . The claimant's case , which we accept, is that she worked on FFPP for virtually the whole of the week leading up to Christmas, stoically without complaint , but was utterly exhausted by the end of it . She thought she was due to work 8am-6pm on each of the Sundays in the busy period as that was what was originally on the rota. We accept that.

2.50. On 30 December 2017, due to some minor unspecified customer complaints in early December Ms Burke issued the claimant with a Record of Improvement ("ROI") , the equivalent of a recorded verbal warning and the first stage of the disciplinary process. Ms Weaver was present with Ms Burke and says the claimant " *didn't take the ROI well. At no point did Sam raise any issues with her REM sleep disorder or attribute her poor performance to any health issues*". This assertion is by someone who had earller said she checked the claimant was alright with the hours which were no more than normal for that time of year. The timing of this ROI was calculated to maintain pressure on the claimant and we believe done at the instigation of Mr Heads . Saying the claimant did not raise the issue of her disability amounts to saying she has to "harp on " (to quote Morison P in Ridout, see later,) in order to get the respondents to make a connection which is obvious, and which we know from Mr Pearce's letter Mr Heads had made .

2.51. The claimant wanted New Year's Eve off for her child's birthday. Mr Heads made her work it , as well as Christmas Eve .On 31 December 2017, Mr Heads and Ms Weaver say the claimant was due to work 9 am to 7 pm but, ***of her own volition and without prior approval*****,** came in at 8 am so she could leave at 6 pm, as she had done for the past few Sundays. Mr Heads says Ms Weaver and Ms Burke had challenged her on previous Sundays for not following her rota and leaving early. We do not believe that either. Mr Heads statement says "*She also failed to explain why she needed to finish early and became hysterical and uncontrollable when Louise explained to her on this day that she needed to adhere to the rota which had been agreed 3 weeks prior. At this point she walked out and said she was too upset to work. This happened at around 9:30am and following this, Sam never returned to work and was signed off as sick*".

2.52. The claimant's statement and diary describe this day graphically. She arrived at 8 am and at 8 20 Mr Heads demanded to know why she was in work early. There had been an amendment to the rota which he denied having made, but we accept it was changed . At 11.15 he called her into the office where Ms Weaver was present. The claimant was tearful and in her oral evidence said she was spoken to like a naughty schoolgirl including words like "*why can't Sam Kent read a simple rota*". She was not allowed to speak and told she would have to work until 7 o'clock that night. She was so upset she was physically sick and left work. As to timing and content, we prefer her account .

2.53. Ms Weaver's version is she "explained" the claimant needed to adhere to the rota times for her shifts so adequate cover was in place. She also says the claimant failed to explain why she needed to finish early. It was her child's birthday and a moment's thought would show she would not be able to share in it if she had to stay until 7pm , be home by 7.30 take her medication and to get to bed by 9pm. It is true she had the next day off , but the medical evidence is clear she must maintain a routine. On 2 January 2018 she was signed off work for eight weeks as a result of anxiety brought on by the respondents' treatment of her and disregard of her disability.

2.54 On 3 January Ms Weaver wrote in an email to Mags Gardner at page 253 the claimant showed a **" *pattern*"** of **" *challenge , outburst, off sick* ".** On the one occasion in March when she went sick, Ms Weaver was not there**.** After 20 years good attendance, what happened , even on Ms Weaver's account , could not be described as a "pattern".

2.55. On 15 January 2018 Ms Weaver wrote to the claimant inviting her to a welfare meeting "*following* ***her long absence*** *from work*". The absence was two weeks fully certificated by her GP. She responded on 22 January 2018 requesting any future meetings be held at a different store as Mr Heads intimidated her. He wanted to speak to her himself, something Mr Pearce had told him he should not insist on doing.

2.56. On 26 January Ms Weaver insisted she had to attend a welfare meeting, which eventually was arranged for Sunday, 28 January 2018 when Mr Heads would not be on the premises. Ms Weaver checked with ERT if she could meet her without Mr Heads present . Why was that necessary if what Mr Pearce had written and what Mr Heads said about the role of a people manager was true ? On 28 January 2018 she did attend and say she did not feel well enough yet to return to work, confirmed her medication had changed and she was attending counselling due to anxiety concerning her relationship with Mr Heads . She said she still wanted to transfer stores. Ms Weaver said there were no café vacancies but she would keep her updated.

2.57. Morrisons was going through a structural change in respect to its management roles at its stores. Ms Weaver announced this at a meeting of all managers to which the claimant had been called, on about 1 February 2018, by reading from a script. In her oral evidence she said it was followed by 1-1s but that was not in her statement. Her statement then reads "*Due to the restructure all transfers had been put on hold. This was a companywide decision. I explained whilst the restructure was going on, a transfer would not be possible . I explained that once the restructure had been completed we would continue to look for other café manager roles for her to consider …As part of the restructure, those managerial roles not put at risk (including Sam's) were changing to include additional duties and would have extended hours. As a result of the restructure, Team Managers would have an additional role of "manager in charge" acting as a key holder which would mean working until 10pm. I explained to Sam whilst this was the case, we would not be making these changes to her role and she would not be expected to work past 7pm. During this conversation Sam mentioned that she was considering stepping down from her Team Manager role to an hourly paid colleague role because she knew there were other Team Managers at risk of redundancy and her new role under the restructure could be offered to one of these Team Managers instead*." **We find the claimant asked on 1 February whether her arrangement not to work past 7 pm would continue and Ms Weaver replied she could not give an answer. The claimant was told she had a week to make up her mind and, not until 8th February was she**

told the 7pm arrangement would continue. We have seen no written confirmation of that to her . She accepts she talked of stepping down to a colleague role, but not to save others jobs, rather to keep to hours she could manage . She had worked only for Morrisons since she left school and did not want to leave . However, she had given Morrisons every chance for about a year to curb Mr Heads behaviour towards her, and there was no sign Mr Heads would change his ways and no prospect of a transfer.

2.58. A further welfare meeting took place on 15 February 2018, again with Ms Weaver when the claimant confirmed her condition had seen no real change, and she needed to '*get over the hurdle'* of Mr Heads before she could return to work.

2.59. After much consideration she resigned on 26 February 2018. During Ms Weaver's conversation with her she mentioned going to work in her husband's pub. At the end of the meeting, she handed over her resignation letter dated 26 February 2018 which stated her reason for leaving was unfair treatment by Mr Heads . Ms Weaver says this was "*totally at odds with what she had told me*". Mr Phipps written submissions contain:

Had C's resignation been partly or wholly in response to R1/R2's conduct, it could have easily been done in December 2017. The reality is, C had a hope to run a pub with her husband and she was intending to leave R1 irrespective of R1/R2's conduct. A family venture like this would obviously take priority even if it results in a reduction in earnings initially or annual benefits. The Tribunal need no clearer demonstration of C's devotion and commitment to that business venture than her work pattern. Within a fortnight of C's resignation from C, she was working in excess of 40 hours weekly. By the May 2018, C was working 49.75 hours a week, and by June 2018, C was consistently working in excess of 52 hours a week: 52.75 hours [515], 53.25 hours [516], 56 hours [517], 65.5 hours [519]. Clearly, this seriously undermines C's allegation that working for 52 hours over Christmas 2017 caused her any adverse impact generally or in light of her disability specifically.

At the time of C's resignation, she had used up all her CSP allowance and had asked to be paid holiday pay in lieu of CSP (See Section I below). Crucially, C's resignation was handed in on the Monday 26.02.2018 [285] which was the same week in which her sick leave would expire [845].

2.60. We wholly reject the respondents' case the claimant left to work with her husband. They needed two incomes and she would not give up a job she had held , albeit with a break in employment , since she had left school to take up a zero hours contract on the national minimum wage with the brewery which owned the pub where her husband was to take over as manager. In our conclusions, we will complement Mr Phipps handling this case in many respects, but this was an "own goal". In her new job she lives on the premises so has no worries about driving to and from work. She can take a break without being tannoyed. She is not subjected to constant criticism and scrutiny. If she had been supported in her efforts to control the symptoms of her disability with the help of medication, she could have put in the hours at Morrisons, and would have.

2.61.The claimant's employment ended on 26 February 2018. She commenced Early Conciliation on 27 February, received her certificate on 9 April upon which day she issued proceedings. On any analysis, any event for which the time limit starts to run on or after the first week of December is issued in time.

2.62. A sum of £812 was deducted from her final wages in respect of holiday overtaken. She says that this is a too much. The holiday year begins in January 2018 and she had taken no holidays because she was on sick leave. However, she had pre-booked some which were deducted . Although we finished the evidence in the allotted time, we had to adjourn for written submissions and during the hearing both Counsel believed an agreement on this issue would be possible .In Mr Robinson-Young's written submissions he says the respondent's solicitors have raised further issues about what days should be deducted. Counsel both suggest we deal with this matter on hearing further evidence and submissions, which we are happy to do.

2.63. The claimant also says she should have been paid a 3% profit share. We reject this claim because it is clear she has to be in employment at the time that the right to profit share vests which she was not . As a breach of contract claim it fails, but the loss of the bonus may be an item of remedy in the claims which have succeeded.

3. Relevant Law

3.1. Section 95(1)(c) of the Act provides an employee is dismissed 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*."

3.2. An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract, Western Excavating (ECC) Ltd v Sharpe [1978] IRLR 27. The conduct of the employer must be more than just unreasonable to constitute a fundamental breach.

3.3. Section 98 (1) requires the respondent to show the principal reason for dismissal and that it falls within section 98 (2) or is some other substantial reason justifying dismissal the employee . Even constructive dismissal may be fair if the respondent shows a potentially fair reason and acts reasonably. The reason in a constructive dismissal was explained in Berriman v Delabole Slate Company [1985] ICR 546: -

"First in our judgment even in a case of constructive dismissal section 57(now section 98 of the Act) *imposes on the employer the burden of showing the reason for dismissal notwithstanding it was the employee not the employer who actually decided to terminate the contract. In our judgment the only way in which the statutory requirements of the Act can be made to fit the case of constructive dismissal is to read section 57 as requiring the employer to show the reason for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer*."

3.4. In WA Goold (Pearmak) Ltd v McConnell 1995 IRLR 516, the EAT held an employer is under an implied duty to 'reasonably and promptly afford a reasonable opportunity to employees to obtain redress of any grievance they may have.

3.5. It is an implied term employers will take reasonable steps to safeguard the health and safety of employees , see Waltons and Morse –v-Dorrington .

3.6. Where the employer has not breached any express or other implied term , an employee may rely on the implied term of mutual trust and confidence. In Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, the EAT, said: -

"*It is clearly established that there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract."*

3.7. The House of Lords in Malik v BCCI said if conduct, objectively considered, was likely to cause serious damage to the relationship between the employer and the employee, a breach was made out irrespective of the motives of the employer. The conduct of the employer must be without "reasonable and proper cause" and that too must be objectively decided. It is not enough the employer thinks it had reasonable and proper cause. Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908 held the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there is a constructive dismissal. Rather, it is to be considered if the employer puts forward a potentially fair reason for dismissal when deciding whether dismissal was reasonable.

3.8. An employer is liable for the acts of its managers towards subordinates done in the course of their employment whether the employer knew or approved of them or not Hilton International v Protopapa. There are countless examples of the ways in which the implied term may be breached, for example, unjustifiably telling an employee he is incapable of doing the job, see Courtaulds v Andrew or failing to take a complaint of harassment seriously Bracebridge Engineering -v- Derby

3.9. A breach of the implied term may result from a number of actions over a period of time, as said in Lewis v Motorworld Garages [1985] IRLR 465. This, sometimes called the "last straw doctrine", was explored in London Borough of Waltham Forest v Omilaju [2005] IRLR 35. The last straw does not have to be a breach of contract in itself or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. An entirely innocuous act by the employer cannot be taken as a last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in the employer.

3.10. Resignation is acceptance by the employee the breach has ended the contract. Conversely, she may expressly or impliedly affirm the contract and thereby lose the right to resign in response to the antecedent breach. There is a lengthy explanation of the principles in WE Cox Toner (International) Ltd v Crook [1981] IRLR 443, which the Court of Appeal confirmed in Henry v London General Transport [2002] IRLR 472. The shorter, but effective explanation in Cantor Fitzgerald v Bird [2002] IRLR 267, is that affirmation is

"*essentially the legal embodiment of the everyday concept of 'letting bygones be bygones'".* Delay of itself does not mean the employee has affirmed the contract but if it shows acceptance of a breach, then in the absence of some other conduct, reawakening the right to resign (see Omilaju), the employee cannot resign in response to that breach.

3.11. Even if there has been a fundamental breach which has not been affirmed, if it is not **at least in part** the effective cause of the resignation, there is no dismissal, see Jones v F.Sirl Furnishing Ltd and Wright v North Ayrshire Council, EAT 0017/13

3.12. Unlawful discrimination requires a **discriminatory act** and a **type of discrimination** The relevant **acts** in s. 39 are

(*2) An employer (A) must not discriminate against an employee of A's (B)—*

*(b) in the way A affords B access, or by **not affording** B access, to opportunities for promotion, **transfer** or training or for receiving **any other benefit**, facility or service;*

*(c) by **dismissing** him*

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

The acts complained of could be all of the above. However if we find dismissal was not only unfair and wrongful but discriminatory, the others become otiose.

3.13. As for **types** of discrimination section 13, " Direct discrimination" says a person discriminates against another if, because of a protected characteristic, it treats her less favourably than it treats or would treat others. Direct discrimination is less favourable treatment because of a **particular** disability.

3.14. Section 15 says

(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.

3.15. In Charlesworth-v-Dransfields Engineering , Simler P endorsed Langstaff P in Basildon NHS Trust-v-Weerasinghe that s 15 required a two stage approach : first, there must be " something" arising in consequence of disability and second that must be an operative cause of the unfavourable treatment. It does not have to be the sole or main cause . Chief Constable of West Yorkshire v Khan held causation requires an analysis of the mental processes (conscious or subconscious) which caused the respondent to act as it did .see too Land Registry-v-Houghton and Pnaiser-v- NHS England.

3.16. Section 39 (5) imposes a duty to make reasonable adjustments. Section 20 says it comprises three requirements but only the first is relevant here.

(3) *The first requirement is a requirement, where a **provision, criterion or practice** of (the employer) 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**.*

3.17. Section 21 says :
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

3.18. Schedule 8 says a reference to a PCP is to one **applied** by **or on behalf** of the employer. Section 109 says

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.
If a manager has a practice , it **is** a practice applied on behalf of the respondent

3.19. The duty was originally differently worded in the Disability Discrimination Act (DDA). The concept of "*arrangements*" originally contained in the DDA was replaced by that of a PCP "*applied by **or on behalf of** the employer*". Under other Acts the original formulation of indirect discrimination referred to a " requirement or condition" imposed by the employer.This was construed in Perera-v- Civil Service Commission to be something the employer said "**must"** be met. The concept of a PCP was meant to be wider. covering not only what the employer insisted upon but what it **expected**. Moreover, what an employer "provides" **should** happen (a **provision**) or a standard it says should be met (a **criterion**) may differ from what in **practice does** happen or the standards which are in **practice** expected to be met .Any one of the three may trigger the duty. Carreras-v-United First Partners Research is authority for this proposition.

3.20. Newham College –v-Sanders affirming Environment Agency v Rowan 2008 IRLR 20 said as well as identifying the offending provision, criterion or practice (PCP) the tribunal must establish the nature and extent of the substantial disadvantage suffered by the employee in comparison with non-disabled people. It must be clear what 'step' the employer has allegedly failed to take to remedy that disadvantage and whether it was reasonable to take that step.

3.21 Schedule 8 includes ;

20 (1). *A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*
(b) .. that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

3.22. Under s 15 the respondent may avoid liability if it shows it did not know, and could not reasonably have been expected to know , the claimant had a disability. The duty to make reasonable adjustments only arises where the employer has actual or constructive knowledge of the adverse effects too. In Secretary of State for Work and Pensions –v-Alam, Lady Smith said the issues on the latter are:

*1. Did the employer know **both** that the employee was disabled **and** that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: "no" then there is a second question, namely,*

*2. Ought the employer to have known **both** that the employee was disabled **and** that his disability was liable to affect him in the manner set out in section 4A(1)?*
If the answer to that second question is: "no", then the section does not impose any duty to make reasonable adjustments.

3.23. In Richmond Adult Community College v McDougall, the Court of Appeal held the determination of disability where there is a recurring or a disputed long term effect should be done by putting oneself back in the position at the time of the acts of discrimination complained of and asking what a properly informed person with medical advice would have predicted at that time. Disability is always assessed as if medication was not being taken. **It was eminently predictable by at the latest April 2017. the claimant would need medication for more than 12 months probably for the rest of her life.**

3.24. In Ridout v TC Group [1998] IRLR 628 Morison P said *"We accept what Counsel for the appellant was saying that Tribunals should be careful not to impose on disabled people … a duty to 'harp on' about their disability … **It would be unsatisfactory to expect a disabled person to have to go into a great long detailed explanation as to the effects their disablement had on them merely to cause the employer to make adjustments which he probably should have made in the first place**.* Gallop v Newport City Council held an employer could not defend on the basis of lack of knowledge of the disability when it had '*unquestioningly*' accepted the opinion of its OH adviser. **In this case the OH reports set out more than enough to show the disability existed ,what its effects were and would be without the correct medication**.

3.25. In Hatton-v-Sutherland, Hale LJ , as she then was , albeit in the different legal context of whether injury to health due to pressure of work is reasonably foreseeable made points which are helpful is assessing what an employer ought to have known. Her Ladyship's references to "Walker "are to the decision of Colman J in Walker-v-Northumberland County Council . She said factors likely to be relevant include.

27.More important are the signs from the employee himself. Here again, it is important to distinguish between signs of stress and signs of impending harm to health. Stress is merely the mechanism which may but usually does not lead to damage to health. Walker is an obvious illustration: Mr Walker was a highly conscientious and seriously overworked manager of a social work area office with a heavy and emotionally demanding case load of child abuse cases. Yet although he complained and asked for help and for extra leave, the judge held that his first mental breakdown was not foreseeable. There was, however, liability when he returned to work with a promise of extra help which did not materialise and experienced a second breakdown only a few months later. If the employee or his doctor makes it plain that unless something is done to help there is a clear risk of a breakdown in mental or physical health, then the employer will have to think what can be done about it.
*28. Harm to health may sometimes be foreseeable without such an express warning. Factors to take into account would be frequent or prolonged absences from work which are **uncharacteristic for the person concerned**; ..*
*29. But when considering what the reasonable employer should make of the information which is available to him, from whatever source, what assumptions is he entitled to make about his employee and to what extent he is bound to probe further into what he is told? **Unless he knows of some particular problem or vulnerability**, an employer is usually entitled to assume that his employee is up to the normal pressures of the job. It is only if there is something specific about the job or the employee or the combination of the two*

that he has to think harder. But thinking harder does not necessarily mean that he has to make searching or intrusive enquiries. Generally he is entitled to take what he is told by or on behalf of the employee at face value. If he is concerned he may suggest that the employee consults his own doctor or an occupational health service. But he should not without a very good reason seek the employee's permission to obtain further information from his medical advisers. Otherwise he would risk unacceptable invasions of his employee's privacy.
There are no concerns about privacy in this case because the claimant told Ms Grey openly what was wrong and had the respondents asked to see the reports of any her clinicians she would readily have agreed.

3.26 Smith-v-Churchills Stairlifts held *"There is no doubt that the test required by section 6(1) is an objective test.* Baroness Hale said in Archibald-v-Fife Council:

*57. … the Act entails a measure of positive discrimination, in the sense that **employers are required to take steps to help disabled people which they are not required to take for others**. It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take.*

*58. … **The control mechanism lies in the fact that the employer is only required to take such steps as it is reasonable for them to have to take. They are not expected to do the impossible.***

3.27. Project Management Institute v Latif 2007 IRLR 579 concerned the burden of proof in relation to the duty to make reasonable adjustments. The EAT explained that, in order to shift the burden onto the employer, the claimant must not only establish that the duty has arisen but that there are facts from which it can be reasonably inferred, absent an explanation, that it has been breached. Accordingly, by the time the case is heard, there must be evidence of some apparently reasonable adjustments that could be made and the Tribunal must decide whether the respondent's given reasons for not making them are objectively reasonable by critically evaluating them, weighing their importance to the employer against the discriminatory effect .

3.28 In Spence-v-Intype Libra Elias P. said. :

38…. The issue…, is whether the necessary reasonable adjustment has been made; whether it is by luck or judgment is immaterial.

*40. A tribunal will be fully entitled in the light of all the evidence before it to conclude that an employer has failed to make a reasonable adjustment, and **his ignorance of the employee's requirements, whether the result of indifference or ignorance, will not avail the employer one iota.** He may carry out an assessment and fail to make reasonable adjustments; equally, he may fail to carry out the adjustment but make all necessary reasonable adjustments.*

3.29. Section 19 defines indirect discrimination thus :

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

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

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

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

3.30. Knowledge of disability is not a requirement under s19. “Proportionate means of achieving a legitimate aim” used to be called “justification” . Balcombe LJ said in Hampson v Department of Education and Science [1989] ICR 179, 191: *"justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition."* Pill LJ in Hardys and Hanson plc-v-Lax said

32 .. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action.

3.31. Justification is also about striking a balance. The DDA expressly said an employer could “justify” disability related treatment only if he had first complied with the duty to make reasonable adjustments. Though the EqA does not expressly say so, it is logically difficult to justify discrimination under s 15 unless the employer has first complied with the duty to make reasonable adjustments. If it has and the adjustments have not removed the disadvantage, there is usually little more to be done to justify unfavourable treatment.

3.32. In Newham Sixth Form College v Sanders [2014] EWCA Civ 734 Laws L.J.said

three aspects of the case -- nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments -- necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable.

3.33. In Olaleye v Liberata UK Ltd UKEAT/0445/13 Lady Stacey said

The Claimant does not and cannot on her pleadings assert she suffers from stress and anxiety and indeed insomnia except as a result of her underlying condition. I understand her today to accept that the information she seeks to put before an Employment Tribunal that decides her case on the merits is that she suffers from stress, anxiety and insomnia

as a result of suffering from the underlying condition and as a result of the effect that that underlying condition has on her in her particular workplace.., and as a result of the attitude that some of her colleagues have taken….

3.34.In Sheikholeslami v University of Edinburgh, the tribunal identified the key issue as being whether the claimant's refusal to return to her existing role was because of her disability or some other reason, such as her having been badly treated in the department. However, the EAT said this was not a binary question - both reasons could have been in play if her disability caused her to experience anxiety, stress and an inability to return to the place where she perceived the mistreatment and hostility to be located, leading to her refusal. Thus s 15 discrimination had occurred.

3.35 As for harassment, section 26 says

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

(a) A engages in ***unwanted conduct related to*** *a relevant protected characteristic, and*

(b) the conduct has the purpose ***or*** *effect of—*

(i) violating B's dignity, or

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

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

(a) the perception of B;

(b) the other circumstances of the case;

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

The relevant protected characteristics include disability. Section 212 says if conduct constitutes harassment it cannot also be a detriment within section 39, so if acts or omissions falling within s15 s 19 or s20/21 subject an employee to detriment short of dismissal but also constitute harassment, it is section 40, not 39, which is infringed.

3.36. Before harassment was a separate statutory tort, if a person engaged in conduct towards another which was related to , say, sex but did not do so **because of** sex , there was no direct discrimination and no unlawful act unless the conduct constituted a PCP which impacted more on women than men. See Porcelli –v-Strathclyde Council Into the old legislation, there was introduced a free-standing tort of harassment. The wording in each statute was not identical. The link which used to have to be proved in most strands except sex was between the protected characteristic and reason for the offensive conduct had to be *on grounds of* " it. The characteristic had to bethe *reason why* the harasser acted as he or she did. Porcelli lived on . Under section 26 on a literal reading, the link is now between the protected characteristic **and the conduct.** Victims do not have to possess the 'protected characteristic' themselves. The authors of the IDS handbook " Discrimination at Work" take the view section 26 covers both conduct done because of the protected characteristic and conduct related to a protected characteristic. We believe it should only cover the latter because s13 , or in this case s15, cover the former . Bakkali-v- Greater Manchester Buses presented Slade J with a little opportunity to decide that . Her Ladyship said *"Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic.* ***It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected***

characteristic would not be related to that protected characteristic of a claimant. *However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour".* A reason why this point has not been decided, and may never be, on appeal, is that if section 39 is not infringed in such circumstances, section 40 certainly is and the remedy is the same.

3.37.This case is a good example of unwanted conduct, in the form of micro-management and unjustified criticism of the claimant done because of something relating to disability, being her reduced levels of efficiency, inability to work whatever hours were best for the operational needs of the business, periodic sick absence and need to have reasonable adjustments made for her, but in which the conduct itself did not relate to disability. That is one basis on which we reject the harassment claim. The other is s 212 does not prevent a finding that acts which constitute harassment but which result in **dismissal** should be dealt with under section 39 rather than 40.

3.38. Section 136 says
(1) This section applies to any proceedings relating to a contravention of this Act.
(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.

3.39. This "reversal of the burden of proof" in direct discrimination is best explained in paragraph 40 of Ladele-v-London Borough of Islington . For this case we need only quote parts which in our view apply to s 15 , with a little adaptation,

(3) ... The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in Igen v Wong. …The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:
"Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer."
If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination.

3.40. In General Dynamics-v Carranza UKEAT/0107/14, HH Judge Richardson said
*The **Equality Act 2010** now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability: section 15 of the Act. The second is the duty to make adjustments: sections 20-21 of the Act. The focus of these provisions is different. Section 15 is focussed upon making allowances for disability: unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20-21 are focussed upon affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage.*

3.41. Elias L.J.in Griffiths v Secretary of State for Pensions.[2015] EWCA Civ 1265 said

. it is perfectly possible for a single act of the employer, not amounting to direct discrimination, to constitute a breach of each of the other three forms. An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment - say allowing him to work part-time - will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified. Finally, if the PCP, breach of which gives rise to the dismissal, also adversely impacts on a class of disabled people including the claimant, the conditions for establishing indirect discrimination will also be met.

His Lordship specifically endorsed Judge Richardson's observations in Carranza

3.42. Section 120 includes:

(1) Proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

3.43 The respondents' refusal to acknowledge the claimant's disability and the need for steps to alleviate its effects spans the period April to December 2017 and beyond. The question of time limits and acts " extending over a period" has been considered in a number of cases notably Cast-v-Croydon College 1998 IRLR 318 Hendricks-v-Commissioner of Police for the Metropolis 2003 IRLR 96. The later held that a **succession of isolated unconnected acts** would not be an act extending over a period. **In this case the acts and omissions of the respondents were anything but that.**

3.44. In Matuszowicz-v-Kingston-Upon-Hull City Council 2009 IRLR 289 Lloyd L.J. set out the statutory provisions then quoted with approval His Honour Judge Reid QC in Humphries v Chevler Packaging Limited at paragraph 24

"the failure to make adjustments is an omission. The respondents are omitting to do what (on the appellant's case) they are obliged to do. They are not doing any act, continuing or otherwise."

3.45. Mr Phipps' submissions examine the pleaded case and urge upon us the need to consider each act or omission . We believe the wording of s 120, which is significantly different from its various predecessor Acts , permits a shorter approach. The continuing omission to make reasonable adjustments and the continuing view of the claimant as a nuisance because of her limitations and need for adjustments, resulting in the over

aggressive management of her over a period are in contravention of s 20/21 and 15 respectively.The acts and omissions we find proved are either within time under s20/21 on the Matuszowicz principles or part of a continuum on the Hendricks principles. It is not that we lack the ability to do an act by act analysis. There is no benefit to anyone in adding to the length of these reasons by doing so. Most importantly, a constructive dismissal is a dismissal within the EqA as it is within the ERA. As the accumulation of the discriminatory acts and omissions culminated in dismissal and the claim was brought within the relevant time limit for that act , s 120 does not prevent us dealing with it.

3.46. If we are wrong, this is plainly a case where it is just and equitable to consider all the acts. Valuable guidance on when it is just and equitable is British Coal Corporation v Keeble [1997] IRLR 336. The length of and reasons for the delay, whether the claimant was being advised at the time and if so by whom and the extent to which the quality of the evidence is impaired by the passage of time are all relevant considerations. Using internal proceedings is not in itself an excuse for not issuing within time see Robinson v The Post Office but is a relevant factor. In Matuszowicz the Court of Appeal considered a failure to make reasonable adjustments claim where the claimant gave the employer some time to remove what the claimant saw as the impediments to doing the job. The argument the claimant should have realised earlier they would not and brought the claim earlier did not find favour with Sedley LJ who said such contentions *"demand a measure of poker faced insincerity which only a lawyer could understand or a casuist forgive ".*

4 CONCLUSIONS

4.1. At this hearing, the claimant presented her case first. When Mr Phipps had cross-examined her and her witnesses the picture he was trying to paint of an employee who unjustifiably acted with petulance when she was fairly criticised for underperformance looked a distinct possibility. His written submissions also read very well but are predicated on our finding his witnesses were credible. We hope our findings of fact, which we appreciate are robust, show we did not find them credible. This was not simply due to their answers to Mr Robinson-Young's questions but more importantly repeated inconsistencies between their written statements, their oral evidence and vital documents, most of which they themselves created, roughly contemporaneously.

4.2. Mr Phipps rightly says Chapman-v-Simon precludes the tribunal dealing with claims which are not pleaded. Office of National Statistics –v-Ali held each type of discrimination is separate from the others. We do not believe anything we have decided was not covered in the original claim.

4.3. The claimant was plainly a disabled person by, at latest, April 2017. The direct discrimination claim fails because the treatment afforded to the claimant was not less favourable than would have been afforded to a person with a different disability whose abilities to perform his or her job were impaired whilst a medication regime to control its symptoms was still being explored. We have given our reasons for rejecting the harassment claim at 3.35-3.37 above and our reasons for rejecting the time limit defence at 3.42-3.46. above.

4.4. There is no doubt the claimant was subjected to unfavourable treatment because of matters arising in consequence of her disability, to which we will return shortly, which is covered by section 15. The first line of defence was lack of knowledge. We find the respondents knew by April 2017 she was disabled and throughout the rest of the year

their protestations they did not know the effects of the disability or the steps that were needed to alleviate it , became increasingly unbelievable, as more and more information was drawn to their attention .

4.5. Mr Heads was "micro managing" her from the start of 2017. Whilst it is not to be complemented, we accept it was his managerial style in respect of any department not performing to 100% efficiency, to "crack the whip " over the team manager . However, as time wore on, he did so to a greater extent to the claimant and in our judgment the reason was her being a nuisance to him because she could not be as flexible as when she was not ill. The acts or omissions of Mr Heads were at least in part because of the claimant's inability to work flexible hours to suit the needs of the business. In this case, the "something" under s15 is (a) her inability to work the hours non-disabled managers do and she would if she were not disabled and (b) absence she had because of that. The treatment of her was caused by those factors and not a proportionate means of achieving the legitimate aim of having an efficient café . That aim could have been achieved at little or no cost or inconvenience to the respondent by supporting her in her efforts to overcome the effects of her disability and carry on working.

4.6. The respondents knew or could reasonably have been expected to know the claimant was disabled and placed at a substantial disadvantage by the application to her of its PCP that she should work the same shifts as non-disabled people and she herself had worked before becoming ill . In our judgment there was a second practice applied by Mr Heads which was to manage reduced performance by picking relentlessly at every fault he could find and blaming it on whoever was the team manager. Knowing that would cause her stress which would exacerbate her condition, we believe that too placed her at a more than trivial disadvantage in comparison with persons who are not disabled.

4.7. The PCP that she should work whatever hours are best suited to the efficient operation of the business, within her contracted 43 hours spread over 5 out of 7 days between the hours of 7 am and 10 pm put her at a more than trivial disadvantage in comparison with non-disabled people who could work such hours without difficulty, as she did for many years, because, as she says, doing so made her exhausted and ill. The steps it would have been reasonable for the respondent to take would have been (i) to vary her hours so she did not have late finishes or **early starts** (ii) not expect her to work extra hours over the Christmas period (iii) give her reassurance " concessions " , which were made would not be withdrawn by Mr Heads whenever he thought fit for the operational benefit of the business . We reject Mr Phipps submission any of these steps were taken as they should have been. The fact she was not rostered to work after 7pm was a concession wrung from the respondent after many months and never acknowledged to be a step to which she was legally entitled. Ms Weaver said had she asked for fixed shifts they could have been given . They certainly could with no problem but they were not, and the reason is Mr Heads was determined all staff , disabled or not , must be " flexible" .

4.8. The PCP applied to all team managers was they should work whatever hours are best suited to the efficient operation of the business, within their contracted hours spread over 5 out of 7 days between the hours of 7 am and 10 pm . This put the claimant and other disabled persons who needed to maintain a routine at a particular disadvantage. The respondent has not shown applying the PCP was a proportionate means of achieving its legitimate aim of providing an effective service to customers. The

acts and omissions are in contravention of both of s 19 and s20/21 but as the latter is shown, the former is otiose.

4.9. The acts or omissions of the respondents cumulatively were a fundamental breach of Morrisons contractual obligations to the claimant, especially
(a) the duty to look after her , and others, health and safety at work
(b) without reasonable and proper cause, conducting itself in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between Morrisons and the claimant .
She was afforded an effective means of resolving grievances but nothing happened to change Mr Heads behaviour despite the decisions of Mr Farage and Mr Pearce.

4.10. The claimant did resign, at least in part, in response to such breach without first affirming the contract. The contrary argument is rejected for reasons given at 2.59-2.60

4.11. The respondent does not show a potentially fair principal reason for its conduct . Mr Heads believed the claimant lacked managerial capability, but there were no reasonable grounds for that belief. Until she became disabled, her work as a team manager was not criticised. When she became disabled we accept her standards may have deteriorated as a consequence of her fatigue which could be related to capability in terms of health. Even if we accepted that had been shown as a potentially fair reason no reasonable employer would have managed the situation in the way Mr Heads did without the slightest regard for her disability. The dismissal is therefore unfair , wrongful and discriminatory.

_____

TM GARNON EMPLOYMENT JUDGE
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 8th NOVEMBER 2018