EMPLOYMENT TRIBUNALS

Claimant: Mrs N McGarry-Gribbin

Respondent: B&Q Limited

HELD AT: Liverpool (by CVP) **ON:** 30 November, 1, 2, 3, 4, 7, 8, 14 & 16 December 2020 (in chambers)

BEFORE: Employment Judge Shotter

Members: Mr G Barker
Ms C Doyle

REPRESENTATION:

Claimant: In person
Respondent: Mr Piddington, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent was in breach of its duty to make reasonable adjustments in respect of allegation 11(a), a requirement to work on the tills and front-end department in respect of working on staffed tills only, on the 1 and 9 July 2019. The reasonable adjustment was ensuring the claimant was not required to work on the staffed till in the front-end department. The claimant's claim of failure to make reasonable adjustments brought under sections 20-21 of the Equality Act 2010 succeeds and is adjourned to the listed remedy hearing listed for one-day on the **23 March 2021** via CVP. The parties will be advised of the dial in details in due course.

2. The claimant was indirectly discriminated against on the grounds of her disability in relation to agreed issue 11(a) when she was put to work on the staffed tills on 1 and 9 February 2019, the claim brought under section 19 of the Equality Act 2010 succeeds the respondent having failed to demonstrate that the provision, criteria or

practice of requiring customer advisors to work on staffed and self-serviced tills was a proportionate means of achieving a legitimate aim. The claim is adjourned for remedy to be assessed.

3. The claimant's claim of disability discrimination set out in agreed issues number 7(a), and (b) and 17(e) are out of time brought under section 13 of the Equality Act 2010 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done), such complaint is out of time, and in all the circumstances of the case, it is not just and equitable to extend the time limit. In the alternative the claims not well-founded and are dismissed.

4. The respondent was not in breach of its duty to make reasonable adjustments in respect of allegations 11(b), (c), (d), (e) and 15(a), (c), (d), (e), (f) and (g) and the claimant's claim of failure to make reasonable adjustments brought under sections 20-21 of the Equality Act 2010 fails and is dismissed.

5. The claimant was not treated less favourably because of her protected characteristic of disability and her claims of direct discrimination set out in agreed issues 7(c), (d), (e) and (f) brought under Section 13 of the Equality Act 2010 are not well founded and dismissed.

6. The claimant was not treated less favourably because of something arising in consequence of her disability in respect of allegations 16(a), (b) and (c), and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed.

7. The claimant was not indirectly discriminated against on the grounds of her disability in relation to agreed issues 11(b), (c), (d) and (e) and she was not subjected to unfavourable treatment and her claims brought under section 19 of the Equality Act 2010 fail and are dismissed. In the alternative, the respondent demonstrated that the provision, criteria or practice was a proportionate means of achieving a legitimate aim.

8. The respondent did not harass the claimant in respect of allegations 25 (a), (b), (c), (d), (e), (f) and (g) and the claimant's claim of harassment brought under section 26 of the Equality Act 2010 fails and is dismissed.

9. The respondent has not breached the implied term of trust and confidence in relation to agreed issues 29(b), (c), (d), (e), (f) and (g). The respondent was in fundamental breach of contract in relation to agreed issue 29(a) sufficiently serious to amount to a fundamental breach. The claimant affirmed the contract and she did not resign as a result of the breach. The claimant was not unfairly dismissed and her claim for constructive unfair dismissal is not well-founded and is dismissed.

REASONS

Preamble

The hearing

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Code V: Kinley CVP fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 696 pages, the contents of which I have recorded where relevant below. In addition, the Tribunal was provided with a bundle of witness statements and separate documents consisting of written submission by both parties, an agreed cast list, chronology, agreed list of issues and amended list of issues.

2. The liability hearing was adjourned on Thursday afternoon 3 December 2020 at the Tribunal's suggestion with the agreement of the parties immediately following the claimant emailing the Tribunal that she had taken opiate painkillers that morning and her concentration was affected. The claimant was due to cross-examine Roger Braun, a key witness in this case, she is a litigant in person and it was in the interests of justice to adjourn until she felt better able to conduct her case. The claimant then continued to present her case and cross-examine without issue for the duration of the liability hearing.

The pleadings

3. The Tribunal has taken time to understand the claimant's claims, which are extensive and complex in their inter-relationship and how they were presented at this liability hearing.

4. In a claim form received on 18 September 2019 following ACAS early conciliation between 29 August 2019 and 18 September 2019, the claimant, who at the time was employed as a customer advisor from 13 March 2017 to her resignation on 20 November 2019, claims the following:

2.1 Constructive unfair dismissal contrary to section 95(1)(c) of the Employment Rights Act 1996 ("the ERA");

2.2 Direct discrimination relating to the claimant's disability contrary to section 13 of the EqA;

2.3 Indirect discrimination relating to the claimant's disability contrary to sections 19 and 39 of the EqA;

2.4 Discrimination arising from the claimant's disability contrary to section 15 and 39 of the EqA;

2.5 Failure to make reasonable adjustments in respect of the claimant's disability contrary to sections 20, 21 and 39 of the EqA.

2.6 Harassment under section 26 of the EqA.

5. The claimant's case is that she was disabled by a physical impairment of diverticular disease, and she does not rely on her medical conditions of asthma, anxiety and depression as a basis for her discrimination complaint. The provision, criteria or practice ("PCP") relied upon is being required to work on the tills was initially being required to work on this till, but this has been expanded as reflected in the agreed list of issues. Having heard all of the

evidence the Tribunal reached a view that the PCP which properly reflected the claimant's case was the requirement to work a staffed till for customer advisors working the front-end of the store.

"Additional Particulars of Claim"

6. In "Additional Particulars of Claim" the claimant alleges the respondent changed her contract when it permanently transferred her to the "front-end" i.e. tills, self-service check out, returns and customer services. There is a reference to health and safety, but this is not a stand-alone complaint brought by the claimant who sought to adduce evidence that the respondent had not made good the concrete area where she had allegedly suffered an accident in 2018. The claimant produced photographs taken in 2019 at the liability hearing, and confusingly attempted to argue that this was a continuous act because the respondent had not carried out any repairs. As indicated by Mr Piddington in oral submissions, the claimant is not bringing a personal injury claim and the Tribunal took the view that the claimant's evidence concerning what had allegedly transpired or not between the alleged incident in 2018 and the date of the claimant's resignation was not a continuing act on the basis the respondent had failed to carry out alleged repairs. The claimant was unable to recall the date of the alleged accident until this liability hearing. The photographs in the agreed bundle were taken in 2019 when on the claimant's own account there was no accident in 2019, and these were found not to be relevant to the issues to be decided by the Tribunal.

"Additional Particulars of Claim" clarifying section 13 EqA claim

7. The claimant has clarified her direct disability discrimination claim as follows:

7.1 In relation to the complaint brought under section 13 of the EqA and the allegation that Roger Braun refused to allocate the claimant early shifts, the actual comparators relied upon are employees within the gardening department; Sheila Kennedy, Steven Smith, Faye Roberts, Rachael Potts, Stephen Edwards, Scott Davies, Paul Rutherford, Lawrence Dowell, Callum Young, Kyle Low, Sam Elliot, Robert Devereux and Christopher Hill. It transpired the claimant had not provided the correct name of some of her comparators, and in oral submissions for the very first time brought up the possibility that Faye Roberts was a transient member of staff in the same position as Rachael Potts, a fact not explored with the respondent's witnesses in cross-examination by her, and no mention of this was made in any pleadings or the claimant's witness statement which the Tribunal found concerning, given the fact the position of Faye Roberts was fundamental to the claimant's case relating to her move from the gardening section to the tills. In short, there was a lack of any evidence to the effect Faye Roberts was transient and should have been moved on this basis instead of the claimant, and the Tribunal did not find this was the case.

7.2 In relation to the complaint brought under section 13 of the EqA concerning the informal action plan dated 24 September 2018 the claimant's actual comparators are the also claimant's colleagues in the gardening department, who were not issued with an informal action plan.

7.3 In relation to not sending the claimant home when she was not fit for work on 2018, the claimant relies on Sheila Kennedy as her actual comparator in addition to other unnamed colleagues.

7.4 In relation to the claimant's transfer to front end by Roger Braun the claimant relies upon Steven Smith, Sheila Kennedy, Faye Roberts and Rachael Potts as actual comparators, who she maintains did not have disabilities. In oral evidence, the respondent maintains Sheila Kennedy was disabled, and adjustments were made for her but nothing hangs on this.

"Additional Particulars of Claim" clarifying section 15 EqA

8. The detrimental action relied upon by the claimant was being transferred to the tills and front-end department due to the claimant having difficulty with heavy lifting and had taken disability related absences.

9. The claimant alleged she was disadvantaged as her transfer to tills and front-end department "disadvantaged her" due to the repeated twisting and lifting required, and "the limitation of not having urgent access to a toilet and flexibility in breaks."

10. The section 15 complaint has been further elaborated on by the claimant as set out in the agreed list of issues.

"Additional Particulars of Claim" clarifying section 19 EqA

11. The claimant relies on the following PCP's which put her at a disadvantage when compared with persons who do not share the claimant's disability which can cause a "flare-up" and the claimant may then require urgent access to a toilet and have difficulty with heavy lifting:

11.1 Requirement to work at till and front-end department,

11.2 Requirement to work on tills and front-end department without urgent access to a toilet and flexibility in breaks,

11.3 Requirement to have flexibility for early shifts,

11.4 Policy for allocating shifts,

11.5 A refusal to allocate early shifts to the claimant,

11.6 Requirement to lift heavy items.

"Additional Particulars of Claim" clarifying section 20 to 21 EqA

12. The claimant relies on PCP's numbered above.

13. The substantial disadvantage relied upon in comparison with non-disabled persons is:

12.1 The claimant needs urgent access to a toilet and is at significant risk of anxiety, distress, pain of her condition and humiliation by being required to frequently leave the till and/or having an accident as a result of incontinency.

12.2 The claimant is unable to lift heavy items and is at greater risk of physical pain and aggravation of her condition. The requirement to life heavy items in the gardening

department “meant she suffered the substantial disadvantage of not being permitted to work on the gardening department.”

12.3 Because of disability related absences, the claimant was perceived to be unreliable and was not given early shifts.

12.4 As a result of her disability, the claimant experiences less pain in the mornings, by not being given early shifts as requested, the claimant was more likely to be symptomatic while at work.

12.5 As a result of her disability the claimant had difficulty fulfilling the role in the tills and front-end department.

14. The reasonable adjustments relied upon by the claimant were:

14.1 Allow the claimant to continue working in the gardening department,

14.2 Ensure the claimant was not required to work on tills or the front-end department,

14.3 Ensure the claimant had urgent access to a toilet and flexibility in breaks when symptomatic,

14.4 Provide appropriate fit for purpose equipment to assist with heavy lifting,

14.5 “Formally ensured” the claimant could seek assistance with lifting if necessary,

14.6 Assign the claimant early shifts,

14.7 Been aware and sympathetic of the claimant’s condition and allowed her to go home if not fit for work.

Section 26 EqA

15. The claimant relies on the following acts as harassment relevant to the protected characteristic:

15.1 Expecting the claimant to work on the till and make her leave the customers compromising her dignity, subjecting her to a degrading and humiliating environment;

15.2 The respondent created a hostile environment by repeatedly telling the claimant she was not reliable due to her ringing in sick which the claimant found offensive,

15.3 The respondent dismissed and disregarded the claimant’s written and verbal concerns about her disability,

15.4 The respondent ignored the medical opinion of professionals and their written recommendations to safeguard and protected the claimant,

15.5 The respondent violated the claimant’s dignity by invading her privacy and asking intrusive questions,

15.6 The respondent intimidated the claimant by asking her to remain working on a department that the respondent knew compromised the claimant's physical and psychological well-being.

15.7 The flawed grievance investigative process and the matter being handed to three different store managers.

Constructive unfair dismissal

16. The claimant relies on the following alleged breaches of contract:

16.1 Express breach by transferring the claimant to front-end and then the lighting department as her primary department was seasonal.

16.2 The respondent failed to follow company policy and procedure by not completing an Employee Contract Change Form changing her primary department from seasonal to front-end.

16.3 The claimant did not consent to the change from seasonal to front-end and made this clear.

16.4 The respondent was in breach of their duty to provide a safe system of work.

16.5 The respondent "forced the change in contract and forced her to continue working under protest with the respondent knowing the claimant was at further risk to her health and well-being."

16.6 The respondent's failure to make reasonable adjustments was a breach of the implied term of trust and confidence.

16.7 The claimant relies on the allegation of discrimination set out above and the flawed grievance investigation as a course of conduct which culminated in a repudiatory breach, the final straw being the outcome of the grievance dated 15 November 2019.

17. The respondent disputes the claimant's claims. It accepts the claimant was disabled with diverticular disease from 8 April 2018 and the respondent possessed knowledge from that date.

Agreed issues

18. The parties agreed the issues as follows. The numbering set out in the list of issues has been duplicated by the Tribunal in the reserved judgment and these are the issues it decided after hearing all of the evidence and oral submissions.

Burden of Proof

1. Has the claimant proved, on the balance of probabilities, facts from which the tribunal could decide, in the absence of any other explanation, that the Respondent subjected her to the discrimination alleged?

2. If so, has the Respondent proved, on the balance of probabilities, that claimant's disability was no part of the reason?

Jurisdiction; Time Point

Claimant's EC notification took place on 29/08/19. The EC Certificate was issued on 18/09/19. The ET1 was lodged on 18/09/19.

3. Did any of claimant's complaints occur on or before 29/05/19, and therefore outside the primary limitation period within s.123 Equality Act 2010 (having regard to the extension of time for early conciliation in s.140B)?

4. If so, does the complaint amount to conduct extending over a period with the end of the period being later than 29/05/19?

5. If the answer to (3) and/or (4) above is no, is it just and equitable to extend time in respect of C's complaints?

Direct Disability Discrimination

6. The claimant relies upon diverticular disease as her disability. The respondent accepts that from April 2018 onwards the claimant was a disabled person pursuant to s.6 EqA 2010 due to diverticular disease and that R had knowledge of the same.

7. Was C subjected to less favourable treatment? The less favourable treatment relied upon by C is:

    a. Issuing C with an Informal Action on 24/09/18.

    b. Failing to send C home when she strained her abdomen on a summer evening in 2018.

    c. Refusing to allocate C early shifts.

    d. RB stating on various dates that he needed reliable staff.

    e. Failing to investigate C's grievance properly.

    f. Transferring C from the seasonal department to the Front End with effect from 01/07/19. The decision was communicated to C on 26/06/19.

8. C relies upon the following actual comparators:

    a. The other staff working in the Seasonal Department, in respect of allegation (a), (c), (d) and (f);

    b. Sheila Kennedy, in respect of allegations (b);

    c. TBC, in respect of allegation (e).

9. R denies that any of the named comparators are actual comparators on the grounds that they were not in materially the same circumstances as C.

10. Was the reason for the alleged less favourable treatment C's disability?

Failure to Make Reasonable Adjustments (s.20 & s.21 EqA 2010)

11. C relies upon the following PCPs:

a. A requirement to work on the tills and Front-End department. Whilst R does not accept that there was a requirement for all Customer Advisers to work on the tills and Front-End department, it is accepted that those Customer Advisers in the Front-End department were required to work on the tills.

b. A requirement to have flexibility for early shifts. R denies that this amounts to a PCP and/or that it applied such a PCP.

c. A 'policy' on the allocation of shifts. It is unclear what this alleged PCP relates to.

d. A refusal to allocate early shifts to C. R denies that this amounts to a PCP and/or that it applied such a PCP.

e. A requirement to lift heavy items. Whilst vaguely stated, R accepts that unless adjustments are made, a Customer Adviser may be required to assist with the moving of 'heavy' items.

12. The substantial disadvantage relied upon by C is:

a. In respect of (a) above, being placed at a significant risk of anxiety, distress, pain of her condition and humiliation by being required to frequently leave the till and/or having an accident.

b. In respect of (b) above being perceived as unreliable and/or being at greater risk of ringing in sick.

c. In respect of 11 (c) no detail was included and the claimant confirmed orally at this liability hearing that the substantial disadvantage she relied on was being put" into an unfavorable position, needs access to the toilet and being on the tills ended that access".

d. In respect of (d) above, being more likely to be symptomatic at work during later shifts.

e. In respect of (e) above:

i. Being unable to lift heavy items and/or being at greater risk of physical pain and aggravation of her medical condition.

ii. Not being permitted to work in the seasonal department.

13. Was the PCP alleged applied to C?

14. Did R fail to take such steps as were reasonable to have taken to avoid the disadvantage?

15. The reasonable adjustments alleged by C are:

a. Allowing C to continue working in the Seasonal Department.

b. Ensuring C was not required to work on tills or the Front-End Department.

c. Ensuring C had urgent access to a toilet and flexibility in breaks when symptomatic between 16/04/18 and June 2019.

d. Providing appropriate, fit for purpose, equipment to assist with heavy lifting.

e. Ensuring that C could seek assistance with lifting if necessary.

f. Assigning C to early shifts.

g. Being aware and sympathetic to C's condition and allowing her to go home if not fit for work.

Discrimination Arising from Disability (s.15 EqA 2010)

16. C relies upon the following 'something arising' from her disability:

    a. Difficulty lifting heavy items.

    b. Taking disability related absences.

17. Was C subjected to unfavourable treatment? C asserts the following unfavourable treatment:

    a. Transferring C to the Front-End Department and requiring her to work on tills with effect from 01/07/19. R accepts that C was asked to transfer however deny that it amounted to unfavourable treatment.

    b. Perceiving C as unreliable due to disability related absences and/or lateness. This is denied by R.

    c. Not allocating C early shifts as she wanted between 16/04/18 and June 2019. This is disputed by R and in any event R denies that it amounts to unfavourable treatment.

    d. Not permitting C time off when she wanted it between 16/04/18 and June 2019. This is disputed by R and in any event R denies that it amounts to unfavourable treatment.

    e. Not sending C home when unfit for work on a summer evening in 2018. This is disputed by R.

18. Was the alleged unfavourable treatment because of the 'something arising' from C's disability?

19. Was the alleged unfavourable treatment a proportionate means of achieving a legitimate aim? R relies upon on or more of the following legitimate aims:

    a. The appropriate deployment / distribution of employee hours across the various departments of the store.

    b. Minimising the risk of C working alone.

    c. Allocating C tasks which did not involve 'heavy' lifting.

    d. Utilising C's gardening knowledge at times of the day when there was greater footfall of customers.

Indirect Discrimination (s.19 EqA 2010)

20. C relies upon the PCPs outlined in para 11 above.

21. The particular disadvantage asserted by C is:

    a. Needing the toilet more urgently.

    b. Putting C at risk of humiliation, degradation and loss of dignity.

22. Were the PCPs alleged applied to C?

23. Did / would the PCPs have put C to the alleged particular disadvantage?

24. Can R demonstrate that the PCP was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon by R are:

    a. The appropriate deployment / distribution of employee hours across the various departments of the store.

    b. Minimising the risk of C working alone.

    c. Allocating C tasks which did not involve 'heavy' lifting.

    d. Utilising C's gardening knowledge at times of the day when there was greater footfall of customers.

Harassment

25. The conduct relied upon by C is:

    a. Expecting C to work on a till.

    b. RB repeatedly telling C that she was not reliable due to her ringing in sick.

    c. Dismissing and/or disregarding C's written and verbal concerns about her disability.

    d. Ignoring the opinions of medical professionals.

    e. Asking intrusive questions concerning C's medical condition.

    f. Conducting a flawed grievance investigation process.

    g. Having 3 different store managers allocated to determine C's grievance.

26. Was the conduct unwanted?

27. Did the conduct have the purpose or effect of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?
28. Was it reasonable for have the effect in para 27 above.

Constructive Dismissal

29. Did R breach the implied term of trust and confidence? C relies upon the following alleged breaches:

a. The alleged discrimination.

b. Transferring C to the Front-End Department.

c. Failing to heed C's complaints regarding the transfer.

d. Failing to consult with C about a proposed transfer to the Lighting Department when C was due to return from sickness absence.

e. Collusion between RB, JF and PS regarding the reason for C's transfer to the Front-End Department.

f. Failing to uphold C's grievance.

g. Failing to invoke disciplinary proceedings against RB, JF and/or PS.

30. Was the breach sufficiently serious to amount to a repudiatory breach?

31. Had C affirmed any breach?

32. Did C resign as a result of the breach?

Remedy

33. In the event of a finding of discrimination and/or unfair dismissal:
    a. What is the appropriate basic award?
    b. What if any loss of earnings is recoverable? Has C mitigated her loss?
    c. What if any pension loss is recoverable?
    d. What if any injury to feelings award is appropriate?

Evidence

17 The Tribunal heard evidence under oath from the claimant and from Julie Harrison, the claimant's friend of approximately 34-years who had not directly witnessed any of the alleged incidents, Stephanie McGarry-Gribben, the claimant's partner who was a direct witness to a health review meeting on 19 August 2019 and Stephanie Taylor, the claimant's daughter who did not witness any of the alleged incidents. All of the claimant's witnesses had no connection with the respondent.

18 The Tribunal found the claimant's evidence was less than credible for the reasons it has set out below when dealing with the conflicts in the evidence. The fact the claimant had sent WhatsApp messages to friends and family did not prove the claimant's case, contrary to the claimant's submissions. The claimant voluntarily disclosed WhatsApp exchanges between herself and witnesses which belied the version of events the claimant presented at the Tribunal, and the fact the claimant chose to disclosure this evidence did not reduce their undermining effect on her case. Mr Paddington in oral submissions argued convincingly that the WhatsApp conversations demonstrated the close relationship between the witnesses and the claimant, and none could offer an independent dispassionate view of events that they had largely been informed of by the claimant, hearsay evidence which reflected the claimant's version of reality. Stephanie McGarry-Gribben gave oral evidence that the claimant "tells it like it is" and Julie Harrison described the claimant as "honest to the point of being blunt." The Tribunal concluded the WhatsApp messages were certainly blunt but that did not necessary mean they reflected the true situation. It has spent a great deal of time looking closely at the documents in this case, going into an unexpected further day in chambers to

ensure nothing had been missed. On balance, it took the view the claimant was exploring through the WhatsApp messages the best way she could to build her case against the respondent, creating opportunities to gather evidence and bouncing ideas off her friends and family.

19 Turning to Julie Harrison and Stephanie McGarry-Gribben, the Tribunal found they gave evidence to the best of their ability, and at no stage knowingly attempted to deceive the Tribunal. Both genuinely believed the version of events presented to them over a period of time by the claimant, without any knowledge or understanding of what had actually transpired in the workplace. Julie Harrison and Stephanie McGarry-Gribben attempted to do their very best for the claimant as one would expect from a loyal friend and caring partner. The Tribunal does not doubt that were concerned, quite rightly, over the claimant's health and wished to protect her as best as they could, and when doing so were unable to dispassionately view the work situation objectively.

20 On behalf of the respondent it heard evidence from Joanne Foulds, deputy manager of B&Q Bidston, Roger Braun, who had been the claimant's seasonal department manager no longer employed by the respondent and against whom the majority of the allegations are alleged, Philip Stephens, store/unit manager at B&Q Bidston and Claire Brown, human resource people partner for Scotland and North West, who was the grievance decision maker. The Tribunal found the witness evidence given on behalf of the respondent was largely credible, although it had concerns over Roger Braun's recollection as to the claimant's requests to work an early shift and the reasons why she was scheduled to work on so few.

21 Joanne Foulds denied stating to the claimant "you do not go to the toilet very often" in respect of which Mr Paddington submitted that there was a difference in the claimant's evidence and that given by Stephanie McGarry-Gribbin. In the claimant's written statement, she stated "Jo was dismissive actually stating that I 'don't go the toilet that often.' In oral evidence Stephanie McGarry-Gribbin stated she was told by the claimant that Joanne Foulds had said "You really don't go to the toilet that often, do you?" Mr Piddington submitted that the addition of the final two words was highly significant as it is more consistent with a question than an inflammatory statement.

22 The Tribunal on the balance of probabilities accepted the claimant's evidence that there was some reference to her not going to the toilet that often in the context of a move to the tills. Having taken into account all of the evidence, and the fact that the claimant conceded during a discussion with Philip Stephens Joanne Foulds may not have recalled using the words, it is more probable than not Joanne Foulds genuinely cannot recall using the words given the context of having been approached by the claimant without warning whilst working in a busy store on a Saturday. Given the claimant's less than credible evidence in relation to a number of other matters, the Tribunal concluded on the balance of probabilities a reference was made by Joanne Foulds to the claimant not going to the toilet that often, but not in the accusatory manner and context alleged by the claimant. The Tribunal, having considered the effect of the words in context, concluded they were not intended to hurt or cause the claimant offence, but reassure her that the move to the front-end would be managed with the adjustments Joanne Foulds suggested during the discussion.

23 Turning to Philip Stephens, the Tribunal concluded he was a credible and honest witness preferring his evidence to that of the claimant's when it came to conflicts, particularly the agreement reached with the claimant as to her move from the front-end to the lighting/décor department. The Tribunal accepted Philip Stephens had instructed

supervisors not to put the claimant back on staffed tills after the 1 July 2019 and his instruction was ignored on the one occasion being the 9 July 2019.

24 There were a number of other fundamental conflicts in the evidence to be resolved by the Tribunal, which it has clarified as set out in the findings of facts below.

25 The Tribunal has considered the documents to which it was taken in the bundle, the agreed chronology incorporated into the finding of facts, written and oral submissions, which the Tribunal does not intend to repeat and has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts.

Facts

26 The respondent is a large national company with over 300 stores throughout UK and Ireland specialising in do-it-yourself, gardening, bathrooms, décor and lighting which were arranged in to different departments.

Respondent's policies and procedures relevant to this claim.

27 The respondent issued a number of policies and procedures set out within the 'Employee Handbook July 2014' available to all employees on the intranet. The relevant policies for this litigation include Disability and Equal Opportunities, Disclosure of Wrongdoing, Health and Safety including manual handling that referenced training and employees speaking to managers if further training was necessary. Chapter 5 provided a disciplinary and grievance procedure; discrimination and harassment was regarded as acts of gross misconduct.

28 Paragraph 5.16 sets out the formal stages set out for a grievance procedure starting with a formal stage one through to a stage 2 appeal.

29 Paragraph 6.5 refers to the hours of work "are set out in your contract of employment."

The claimant

30 The claimant was born on the 05/02/69 and is currently 51 years old. Her employment with the respondent commenced on 13 March 2017 working 15-hours per week as a customer adviser front end working on tills in the B&Q store based at Bidston, Wallasey, one of the largest stores in the country and referred to as B&Q Wallasey Warehouse within these reasons.

31 The claimant took part in an induction covering a number of matters in addition to health and safety training including manual handling, a store tour and online training which is audited and flagged up if employees miss training. The claimant may have had an online issue at some stage, she is unable to provide a date, and there was no evidence the matter went unresolved, to the contrary, the claimant worked without complaint, satisfied the audits and communicated online with the respondent. The claimant did not raise an issue that she required manual handling training until much later on in her employment.

The contract

32 The claimant was issued with a three-month fixed term contract in an offer letter dated 7 March 2017 that set out her hours of work and flexibility. It is undisputed the claimant was "fully flexible" and could be asked to work any day and any time up to the maximum

of her contacted hours. The contract makes it clear that flexibility was key "due to the nature of our business we need to have the flexibility to ensure our store teams are in place to deliver great service to our customers, particularly on our busiest trading days e.g. Saturday, Sunday Wednesday…therefore, under your contract of employment, your manger will require you to work a varied rota to accommodate these business needs. It was also provided "we will make all reasonable efforts to ensure you will receive 2-weeks' notice of any rota changes and your availability matrix will also be taken into consideration. The availability matrix will be discussed with you on your first day in store." The undisputed evidence was that the claimant could agree a new availability matrix i.e. if she did not want to be fully flexible, and at no stage did she chose to do this to reflect she wanted to work the early shift. Under the claimant's contract she could be asked to work any hours any day to the contract maximum hours and in any department within B&Q Wallasey Warehouse.

33 The offer letter expressly provided that it "details some of the key parts to your terms and conditions of employment and included with your offer letter is your personal copy of our Employee Handbook together with the changes to the Employee Handbook 2016. This contains all other terms and conditions of your employment at B&Q so please ensure you have read it carefully."

34 The claimant signed the offer letter on 9 March 2017.

35 The claimant was offered and accepted a permanent position as a Customer Advisor in B&Q Wallasey Warehouse effective from 11 June 2017. The contract made it clear "your manager will require you to work a varied rota to accommodate these business needs…" The terms and conditions of employment were contained in the offer letter and Employee Handbook, and there is no reference to a "contract change form" being used to confirm any changes in the contract superseding the original contract. Philip Stephens' evidence was that different stores used different forms to confirm movements around the various departments in B&Q, and he had inherited the contract change form which was not used in the store he had previously worked in. The Tribunal concluded there was no contractual obligation on the respondent to complete a contract change form when employees, including the claimant, moved from one department to the other within B&W Wallasey Warehouse or any of the respondent's other warehouses.

36 The claimant was under no illusion that flexibility was the keystone of her employment. Throughout the claimant's employment she was moved around various departments within B&Q Wallasey Warehouse as follows:

35.1 13 March 2017 front end which includes tills, self-service tills, returns.

35.2 12 November 2017 showroom

35.3 15 April 2018 seasonal

35.4 6 November 2018 outdoor

35.5 2 July 2019 front end

35.6 24 July 2019 to décor (which incorporated lighting).

37 There were no issues with the claimant moving from department to department during the period until leading up to her move from the seasonal/gardening department to front-end including tills in July 2019.

38 In October 2017 the claimant transferred to the showroom department when she was managed by Gareth Barr and he issued the claimant with an informal action form on the 8 January 2018 regarding Facebook entries where the claimant wrote "Oh dear, it looks like I may just be eating a manager for breakfast…this could be fun." The Tribunal notes that in the claimant's witness statement there is a reference to a manager Leah announcing she wanted to do a performance review turning away "without giving me the opportunity to respond" and yet in the Facebook entry she described how she (the claimant) had responded and the manager Leah was "taken aback and told me how she had put this on an appraisal form and will discuss it with me tomorrow." The Tribunal concluded this was a typical example of how the claimant exaggerated the interplay between managers and how she how she was not allowed to respond, downplaying the fact that the claimant was confident enough to stand-up to those managers who confronted her.

The claimant's health problems.

39 In 2017 the claimant was absent from work unwell. There is no dispute between the parties about the fit notes issued at the time. The 26/09/17 claimant's GP Fit Note for period to 03/10/17 referenced Viral Gastroenteritis. A 04/10/17 Return to Work Interview Form was completed and the claimant confirmed she was undergoing tests and no adjustments were necessary.

40 The claimant was absent 20/11/17 until 27/11/17 and a return to Work Interview Form was completed. To assist her daughter's childcare, the claimant was granted 5-hour shift pattern over 4-days on the claimant's request.

41 On the 15/03/18 the claimant was admitted to Arrowe Park Hospital for a perforated bowel and on 22/03/18 discharged from hospital. On 27/03/18 a GP Fit Note was issued for period 22/03/18 to 05/04/18 and the claimant returned to work disabled by the physical impairment of diverticular disease which, she informed the respondent, prevented her from carrying heavy objects.

The reasonable adjustment

42 As a reasonable adjustment the claimant was not required to carry heavy objects, especially if she was suffering from a "flare-up" of her condition and she worked the mid-shifts.

43 The claimant went to work in the seasonal department, which was her preference because she was a keen gardener herself and knowledgably about plants. The seasonal department was the same distance away from the toilets as the front of house and tills.

The seasonal department.

44 The respondent's seasonable department includes the sale of stone and garden grit, greenhouses, gardening and products linked to the garden, such as plants, compost, lawn mowers and garden furniture. The seasonal department is quiet at the start of the day, known as the early shift. The respondent had moved its re-stocking in the night to daytime re-stocking and this took place during the early shift when for example, items

such as lawnmowers were taken out of their boxes and other heavy items moved, sometimes by hand and other times by fork-lift truck. The claimant was not a qualified fork-lift truck driver.

45 The seasonal department is busy in certain times of the year including the April Bank Holidays through to August and then at Christmas time, the rest of the time it is quiet and its need for staff in the department is reduced. The allocated staff hours for the department increased and decreased with the influx of work, and this was decided at a meeting of department and store managers when staff who had transferred to temporality assist during busy periods were transferred back to their department, for example, Rachael Potts, in addition to other staff transfers.

46 Roger Braun managed the claimant in his capacity as seasonal department manager reporting to Jo Foulds, deputy manager and the store manager (known as unit manager) Robert Owens who was eventually replaced by Philip Stephens as recorded below.

47 The claimant enjoyed working in the seasonal department, and there were no issues during this period. She worked with a number of colleagues, who are her comparators in these proceedings. Sheila Kennedy worked 28-hours per week and had a historical fixed shift pattern on "earlies" being the early morning shift. Steven Smith worked 23 hours per week and had set hours to fit around a second job. Faye Roberts worked 30 hours, no fixed pattern and was fully flexible. Rachael Potts worked 10-hours and had been transferred temporarily from another department, having failed a secret shopper assessment whilst on tills working the front-end. Stephen Edwards worked 30 hours per week and was mainly on "earlies" because he was fork-lift driver trained. The early shift was when the heavy lifting took place, with manually or by fork-lift; Scott Davies worked 30 hours and was flexible around care of his disabled son. Paul Rutherford worked 8 hours on a fixed shift, Lawrence Dowdall worked 39 hours mainly on earlies because he was fork-lift driver trained, Callum Bradford [Young] had transferred from decor and worked 16-hours during peak months only, Kyle Low worked 30-hours fully flexible mid to late shifts, Sam Isaac [Elliot] worked 39-hours in the greenhouse, Robert Devereux worked 30-hours normally in the outside garden area and Christopher Hill worked 30 hours consisting of varied shifts. There were two additional staff, who were not named comparators, one worked 6-hours on a Sunday, the other 39 hours per week. The names in square brackets are the claimant's incorrect references set out in the further information she provided.

48 The claimant was the only member of the team who worked 20 hours fully flexible 5 hours a day over 4-days and this differentiated her from the comparators she relies upon.

Return to work interview

49 On 16/04/18 the claimant's Return to Work Interview Form was completed at which the claimant confirmed the adjustments were "no heavy lifting for the foreseeable future" and "**mid-shifts – no early/lates until further results**" [the Tribunal's emphasis]. There was no reference to any other issues including on occasions the need by the claimant to go to the toilet urgently, and the claimant encountered no problems dealing with customers either before or after she transferred to the seasonal department until her transfer to the front-end on 1 July 2019.

Employee Contract Change Form and return to work

50 On 15 April 18 the claimant transferred to Seasonal Department.

51 On the 16/04/18 the claimant returned to work having completed a "Employees Contract Change Form (in store)" that confirmed the effective date of change was 15 April 2018, her primary job title was customer advisor and primary department seasonal working 20-hours 7-days per week 20 hours. The form also included leaver information, and the Tribunal concluded that despite the title of the form, the claimant's contract had not been changed to reflect the only department she was contracted to work in was the seasonal department. The Tribunal found the claimant had no contractual right to remain employed in the seasonal department, and the contractual position was that she was flexible throughout B&Q Wallasey Warehouse evidenced by her employment history and the fact that she had worked in a number of departments previously as a customer advisor.

17/04/18 Occupational Health report

52 The claimant was referred to occupational health following her operation and absence. Occupational health confirmed "**other than heavy moving and lifting tasks, there are no further medically determined adjustments or restrictions needed to her role based on risk**…does have an underlying health condition, therefore would be susceptible to episodes of relapse from time to time, although the frequency and duration of such spells of absence cannot be reliably predicted. There is no medical condition that is likely to lead to any impairment to her usual performance in work…is considered fit to continue in her current post and to undertake her usual hours and duties" (the Tribunal's emphasis).

53 The claimant had been working mid-shifts 20 hours per week and the status quo remained. Roger Braun was aware of the contents of the occupational health report and he was not concerned about the possibility of the claimant being absent with any "flare-ups." Neither the claimant or occupational health advised the respondent's managers that the claimant could require urgent access to a toilet and Roger Braun had no knowledge of this. Roger Braun was happy to make adjustments as and when the claimant requested, for example, he would put her on light duties and they had a good working relationship with no complaints from the claimant.

54 The claimant requested and was given an early shift to work from 7am 13 and 28 June 2018.

Alleged accident 17 July 2018 and Roger Braun's alleged refusal to allow the claimant to go home after it.

55 The claimant alleges that an accident at work had taken place on 17 July 2018, a date she was unable to recall in her written statement and had not referred to in her pleadings. The claimant was first able to recall this date at the liability hearing.

56 The accident allegedly took place when the claimant was pulling a "Danish Trolley" across concrete, which the claimant maintains was rutted. The claimant referred the Tribunal to WhatsApp exchange with Julie Harrison of the same date, and yet there is no reference in Julie Harrison's witness statement to an accident at work that took place on the 17 July 2018, which is surprising given the claimant's evidence that she ended up in hospital that evening directly as a result of the accident.

57 The WhatsApp message to which the Tribunal was referred, described how the claimant was waiting for a surgeon, it was part-kidney part-bowel related and in a post sent at 10.18 the claimant confirmed it was her kidneys and could be kidney stones. There is no reference to any accident at work, and this is in direct contrast to other WhatsApp messages in which the claimant goes into great detail, for example, when she related the accident with a fence board and having been sent home from work. Despite the fact the claimant had been told she was not allowed to lift and the adjustments that had been made to ensure she did not lift heavy objects which the claimant accepted in her evidence, she informed Stephanie Taylor at 13.41 "Well I haven't been told I am not allowed to lift" which was clearly not the case as reasonable adjustments had been made in regard to heavy lifting.

58 The photographs produced by the claimant as evidence of the alleged accident and continuing act referred to above, taken some 18 months after the alleged incident by the claimant to which the Tribunal was taken was not evidence that the accident had taken place as alleged. The photograph was of a gate and some concrete, and the Tribunal found it surprising that the claimant waited for over 18 months before taking the photographs, given her evidence now that it was a serious accident which hospitalised her and on which she relies in these proceedings as evidence of Roger Braun's discriminatory behaviour towards her. It is notable that the claimant made no reference to the alleged accident to occupational health and nor was it referenced in any reports.

59 In oral submissions the claimant was clearly aware that she lacked the evidence, and indicated she could have obtained hospital records to support her case. It is notable that there are numerous hospital records in the agreed bundle that cover the period in question and these undermine the claimant's allegation that she sustained an accident at work. The discharge summary dated 19 July 2018 referred to the claimant being admitted to hospital on the 17 July 2018 "with left flank pain for the last 4 days…is felt to be like her previous renal pain than her previous diverticular pain…" The medical evidence reflects the claimant had suffered from left flank pain since 13 July 2018, three days before the claimant alleges she was caused an injury at work. Accordingly, the Tribunal found the claimant an inaccurate historian and her general credibility was adversely affected and undermined by her evidence in this regard.

60 The Tribunal concluded on the balance of probabilities the claimant not suffered an accident at work on the 17 July 2018. The Tribunal found the claimant had at no stage asked Roger Braun to go home ill after an alleged accident, and it follows she had not been refused a request to go home. It is notable the claimant gave no evidence that she had expressly made a request to go home, and it had been refused.

Claimant's absence and return work meeting

61 On 20/08/18 the claimant was absent due to diverticulitis, and returned to work on the 22/08/18. Roger Braun conducted the return to work meeting and completed the Return to Work Interview Form which recorded the claimant had been absent on 24 days in the last rolling 12-months.

62 The claimant's Return to Work Form confirmed the claimant had the diverticulitis under control with a high fibre diet, and the absence recorded as disability related and therefore not counted towards the respondent's absence management procedure. The claimant made no request of a reasonable adjustment for early shifts, and she made no reference

to not eating breakfast and feeling better/less at risk in the mornings, and the adjustment previously agreed that she work mid-shifts remained. The Tribunal found this remained the case throughout the time the claimant was managed by Roger Braun.

63 There were no complaints from the claimant during this period, who had a good working relationship with Roger Braun, and she continued to enjoy working in the seasonal department where she could utilise her plant knowledge and assist customers in the busiest part of the day, which was the midday shift.

24/0918 Informal Action Form

64 In or around September 2018 the claimant had a discussion with Sheila Kennedy, Scott Davies and John Manning about staffing issues, and she decided unilaterally to change her shift pattern without the consent and did not inform Roger Braun, with the result that the claimant's original shift was not covered and the department was left understaffed.

65 Roger Braun took informal action against the claimant as she was the only employee out of the group to have changed her shift without his consent and knowledge. Sheila Kennedy, Scott Davies and John Manning did not change their shift, and in this fundamental regard were not appropriate comparators on which the claimant could rely, and the Tribunal found a hypothetical comparator would have been treated no differently.

66 The Informal Action form reflected the difficulty faced by the department and "concerns about Niamh's flexibility with regards to working 5/7." Roger Braun wanted the claimant to be fully flexible as per her contract, and available for work 5-days and the not 4-days per week worked in order that the claimant could assist her daughter with childcare. The standards required with reference to working allocated shifts was clarified and the claimant was made aware that she could not vary any rostered working arrangement without the requisite consent of a manager, and disciplinary action could be taken. The Tribunal did not have any evidence of the other employees changing shifts without consent during this period, and the claimant's allegations that this took place was unsupported by any contemporaneous evidence and could not be relied upon. There was no WhatsApp group at this time that enabled managers and employees to communicate with each other about shifts.

25 October 2018 accident

67 On the 25 October 2018 the claimant suffered an accident at work lifting a fence panel which pulled and hurt her stomach and went home early. The accident report was completed by a different manager. Roger Braun can remember the incident believing the claimant had told him she was taking painkillers. This was the only accident at work Roger Braun can recall, and the Tribunal preferred his evidence to that of the claimant concluding the 17 July 2018 accident had not taken place as described.

22 November 2019 informal discussion about moving to work on tills and work five shifts.

68 An informal discussion took place between the claimant and Roger Braun as he wanted her to work the contractual hours over five days a week. The claimant was not happy with this prospect, despite her fully flexible contract.

69 The claimant responded in a letter dated 23 November 2018 referencing a "chronic and sometimes debilitating bowel condition" when she experienced "flare ups". She pointed

out the possibility that working 20-hours over a five-day week "could compromise my attendance further" and were inconvenient to her.

70 With reference to shifts the claimant wrote "I am more than flexible being able to work early, middle or late shifts over a seven-day period, I just ask that the shifts are allocated on an even-handed basis." No reference is made to morning shifts being preferred as the claimant did not eat breakfast. The Tribunal accepted Mr Piddington's submission that despite the claimant's previous experience working on the front end and having knowledge of her symptoms and condition she did not, in her letter of objection to the transfer from seasonal to front end make any reference to the toilet issue causing her problems in the seasonal department. In oral evidence the claimant conceded she had not thought of it at the time, and confirmed she had no toilet issues when working in the seasonal department, and had she issues she could and did leave the customer and get to the toilet in time.

71 The claimant objected to working front end. She wrote "I explained to you yesterday that **there is more bending and lifting working on the front end** and less chance of a colleague being around to assist me if needed. However, **on the front-end department the rota is done in a month in advance and there are more staff and a greater chance of being allocated early shifts. Therefore, my working front end is conducive to my social and personal needs but could potentially compromise my health needs**. This is the dilemma I have in making such a decision. Therefore, **I leave it in your hands to decide which department I am best employed**. With that said I reiterate that I am unable to work a five-day week" (the Tribunal's emphasis).

72 Roger Braun made the decision to keep the claimant on 4-day a week remaining on seasonal and the only issue was the claimant working the "occasional earlies" not as reasonable adjustments, the gloss the claimant is now attempting to put on early shift working during this liability hearing, but to occasionally facilitate her looking after grandchildren and helping in her partner's business.

73 During this liability hearing the claimant gave the impression that she was not entirely happy being managed by Roger Braun alleging he had not let her go home or work the early shifts, and yet in the letter she wrote confirmed "I actually do enjoy working at B&Q. I know how important it is to be happy in one's work and I have found this balance during my time working at the store." The claimant expressed this view in the knowledge that she may be put to work on tills, having worked front end in the past.

<u>The claimant's first reference to discrimination</u>

74 On the 28 November 2018 the claimant sent a WhatsApp to Stephanie Taylor referencing discrimination if she had to work 5-days per week. She wrote "I am being moved to work on tills so I can work some early shifts. I have been asking for months for early shifts but because they both cover them I just get the late and middle shifts…I will return to gardening in April when the gardening season is busy again. Three weeks ago, they stopped all the night shifts…now the day staff work extended hours until 10pm to drop stock and use fork lift trucks etc that we cannot do when the store is open with customers milling around. I am happy in B&Q it was not having my off duty in advance that was winding me up and then being told I have to work five days a week was the last straw."

75 Roger Braun in oral evidence confirmed staff no longer worked nights, the heavy lifting was carried out in seasonal during the morning shift, and he had taken the decision the

claimant would not regularly work an early shift on the basis that he needed her skills when there the most customers who may need advice on plants, which was the mid shift as conceded by the claimant, and as a reasonable adjustment avoid any of the heavy lifting required in the early shift. The Tribunal considered Pager Braun's explanation and concluded it was credible and not tainted by disability discrimination. He wanted the best for his department and the claimant. It is accepted Roger Braun offered and allocated the claimant light work when she was experiencing a "flare up."

76 The claimant continued working in seasonal without complaint.

29/11/18 Occupational Health assessment

77 Following the claimant's letter recorded above, she was referred to occupational health.

78 The occupational health report recorded the claimant stating that her role in the seasonal department involved some heavy lifting and push/pull of heavy cages and she was found fit to work with adjustments.

79 It recorded the claimant experienced "**flair ups of her condition at least once a month…experiencing severe abdominal pain, acute diarrhoea with urgency and can require the toilet up to 8 times a day. When experiencing symptoms, she is unable to lift anything heavy, push or pull…is unable to bend or twist** and finds her mobility slows down…she reported a more severe flare up in August this year…and was in hospital overnight" (the Tribunal's emphasis).

80 The recommendation was light duties when the claimant was experiencing a flare-up until her symptoms abate and "in terms of what role she should perform in work it is up to management to decide what role would be best suited…Other adjustments would include access to disabled toilet facilities, flexibility in breaks when symptomatic due to urgency and requirement for increased rest room breaks, light duties during a flare up and management may wish to consider early shifts only as I understand from Mrs McGarry Gribben that management are concerned with regards to lone working and access to help should she require it and that there are more staff available on the early shift…" The OH assessment was silent on any accidents at work. It is undisputed between the parties that less staff and not more staff were available on the early shift because of the reduced customer numbers, the early shift did entail lone working, and the information given to occupational health by the claimant was incorrect in this regard.

81 Following the 29 November 2018 medical report, the respondent was made aware of the claimant's acute need for a toilet when she had a flare up in her condition, coupled with an inability to bend or twist and this advice remained relevant when it came to transfer the claimant to work on the tills at the front end, and there was no evidence before the Tribunal that it was not taken into account or ignored as alleged by the claimant. The claimant was not concerned about accessing the toilet on front end, which she had not thought of.

82 The claimant remained working on seasonal.

83 The claimant in a WhatsApp message wrote to Julie Harrison on 29 November 2018 "It looks like due to my health issues I have to stay on gardening and work early shifts. I was being moved to the tills and **I was concerned about having to lift heavy goods searching for a bar code when I gave a flare up with stomach pains. The nurse was more concerned with my accessing the toilet as a matter of urgency when I**

flare up. On the tills I would have to wait for someone to cover me. **During a flare up, I can go as much as 8 times a day, sometimes 2-3 times in an hour. I had not thought of the toileting issue. On gardening I can go when I want.**" The claimant relies upon this WhatsApp message as to Roger Braun's knowledge during this period, and yet there is no documentary evidence of similar communications with Roger Braun and the occupational health report did not (a) specify the claimant was to work early shift due to her health issues and (b) find that working on the tills would require lifting heavy when searching for a bar code. The claimant was found fit to carry out her role in gardening which required some heavy lifting, and the adjustments came into play when she was experiencing a flare up. Tribunal took the view that the occupational health report was a significant pointer to the possibility that the claimant, when experiencing a flare up, may have problems if she was put to work on the staffed tills in 2018 and then later in 2019.

84 There was no indication from the claimant or occupational health that she required the early shift as a reasonable adjustment. The Tribunal did not accept the claimant's evidence that she did request some early shifts and she was not given them by Roger Braun. It is a matter of record that the claimant was not rostered for many early shifts. However, she did work a small number including one on the 2 December 2018. The basis for Roger Braun's decision encompassed the following reasons:

80.1 Heavy lifting was being carried out in the early shift, no longer during the night and this entailed moving heavy items such as unpacking lawn mowers, rocks, compost and so on, re-filling the tall cages, and often using fork-lift trucks.

80.2 Sheila Kennedy had a historic basis for working the early shift in gardening, and the evidence before the Tribunal was this did not change despite the claimant's allegation that Roger Braun discriminated against Sheila Kennedy on the grounds of her disability, which was not a matter the Tribunal was in a position to reach any conclusions on. Like the claimant, Sheila Kennedy was not fork-lift truck qualified.

80.3 One person generally worked the early shift, a statement the claimant did not rebut.

80.4 More staff worked on the mid shift and were available to help the claimant if she had a flare up, for example, with lifting or providing assistance with customers.

80.5 If a member of staff did not turn up to work, the department was not re-stocked on the early shift, and there was no one to deal with customers.

80.6 The claimant's attendance record was not good, and she would miss a shift without giving Roger Braun notice.

80.7 The claimant was knowledgeable about plants and gardening, and she was better placed working on the mid shift in the middle of the day when there was greater footfall.

80.8 If the claimant had to rush to the toilet when working the mid shift there was at least one other member of staff there to deal with customers. In oral evidence the claimant confirmed that she had on occasion required the toilet urgently, and directed customers to another member of staff and if she happened to be on her way to the toilet would say "I am already busy dealing with someone else."

81 The claimant continued working until her 2-day absence on the 18 January 2019 when she was placed by Roger Braun on "light duties until pains subsist" as recorded in the return to work interview record.

82 In February 2019 Faye Roberts transferred to gardening department and she worked various shifts, including some early shifts at the same time as another colleague resigned which left more shift available in the department. The claimant sent a WhatsApp messages to Stephanie McGarry Gribbin as follows "Well I have had my chat with Roger…so that means there will be early shifts for me BUT Rob the store manager wants us working five days a week….it could mean that I get allocated a few early shifts now. I think I need to put it to Roger about discrimination. **But also, the middle shifts do suit me so I don't want to shoot mself in the foot**…" [the Tribunal's emphasis].

83 The claimant requested and was given an early shift to work from 8am on 1 March 2019.

Absence and return to work interview 16 March 2019

84 On 06/03/19 the claimant was absent for 7 days returning 16/03/19 when a Return to Work Interview Form completed confirming it was a flare up diverticulitis and no adjustments were needed. The absence was treated as a disability related "white absence" with the result that it was not to be taken into account in any absence procedure. The claimant signed the form on the same date. The claimant texted Roger Braun and informed him of her medical condition and it appears from the communications they got on well, and the claimant had no hesitation in describing her medical position in detail. The relationship appeared to be warm and convivial, and there was no suggestion Roger Braun was pressing/harassing the claimant by asking her medical details, on which the claimant volunteered a lot of information. This undermines her complaint that Roger Braun was asking intrusive questions about the claimant's medical condition, and his behaviour amounted to bullying and harassment. There was no satisfactory evidence that Roger Braun had "violated the claimant's dignity by invading her privacy and asking intrusive questions" and the Tribunal found this was not the case on the balance of probabilities.

Rota communications

85 In a text message dated 9 April 2019 Roger Braun texted his team, including the claimant, about the rota, "Guys unless I ask or authorise any changes…please follow the rotas going forward I've had enough grief today…I'll do 4 weeks again tomorrow so any requests get them to me ASAP." The claimant relies on this text message as evidence that Roger Braun treated her less favourably when he issued the informal action form on the 24 September 2018. Roger Braun disputed this maintaining the test message was sent because of the claimant's actions.

86 The Tribunal found the evidence was less than satisfactory from the claimant and Roger Braun on this point, it was unclear what and to whom was being referred to and neither could cast any light on it. However, the claimant sent a WhatsApp message to Stephanie Taylor on the 24 April 2019 "Well Roger is going to try and tell me off today as yesterday I should have been on a late shift and worked 11-4. He changed my shift three weeks ago and sent us all messages on WhatsApp…I didn't see the changes…he blames 'the tool.' The only tool is him as tills and showrooms don't have a problem…"

87 The Tribunal found on the balance of probabilities that the claimant was not treated any differently than any of her colleagues when it came to rota changes. The Tribunal

accepted Mr Piddington's submission that it appears the comment made in the WhatsApp message by Roger Braun was a result of the claimant's actions. There is no evidence that other individuals had changed their shifts leaving the department short staffed. The undisputed evidence was that rotas were prepared 4-weeks in advance of the shift, and on the claimant's own account to Stephanie Taylor, she had not seen the changes.

88 The claimant requested and was given an early shift to work from 7am on 19 May 2019.

89 In or around June 2019 the claimant allegedly brought up the issue of discrimination with Faye Roberts, a work colleague and not a manager, and the claimant relies on this discussion as evidence of on-going discrimination. The Tribunal found no direct contemporaneous evidence of this conversation, and found the claimant's evidence in this regard surprising given the contempt the claimant felt for Faye Roberts as set out by her both in her written and oral evidence. The claimant in a text message to Roger Braun referred to Faye Robert's in vitriolic terms threatening to raise a grievance against her. The claimant's view was that Faye Roberts should be the one working on the tills, and the claimant should have been retained in the seasonal department. This has been the claimant's position throughout these proceedings. The basis of the claimant's discrimination claims in respect of the move to tills concerned in part Faye Roberts and the claimant's view that she was not worthy to be working in the seasonal department. Faye Roberts was not a manager and it is irrelevant whether the claimant had a discussion with her about discrimination or not and so the Tribunal found.

<u>June 2019 change of store manager to Philip Stephens and reduction of hours in the seasonal department</u>

90 Philip Stephens joined the store as unit manager in June 2019. He had no information about the individuals within the store, including the claimant and her disabilities. He reviewed the staffing of all departments and informed Roger Braun that he had to lose 150 hours from the total number of hours the seasonal department employees worked per week, and those hours would go the front end, being the tills. As a result of the review 13 customer advisors needed to move departments by the end of June 2019 including colleagues to lighting/décor and front end, the latter needing a gain of 76 hours a week.

91 The decision as to which staff to be moved was down to Roger Braun exclusively, and the Tribunal looked closely as his decision-making process. Roger Braun transferred 39 hours to showrooms, 60 hours to flooring, 30 hours to lighting/décor and 26 hours to front end. Kyle Low and Callum Bradford returned to décor. Rachael Potts could not be moved to the tills, due to a previous issue, and was transferred back to the department she had come from before she worked in seasonal during the busy months. Seven customer advisors based in the seasonal department, including the claimant, were transferred to other departments.

92 Managers met at a store departmental review ("SDR") in mid to late June 2019 and the names of all employees were placed on post-it notes depending on the hours that needed to be lost and gained across the store. At this meeting there was no discussion of individuals and their disabilities, including the claimant, contrary to the claimant's belief. The claimant was not at this meeting.

93 Roger Braun selected seven members of staff, including the claimant, for a transfer and he did this on the basis of hours only. The claimant's suspects she was chosen because

of her disability and absences, and in support she referred the Tribunal to the grievance investigation minutes when Clare Brown interviewed Philip Stephens. Philip Stephens was asked "at the time of the SDR were you aware of Niamh's condition" to which he replied, "at the time of SDR it came up of Niamh's condition she joined the business with this condition but Niamh had written a letter in the way that she would go back on the tills it would compromise her health but suits her social needs – would leave decision to manager." Philip Stephens disputes that the claimant's condition was discussed at the SDR, maintaining hindsight was a wonderful thing and he had learnt about the claimant's condition at around that time. Roger Braun and Joanne Foulds, who were also at the SDR meeting, both denied the claimant's condition was discussed.

94 There are no notes of what was said at that meeting, which consisted of posting stickers on a board and involved a considerable number of staff. The only document evidencing the possibility of the claimant's condition being discussed is dated 28 October 2019, at least 4-months after the event. Memories cannot be relied upon, the claimant had no knowledge whatsoever as to what had taken place at the SDR meeting and on balance the Tribunal took the view that her condition was not discussed but Philip Stephens, Roger Braun and Joanne Foulds were aware of it at the time her name placed on a post it sticker and moved from seasonal to front end tills. On the balance of probabilities, the Tribunal found that the only reason for this was the number of hours Roger Braun had to lose. He needed to minimise the effect of the loss of hours on his department and keep as many hours as possible by retaining those employees who worked longer hours than the claimant. Roger Braun was the decision maker in respect of the claimant's move, although the loss of hours he had to find was outside his control and the Tribunal concluded, having looked closely at Roger Braun's explanation his decision was untainted by disability discrimination.

95 Having decided that the claimant would be transferred to another department on the basis that she worked twenty-hours a week, Roger Braun then had to decide about the department the claimant was to be transferred into. When he made the decision to move the claimant to front end he had in mind the occupational health report dated 29 November 2018, the claimant's letter of 23 November 2018 and the fact that the claimant had worked on tills in the past. There was nothing to put Roger Braun on notice the claimant could not work front-end on tills providing reasonable adjustments were made during the period she had a "flare-up". In oral evidence the clamant acknowledged that even she had not foreseen a problem with the toilet situation until it was raised by occupational health, and the uncontroversial evidence before the Tribunal was that the front-end department was the same distance away from the toilets as the seasonal department. Roger Braun selected the claimant instead of Faye Roberts on the basis of hours only. Faye Roberts worked 30-hours in comparison to the claimant's twenty-hours. The claimant's view, as stated during her evidence and when cross-examining Roger Braun, was Faye Roberts was a poor performer and not capable, she should have been the one selected and not the claimant. This was not a consideration for Roger Braun who was exclusively concerned with retaining as many hours as possible within the department.

96 In relation to the claimant's transfer to front end by Roger Braun the claimant relies upon Steven Smith, Sheila Kennedy, Faye Roberts and Rachael Potts as actual comparators, who she maintains did not have disabilities the Tribunal found their circumstances were different in comparison to the claimant. Steven Smith worked 23 hours per week, Faye Roberts worked 30 hours and Rachael Potts worked 10-hours per week and she was transferred to another department.

26/06/19 Informal discussion and allegation concerning Jo Foulds.

97 The claimant was informed of the decision to transfer her to front end by Roger Braun and Gemma Glover, and she explained that she would be bored working at the tills, which the Tribunal found was the claimant's true motivation for not wanting to work front-end. The meeting was not minuted.

98 The claimant recorded her version of the meeting in a letter dated 30 June 2019 sent to Philip Stephens complaining about the move and setting out her grievance against Jo Foulds. The first issue referenced by the claimant was the boredom she would feel working front end and "**my psychological well-being becoming compromised with boredom…my being bored on the front end was also discussed during the meeting I had with Gemma Glover and Roger Braun on Wednesday 26 June 2019**…" [the Tribunal's emphasis]. The Tribunal took the view that boredom on the tills was the principle issue for the claimant, who did not see why she had to move away from a department in which she had an expertise and enjoyed when other members of staff, such as Faye Roberts, remained in situ. This was in short, the nub of the claimant's case.

99 The claimant sent a WhatsApp to Stephanie McGarry Gribbin on the 26 June 2019 after her informal meeting stating "I have been moved to the tills as of Sunday. **Simply because of my hours.** If Faye does not perform well it will be reviewed. Roger agreed it doesn't make sense to move someone knowledgeable in plants, **it is merely because she works 5-days a week. It could be a lot worse. I just stated about the toileting issue and getting bored"** [the Tribunal's emphasis]. The Tribunal concluded that at the time the claimant accepted Roger Braun's explanation that the claimant was selected due to her hours and Faye retained because she worked longer hours five days a week.

100 The claimant believed as a result of her complaint to Philip Stephenson she would be transferred to the lighting department or kept working in seasonal.

101 The claimant texted an ex-colleague "**Well I know that I'm going to either décor or gardening…I would love to go back to gardening though as I really dislike Gareth. He's a smarmy little bastard full of his own self importance and I just want to smack him in the mouth every time I see him"** [the Tribunal's emphasis]. The claimant had worked in the showroom department that included décor/lighting in October 2017 when Gareth Barr, the manager, had issued her with an informal action form for Facebook entries as set out above. The claimant did not want to be managed by Gareth Barr again and had no intention of working in the lighting department, even if it was closer to the toilets. The claimant's position in this regard is relevant to her resignation when it became inevitable after she had fought to stay in the seasonal department, a transfer to lighting/décor under the management of Gareth Barr would follow.

102 On the 26 June 2019 the claimant sent a WhatsApp message to Julie Harrison about working on tills "As I need immediate access to the loos…The think is if I kick up too much fuss they may put me in bloody lighting and décor instead and I can't stand Gareth who is the manager of the department." The claimant then expanded in a later message "**I can't stand Gareth the manager of lighting and décor so got to be careful with this one. The tills are the lesser of the two evils**" [the Tribunal's emphasis].

The claimant's letter of 28 June 2019 to Philip Stephens

103 The claimant wrote a letter of complaint to Philip Stephens dated 28 June 2019 that described her medical condition in detail including flare-ups once a month which are associated with "chronic diarrhoea…My concerns are that I should need to use the toilet in an emergency working on the tills, I am unable to reach it with the immediacy required. **This undoubtedly compromises my dignity and is causing me a great deal of distress worrying about it**…You may be aware of my occupational health assessments that state during a flare up I need work light duties only what with being unable to bend, lift. Stretch, pull or push. **On these occasions I foresee that working on the self-service till would be beneficial, however, there is still a problem of having to attract attention and wait for someone to relieve me of my duties so that I can rush to the toilet urgently…**" [the Tribunal's emphasis].

104 On the evidence before the Tribunal it was apparent that there was little or no difference between working on the self-service till or returns and seeing to customers in the seasonal department; either way if the claimant had a "flare-up" and urgent need for the toilet, she would make her apologies to the customer and go. There was however an issue with the claimant working on staffed tills, with bending, stretching, lifting and pulling during a flare-up and it was more difficult and embarrassing for the claimant to stop and log out of her till part-way through the customer's trolley, and catch the attention of an employee working front end in order that they could take over on the till. Philip Stephens was put on notice by the claimant, and the 29 November 2019 occupational health report the claimant could be in some difficulties working on staffed tills and she was concerned.

105 The claimant requested and was given an early shift to work from 8am on 13 June 2019.

29/06/19 informal discussion between the claimant and Joanne Foulds regarding move to tills

106 On a busy Saturday in the store the claimant approached Joanne Foulds whilst she is working on the shop floor to discuss the move as Philip Stephens was not working that day and back in store on Monday.

107 In contrast to the claimant's evidence the Tribunal found it credible Joanne Foulds offered to move the discussion into a private room, which the claimant rejected as she wanted to have the discussion then and there. It is unfortunate the discussion took place in a public area against the backdrop of a busy store, and notwithstanding the claimant's insistence, it should have been moved to a quiet private room and for this Joanne Foulds as the deputy manager can be criticised.

108 During the conversation on the shop floor about the claimant working front end, the claimant raised the fact the fact she would be bored and raised the possibility of flare up and diarrhoea. Joanne Foulds tried to put the claimant's mind at rest assuring her that she could leave the till and customer whenever she wanted. The claimant alleged Joanne Foulds had said words to the effect that "someone will see me going and jump on the till until I return," and the Tribunal finds this was said by Joanne Foulds supported by other contemporaneous documentation, who told the claimant "not to worry". Joanne Foulds attempted to reassure the claimant over her move to front end, informing her if she was serving a customer on the staffed till and suddenly had to go to the toilet she should lock up her till, make her excuse to the customer and leave to use the toilet while "someone would see her go and jump on her till in the meantime." Joanne Foulds suggested the claimant mixed working on the self-service tills and returns desk. She did

not say the claimant would be put exclusively to work on the self-service tills and returns desk, and as deputy manager she did not arrange this to take place with the supervisor on the claimant's first day working at front end. It did not cross the mind of Joanne Foulds that the claimant should not be working on staffed tills at all as a reasonable adjustment and this adjustment was not put in place on 1 July 2019.

109 The claimant alleged Joanne Foulds had said "You don't go to the toilet that often" a remark which the claimant took to be dismissive and flippant. The Tribunal as indicated above, found words to that effect were said, but not in the manner described by the claimant. The words should be viewed in context. The context was Joanne Foulds attempting to reassure the claimant. The Tribunal found Joanne Foulds had not dismissed the claimant's verbal concerns about her disability as alleged by the claimant. Joanne Foulds informed the claimant that she should discuss the issue with Philip Stephens when he was back in store on the Monday.

110 The claimant whilst discussing the position with Joanne Foulds in public on the shop floor attempted to raise the issue of Faye Roberts and her laziness, and alleged "Ms Foulds said she was not going to discuss another member of staff as it is not professional, to which I have to agree." The claimant also alleges Joanne Foulds harassed her by dismissing and/or disregarding the claimant's verbal concerns about her disability when she refused to discuss it on the shop floor.

111 It is notable that in the grievance letter dated 30 June 2019 there is no reference to this, and the only matter which Joanne Foulds refused to discuss was other staff. The letter contradicts the claimant's evidence that Joanne Foulds refused to discuss her disability, and supports Joanne Foulds evidence that she did not refuse to discuss disability, but did refuse to discuss staff, such as Faye Roberts. This undermines the claimant's credibility as the 30 June 2019 letter is forensic in detail.

112 On balance, despite the difference in evidence between the claimant and Stephanie McGarry-Gribbin, the Tribunal on the balance of probabilities preferred the claimant's evidence on the balance of probabilities that Joanne Foulds had said words to the effect of "You don't go to the toilet that often, do you" but this was not said with the purpose or effect of violating the claimant's dignity or creating an offensive environment for her. The words should be interpreted in context, Joanne Foulds was attempting to provide reassurance to the claimant that she could work on the tills, and she had the benefit of occupational health report which confirmed a flare up once a month and for the claimant not to worry as she can leave the till whenever she needed to. At its highest the comment could be viewed to be insensitive; Joanne Foulds was attempting to reassure a colleague who had concerns about an upcoming move, and nothing could be said or done to appease the claimant who did not want to move from work she enjoyed to one which would bore her.

113 With reference to Joanne Foulds failure to recollect the words that were said; it is not surprising given how and when the conversation took place. The fact is that she was seeking to reassure the claimant and not question her about her toilet habits, and therefore it is entirely credible she had no memory of making that remark or a similar remark.

<u>30 June 2019 grievances</u>

114 The claimant raised two grievances. The first grievance was against Joanne Foulds in a letter dated 30 June 2019. In that letter she referred to occupational health as follows:

"Ms Barnes stated that I could not work on the tills as it could adversely affect my physical and psychical well-being." The Tribunal has read the report in detail, and it does not say this, and the claimant did not obtain any such clarification from occupational health.

115 The claimant also raised a grievance against Roger Braun, stating her concerns arose "when he became my manager on the gardening department" alleging discrimination, despite the fact that the claimant had no issues with Roger Braun, enjoyed working in seasonal and got on well with him.

116 In the second grievance the claimant also alleged occupational health had stated working on front end would "actually compromise my wellbeing…what is extremely interesting is that Ms Barnes RGN states in her report that it would be beneficial for me to work early shifts." Again, the occupational health report did not specify this, and the claimant misrepresented the position to the respondent, the claimant having informed occupational health on the 29 November 2018 that management was concerned about lone working and more staff were available on the early shift, when that was not the case as the claimant well knew.

117 On the 1 July 2019 Philip Stephens read the claimant's grievance for the first time.

<u>01/07/19 the claimant's first shift on the front-end post transfer.</u>

118 The claimant worked her first early shift on a staffed till on 1 July 2019 without complaint until part way through the shift when she found the twisting and lifting exacerbated her medical condition.

119 The mechanics of leaving a customer whilst working on a staffed till as a matter of urgency presupposes there was an employee ready and able to jump on the till and replace the claimant, which is not realistic and so the Tribunal found. To put the claimant in the position of jumping off the till and urgently making her way to the toilet was invidious. It is not the same as being in the gardening department, lighting department, working on the self-service till or returns. The claimant, when working on the staffed till and scanning items, serving clients as the conveyor belt was running, scanning bar codes including lifting, bending and twisting, was in a different position to when she worked on seasonal and the self-service till/returns. On the staffed till there is a one hundred percent customer interaction with less autonomy over what a customer service advisor can and cannot do. A reasonable adjustment would have been to ensure the claimant was not working on a staffed till, and allocate her to self-service or returns and this was not carried out until later that day, and so the Tribunal found.

120 The Tribunal found it was not credible that another employee would be available to jump on the till and replace the claimant with the immediacy she needed. It was unrealistic for the store manager to say; "lock the till and just go." It only takes one of those activities carried out on the staffed till not to take place and the claimant could have been in a pretty desperate position. The staffed till presented unique difficulties for the claimant given her disability. The respondent had failed to make reasonable adjustment for a period of 3-hours, following which the claimant worked on self-service/returns which were reasonable adjustments and the roles were not dissimilar to the those previously held by the claimant in respect of risk.

121 The claimant maintains in submissions that self-service was not a reasonable adjustment as they would no longer exist by the end of August. In fact, self-service

finished at Christmas and the length of period self-service was available to the claimant as a reasonable adjustment was not a consideration at the time. Working on the self-service tills was one of a number of roles front end that did not require sitting at a staffed till, and the respondent was under a duty to make reasonable adjustments going into the future and met it its obligations in this regard.

Date of knowledge and failure to make reasonable adjustment on 1 July 2019 following the transfer.

122 By the 1 July 2019 at the very latest, when Philip Stephens read the claimant's letter of 28 June 2019, he had knowledge that the claimant may be disadvantaged if she were to work on a staffed till as opposed to self-service till or returns desk, which he would not have necessarily picked up from the 29 November 2018 occupational health report that put the respondent on notice reasonable adjustments referred to continued to be necessary post-transfer. The respondent was put on notice in the conversation between the claimant and Joanne Foulds when the claimant raised the "toileting issue" on 29 June 2019 and adjustments were offered, including the suggestion that the claimant worked on the self-service tills and returns desk, but this did not happen.

123 The Tribunal did not accept Mr Piddinton's submission that the respondent had made reasonable adjustments. The Tribunal found as at 1 July 2019 the respondent had failed to make a reasonable adjustment when it placed the claimant to work on the staffed till in the early morning shift when there were not so many customers (or staff) around. as opposed to self-service or returns desk. The fact the claimant accepted the instruction and worked on the staffed till does not assist the respondent, contrary to Mr Piddinton's submissions. The claimant had raised her objections, Joanne Foulds had spoken about the adjustment of placing her to work on self-service/returns but had not actioned it despite having the authority to do so, and the reason for this was that she believed the adjustments provided of flexibility, light work and the ability of the claimant to down tools anytime she wanted to in order to gain quick access to the toilets, had been put in place and the claimant understood this to be the position. Neither she not the claimant had any idea that working on the staffed tills could exacerbate the claimant's medical condition because of the twisting and bending. Joanne Foulds did not ignore the claimant's medical condition as alleged by the claimant, and nor did she ignore the advice of occupational health, to the contrary as she believed reasonable adjustments had been put in place in order that the claimant could safely work on all tills.

124 As a result of twisting and turning when working on the staffed tills the claimant realised that it exacerbated her medical condition and informed the respondent of this for the first time, and the Tribunal found the respondent had no prior notice that exacerbation of her condition could result. As soon as the claimant complained she was immediately taken off the tills and worked on self-service for the remainder of the shift.

125 in a letter to Debbie Hayes dated 2 July 2019 the claimant reported that the "repetitive twisting motion…has caused extreme left abdominal pain extending down my left leg and aggravating my condition." Reference was also made to the claimant "worrying about needed toilet facilities when I have a flare up of my condition in an acute episode." The claimant reported how Gemma Glover, her supervisor, had "**made the wise decision to move me onto the self-service tills…Even with my experience and medical knowledge in nursing I have to say that I had not anticipated that actually working on the tills would aggravate my condition.** My focus and concerns had been accessing the toilet in an emergency when serving customers" [the Tribunal's emphasis].

126 Prior to putting the claimant to work on staffed tills the respondent had knowledge that it could cause her difficulties with getting to a toilet in time but it did not have knowledge, and could not be expected to have knowledge that the claimant twisting and turning would exacerbate her condition; a possibility that the claimant had not foreseen herself despite previous experience working on the tills.

127 The Tribunal found the respondent was in breach of its duty to make reasonable adjustments for a limited amount of time on the 1 July 2019 when the claimant worked on the staffed till, thereafter she completed her shift with reasonable adjustments in place.

128 On the 01/07/19 the claimant completed a Formal Grievance Form and went absent from work.

Claimant's sickness absence

04/07/19 Return to Work Interview Form completed and 'Informal' meeting between Philip Stephens and the claimant regarding her grievance

129 The claimant was absent from work sick returning 4 July 2019.

130 Unusually the return to work meeting was carried out by Philip Stephens, who was due to meet with the claimant to discuss her grievance. Philip Stephens noted the claimant had a disability and there was a reference to the claimant's condition not being work related which working on the till had contributed to. A detailed conversation took place and notes were taken. It is clear from the notes the claimant volunteered information about her medical condition and there was no evidence Philip Stephens asked intrusive questions, and the Tribunal found on the balance of probabilities that he had not. The claimant offered information about her the spasms she suffered which required her to go to the toilet daily up to three times per hour. The claimant also acknowledged that working in the gardening department entailed twisting but she would "go off sick if bad," would take painkillers and carry out light duties. When asked what the claimant's ideal outcome would be her response was **"close to toilets – seasonal ideal or décor…ok on self-service check out and return desk. I am bored at tills F/end that is why Rob moved me"** [the Tribunal's emphasis].

131 Working on the self-check tills in the early morning starting at 7am when there were fewer customers was explored and agreed with the claimant, which would give Philip Stephens time to redeploy her into a "mix of roles with no twisting." Philip Stephens made it clear to the claimant "I have no issues regarding [you] leaving a till until a long-term solution" was found. The agreed evidence is that the claimant could leave for the toilet whenever she wanted without giving anybody notice. Philip Stephens made it clear that he would redeploy the claimant into another department and reasonable adjustments would be put in place giving him time to do so. In the notes there is no reference to any time limit, whether it be a couple of days as submitted by the claimant. From the contemporaneous evidence it appears the redeployment was to happen but not within a specified time limit. Towards the end of the meeting when agreement had been reached, the claimant expressed her concern as to why she had been chosen to leave the seasonal department and she questioned it again stating, "whenever you move me it is a rock and a hard place."

132 The claimant also agreed that Philip Stephens would have a word with Joanne Foulds following their discussing when Philip Stephens suggested the claimant was prepared for the conversation when Joanne 'Foulds was not, and the claimant accepted this. The grievance concerning Joanne Foulds was resolved on this basis, and the grievance against Roger Braun was to be continued and investigated. In the meantime, the claimant agreed to work on self-service tills and returns pending redeployment into another department, which she did with no issues until allegedly on 9 July 2019.

133 In direct contrast to the claimant's evidence the Tribunal found Philip Stephens had not committed the acts of harassment as alleged and his conduct did not have the purpose of the proscribed effect set out in section 26(1)(a) and (b) of the EqA. Philip Stephens had genuinely attempted to understand the claimant's grievance, make suggestions for the resolution of it, agree reasonable adjustments with the claimant and ensure that she would continue her employment with the agreed adjustments in place, which the claimant did. Judged objectively, the claimant could not properly conclude by the actions of Philip Stephens the respondent was repudiating the contract: Buckland.

134 At some point after the meeting Philip Stephens informed the front end supervisors that the claimant should only work on the self-service tills and returns, as these were the reasonable adjustments he had agreed with the claimant to put in place.

09/07/19 The claimant completed a further Grievance Form attaching letter dated 08/07/19

135 The claimant completed a further Grievance Form attaching a letter dated 08/07/19 which included a request that what she would like was to return to the seasonal department with "reassurances that I will be treated fairly." Within the 3-page letter the claimant raised numerous allegations against Roger Braun, that included a number of inaccuracies concerning what occupational health had advised. Reference was also made to the claimant finding the tills "**very much brain numbing and totally boring as well as having very valid concerns about using the toilet in an emergency**" [the Tribunal's emphasis].

9 July 2019 respondent's duty to make reasonable adjustments

136 The claimant came in to work on the 9 July 2019 and was initially put to work on the staffed tills as a result of customer advisor who had not turned up to work that morning due to sickness. When the claimant complained to a supervisor, she was immediately put to work on the self-service till and returns without complaint. The claimant worked from 7am to 12pm, and worked on the staffed till for a short period of the shift. She was not asked to, and did not work on a staffed till again during the remainder of her employment, and from the point of time when the claimant was taken off the staffed till the respondent was not in breach of its duty to make reasonable adjustments and so the Tribunal found on the balance of probabilities.

137 The Tribunal found claimant was first put to work on the staffed tills in breach of Philip Stephens instructions to the claimant, the supervisors and the respondent's duty to make reasonable adjustments. The claimant started work on the staffed tills, had a "flare up" in her condition and was moved to self-service by the supervisor. The claimant was working in self-service during another "flare up", which necessitated toilet breaks. There is a dispute in the evidence as to whether the claimant suffered incontinence on the way to the toilet ("the accident") as maintained by the claimant. The claimant's case is that this alleged incident took place when she was working on the self-service tills after she had been taken off the staffed till.

138 There is an issue with the claimant's evidence that she suffered incontinence on the 9 July 2019. The respondent disputes that the "accident" ever took place, with good reason. The claimant's evidence was that it had taken place on the last day she worked, before changing the date to the 9 July which was not the last day. The claimant's oral evidence on cross-examination the accident took place late in the shift and she worked the last 40 minutes without telling anybody about it at the time, including friends and family despite the documentary evidence before the Tribunal that she regularly sent WhatsApp messages about her work and had no difficulties discussing her toileting issues and raising complaints with managers.

139 The afternoon of the 9 July 2019 after the claimant's shift had finished she had a pre-arranged appointment with occupational health, and the Tribunal found as a matter of fact that the claimant did not raise "the accident" with occupational health, and this coupled with the contradictions in her evidence, brought into question again the credibility of the claimant's evidence.

09/07/19 occupational health report

140 In the occupational report was prepared on the 9 July 2019 the claimant was found "fit to continue in her current role and is currently at work." The claimant's "current role" was working at the front end which included staffed and self-service tills.

141 The relevant history/current situation was set out by occupational health and surprisingly there is no reference or suggestion that the claimant had suffered from incontinence approximately 3 hours before she spoke with the occupational health professional. There is no reference to the claimant presenting as agitated or having a mental block, which was the evidence the claimant gave to this Tribunal, suggesting she could not even remember the meeting with occupational health. The claimant described working her shift on autopilot and then being inconsolable when she arrived home after the shift.

142 Occupational health recommended the claimant be returned to work at the Garden Centre and allowed good access to toilet facilities as a reasonable adjustment. The report set out that "due to her condition Mrs McGarry Gribben can be and has on numerous occasions been caught short and required to attend the toilet urgently." It recorded that the claimant stated it was not an issue in the gardening department "as she was within a reasonable proximity to the ladies' toilet. However, it appears that the change in her role had made it increasingly more difficult to get to the toilet when required. Being on the till means if she urgently needs to go then she has to get someone to relieve her on the till and this isn't always going to happen within the timescale require. She then has to travel from the till area to where the toilet and it and in doing so she is likely to be stopped by customers increasing her journey time to avoid being rude to customers." It is clear from the contents of the report that a discussion took place with the claimant concerning her being "caught short" in the past, and yet there was no suggestion that she had suffered a similar fate less than three hours before, and the claimant's explanation that she had "blanked out the incident" was not credible. On the balance of probabilities, the Tribunal concluded the alleged accident had not taken place, and the claimant first raised it ten-days later to pressurise the respondent to return her to the seasonal department.

143 The claimant believed that as occupational health had recommended she be returned to work to the seasonal department the respondent was under a legal obligation to carry this out, and she would eventually end up back working in the gardening department

being managed by Roger Braun and not the lighting/décor manager. The Tribunal found the claimant had no intention of resigning, and was prepared to wait for the outcome of the grievance procedure which she believe would be found in her favour and she would be returned to the Seasonal department forthwith.

144 At the time the occupational health report was prepared the claimant knew she was to work on self-service tills or the returns desk until redeployment. The claimant knew the seasonal and front end department were equidistant to the toilet, and there was the same risk of customers stopping her and increasing the journey time to the toilet. The claimant knew she could leave the self-service and returns desk at any time without notice, and there was no need to wait for someone to relieve her. The real issue was the staffed tills and getting someone to replace the claimant part way through a shop, and so the Tribunal found. The claimant did not make this clear to occupational health because it did not suit her purpose, which was to ensure a return to the seasonal department, even if it meant occupational health were not provide with the correct facts.

145 It is undisputed that the claimant was working on the returns desk when the alleged accident happened, which cannot be attributed to any breach on the part of the respondent in respect of its duty of care to the claimant, as a reasonable adjustment had been made and the claimant was in the same position she would have been had she been working in the seasonal department and seeing to a customer there i.e. she could have made her excuses and left.

<u>10 July 2019 meeting with Philip Stephens and the claimant's last day when she was physically at work.</u>

146 The claimant returned to work on the 10 July 2019 without complaint, and she worked on the self-service till. The claimant believed at the time the respondent had a legal duty to return her to the seasonal department and her position had been strengthened by the occupational health advice. The claimant did not resign in response to the respondent breaching its duty to make reasonable adjustments on two occasions, and continued to wait for the redeployment to seasonal which she believed was the inevitable outcome of her grievances.

147 A meeting took place between the claimant and Philip Stephens about the claimant's grievance and redeployment. The undisputed evidence is that Philip Stephens informed the claimant she was going to be moved and "we just need to sit down together to talk through the move." Philip Stephens had previously approached two members of staff from other departments to facilitate the claimant's move, and informed her of this. The claimant disputes that she was informed she would be moved to lighting and Philip Stephens had made it clear he would be discussing the move with her on the 11 July when she was next on shift. There is a conflict in the evidence as to whether the claimant was told the move was to the lighting department or not, and on the balance of probabilities the Tribunal found that she was. The claimant knew she was going to be relocated either to the lighting department nearer the toilets or the seasonal department, and her oral evidence was that she had heard through the grapevine it was to be lighting/seasonal. Nevertheless, the claimant believed she could persuade the respondent to transfer her back into the seasonal department via the grievance process.

148 It was put to the claimant on cross-examination that Philip Stephens "remembers talking to you on the till and said he had sorted the moves. But he never had the chance to address that as you went off sick. What do you think could be done sooner?" The claimant did not dispute this version of events and her response to the question was "I

should not have been moved as the HML states and backs up" conceded she had agreed to give Philip Stephens time to arrange the move and "one day is enough." This is the nub of the claimant's case, reinforced in other contemporaneous documents and evidence given at this liability hearing to the effect that she should not have been the employee moved from the seasonal department and the respondent's explanation for the move was met with distrust and disbelief from the time the decision was made to the claimant's resignation when she finally realised that she would be returning to seasonal until the Spring/summer and no earlier, despite her best endeavours at forcing the respondent's hand.

149 In oral evidence on cross-examination the claimant's recollection of the events which took place on 10 July 2019 was not clear. The claimant's described how she had a mental block on 9 July and was struggling to remember what happened on the 10/11 July 2019 which was attributed to the "accident" that had allegedly occurred on the 9 July 2019. The claimant was unable to recollect having a conversation with Philip Stephens on the 10 July "struggling" because of what happened on the 9 July. It is undisputed the claimant did not mention the accident at work that had allegedly taken place on 9 July 2019 to Philip Stephens or anybody else within the respondent until ten days later, and as indicated earlier the Tribunal found she had not mentioned it to occupational health because the accident did not take place.

150 The recollection of Philip Stephens is preferred to that of the claimant's concerning what was said on the 10 July 2019. The move to the lighting department was imminent and the claimant was to have a meeting with Philip Stephens the next day to discuss it. The claimant has made much of the fact that Philip Stephens had previously told her words to the effect that he could move anybody at any time within the store, which he denied. The evidence before the Tribunal is that (a) no time scale for the redeployment into the lighting department had been discussed or agreed, it could be a "couple of days" or longer, (b) Philip Stephens had to consult with the staff who were to be affected by the redeployment which is what he did as their working pattern had been allocated and it would have to fit in to the new department they were transferred into, and (c) the reasonable adjustment agreed to by the claimant that she work on the self-service till and returns which she could leave at any time without notice, remained in place for the duration until her redeployment.

151 The claimant did not return to work on the 11 July 2019 and self-certified her sickness absence. Consequently, she did not meet up with Philip Stephens. If she was in any doubt as to what had transpired at the 10 July 2019 meeting and the fact that the next move was redeployment and a meeting with Philip Stephens to discuss it, the position was clarified by Debbie Hayes who rang the claimant on the 12 July 2019.

Telephone call 12 July 2019 HR and claimant

152 It is undisputed Debbie Hayes from HR made telephone contact on the 12 July with the claimant, who was subsequently signed off unfit for work by her GP with no adjustments suggested, from 18 July to 25 July 2019.

153 Debbie Hayes informed the claimant that she was arranging the meeting to take place between the claimant and Philip Stephens, and the claimant was to be moved. After her discussion with Debbie Hayes the claimant was aware that the next time she returned to work she would not be working front end. The claimant was convinced she had a strong case and would be transferred back to the seasonal department and wrote in a WhatsApp message "The thing is if he moves me to décor I still have a case of

discrimination for not being kept on in gardening and them keeping fuckwit Faye." By this stage the claimant had in mind proceedings for discrimination as she had "taken BUPA down twice, so B&Q are nothing" as evidenced in a number of different WhatsApp messages which reflect the claimant was planning the various steps leading to what she perceived to be a successful litigation outcome based on her previous experience.

154 With reference to the alleged breaches of contract relied upon by the claimant set out in allegation 29 (d) the evidence before the Tribunal was that the claimant was consulted over the proposed transfer to the lighting department when she was due to return to work from sickness absence, and there was no evidence of any breach of contract on the part of the respondent.

155 The claimant was signed off with stress at work and the respondent took the view the meeting with the claimant to discuss her grievances should wait until she felt better.

19/08/19 Health Review Meeting

156 The claimant continued to be signed off unfit for work with stress at work with no adjustments from 18/07/19 to 07/09/19 which resulted in a health review meeting held on the 19 August 2019 between the claimant supported by her partner, and Joanne Foulds supported by a HR notetaker. The meeting was held at the claimant's home and it was an undisputed disaster as a direct result of the claimant's aggressive behaviour aimed at Joanne Foulds, over which no criticism can be levied against Joanne Foulds who behaved professionally, as conceded by Stephanie McGarry-Gribben.

157 It was at the 19 August 2019 Health Review Meeting the claimant disclosed for the first time the "accident" she had allegedly experienced on her last day physically working The claimant accused Joanne Foulds of lying when she disputed saying "Oh come on Niamh how often do you go to the toilet". It is notable that in the claimant's notes of that meeting, which differed substantially from the record taken by HR that the words alleged used by Joanne Foulds had been embellished, and there was a third version with the inclusion of "Oh come on Niamh" which raised a further issue over the claimant's credibility. The claimant has attempted to use Joanne Foulds' denial that she had not made a comment about how often or not the claimant had gone to the toilet as justification for the aggressive onslaught directed at Joanne Foulds, despite an earlier acknowledgment when discussing her grievance with Philip Stephens that Joanne Foulds may not have remembered using those words. The claimant was not disciplined for aggressive behavior towards a manager.

158 The claimant was informed again of her move to the lighting department, and as indicated above this did not come as a surprise to the claimant, who was already aware of the possibility that she would be moved to lighting. The health review meeting could not take place and Joanne Foulds indicated to the claimant that it would be re-arranged. It is undisputed the claimant remained aggressive and shouted at Joanne Foulds throughout, Stephanie McGarry-Gribben told her to calm down numerous times, and on re-examination by the claimant she also confirmed Joanne Foulds acted professionally throughout.

159 The claimant had been informed her grievance was on hold during her sickness absence, and a grievance meeting with a manager was yet to take place.

20/08/19 claimant's letter to Debbie Hayes

160 On the 20/08/19 the claimant wrote a letter to Debbie Hayes confirming that her grievance was on hold due to her being absent, and requesting that the grievance be dealt with including the original grievance brought against Joanne Foulds which had been discontinued earlier, and a new grievance was raised against Philip Stephens.

161 As a result, the claimant was sent a letter dated 22 August 2019 inviting her to a formal grievance meeting arranged on 3 September 2019.

162 In a letter dated 29 August 2019 the claimant was informed Andrew Fraser would deal with grievance. Andrew Fraser was an independent manager from another store who had no previous dealings with the claimant.

Grievance hearing with Andrew Fraser held on 3 September 2019.

163 The claimant submitted a 10-page statement referring to her last day at work as being the 11 July and the accident she had whilst working on the returns desk that day. It is notable the "accident" had taken place on the 9 July, 10 and 11 July 2019 which is a further indication of the claimant's unreliability.

164 Notes were taken by the respondent of the 3 September 2019 meeting between the claimant and Andre Fraser, which records the claimant's statement being read out by her. After a discussion on some of the points raised by the claimant it was agreed the grievance hearing would reconvene on 13 September and the claimant was given 24-hours "to think if there is anything else to add" and Andrew Fraser promised that "I will speak to all managers concerned." The claimant did not complain about Andrew Fraser at this stage, and there is no evidence in the notes taken at the 3 September 2019 grievance meeting or the reconvened meeting on 13 September 2019 that Andrew Fraser had made any concessions about the claimant's case about how she alleged she had been treated by managers, the Tribunal preferring to rely upon contemporaneous documents rather than the claimant's inaccurate memory of the events recollected to fit into an Employment Tribunal claim.

165 On the 29 August 2019 the claimant entered ACAS early conciliation.

166 The claimant was signed off unfit to work with no adjustments between 05/09/19 and 16/10/19.

13/09/19 Reconvened grievance meeting

167 As previously agreed, a reconvened grievance meeting took place on the 13 September 2019 between claimant and Andrew Fraser at which the move to lighting department was discussed. Andrew Fraser confirmed the; "reason to moving you to lighting more sales and closer to toilets and no heavy lifting". He pointed out that "the requirement for plant work becomes less and heavy lifting becomes more...we have a gardening expert already no need for extra during the winter." The claimant conceded that the move to lighting made sense but the move to the tills had aggravated her condition. It is notable in the contemporaneous communications the claimant does not dispute working in the lighting department was suitable.

168 The claimant was asked why Roger Braun had moved her, maintaining "I think Roger moved me as Roger does not like my personality he cannot handle me as a person. I think he is a lovely man." This is similar to various WhatsApp message sent by the claimant in which she expressed a view that Roger Braun could not handle her because she had a strong personality. The claimant's comment undermined her claim before this Tribunal which was that she was "not being permitted to work in the seasonal department" due to her inability to lift heavy items and Roger Braun's perception of her reliability caused by disability related absences. The Tribunal queried how a manager who had alleged committed a number of acts of unlawful disability discrimination since the claimant had joined the seasonal department could be described as "a lovely man" as far as the claimant was concerned.

169 When asked "How do we engage you into B&Q" the claimant's response as that "I have no faith in Roger, Jo and Phil. If I return I have no faith or intelligence in any of them. If given an instruction I will find myself in a disciplinary I am an extremely intelligent person and I think this is why I have problem with Roger." There was no suggestion in any of the documents, or by witnesses including the claimant, that she was facing any disciplinary action, and it is notable that the claimant believed Roger Braun's problem with her stemmed from a conflict in personalities and not her disability.

170 The outcome suggested by Andrew Fraser was to meet again, review the occupational reports, carry out a risk assessment and agree an action plan, which he described as a "win" situation. Andrew Fraser confirmed the lighting department lighting was "the best move with the recommendation you move back to seasonal in the spring/summer. The work is lightweight and closer to the toilet" to which the claimant responded, "I will be bored out my brains." The Tribunal noted that the claimant's allegation of not being permitted to work in the seasonal department was undermined by the fact she was to return to seasonal when it was busier and needed more staff in spring and summer.

171 Andrew Fraser asked the claimant if it would be possible for her to be signed off the sick and "use your holidays so that you can get paid then come back and decide what to do after speaking with Jo and Roger" in an attempt to ensure the claimant was paid during the holidays she had booked, much of which has been made of by the claimant and her witnesses who alleged Andrew Fraser had asked the claimant to come into work when she had been signed off as unfit. The Tribunal found Andrew Fraser had not asked the claimant to come into work at the same time she was signed off work in a Fit note. He was aware the claimant was going to Peru and wanted to help her out financially. Andrew Fraser was considering the possibility of a resolution being found whereupon the claimant would then be signed as fit to work by her GP so she could be paid holidays. He was not proposing she went against the GP's advice, and the evidence given by the claimant and her witnesses was indicative of the exaggerated interpretation given to events in order to show Andrew Fraser in a poor light, which on a closer reading of the contemporaneous documents had no merit and were not credible.

172 During the meeting the claimant made it clear the outcome she wanted was for the three managers against which she had brought the grievance to be moved from the store. The claimant was not happy that Andrew Fraser supported the move to lighting/décor and her next step was to raise yet another grievance in an attempt to persuade the respondent that she should be transferred back to the seasonal department.

Claimant's further grievance 14 September 2019

173 Immediately following the grievance meeting, in a letter dated 14 September 2019 the claimant set out in a three-page letter a number of complaints against Andrew Fraser giving reasons why the claimant believed the grievance investigation was "unfair, biased, skewed, and somewhat corrupt…the very person chairing the process wants to jump on the same bandwagon as the three managers whom my grievances are about. It beggars belief."

174 It was clear Andrew Fraser could not continue with the grievance investigation and he did not take the matter any further, a second manager became involved and finally Clare Brown as the respondent took the view that a female manager would be a more sensitive option when dealing with the claimant. Claire Brown was the HR People Partner for Scotland, she was independent with no prior relationship with B&Q Wallasey Warehouse and the people involved in the claimant's grievance. The claimant found her initially to be empathetic and understanding as her Father had the same symptoms the claimant experienced.

175 The Tribunal found that the fact the claimant's grievance was dealt with by three different managers could not be characterised as unwanted conduct related to the claimant's disability. The claimant wanted her grievance to be dealt with, but not by Andrew Fraser against whom serious allegations were made and it was not reasonable for her to perceive that three different managers handling her grievance had the proscribed effect set out in section 26(1)(b) of the EqA. The Tribunal is in no doubt that had Andrew Fraser continued to deal with the grievance the claimant would have raised a number of additional complaints. Instead, the respondent attempted to deal with the claimant sympathetically, and allocating Claire Brown as grievance officer was an attempt to resolve the situation and get the claimant back into work. The respondent's actions, objectively assessed, were not likely to destroy or seriously damage the relationship of confidence and trust, and the claimant could not properly conclude the respondent was repudiating the contract.

176 In a 14 September 2019 WhatsApp message sent by the claimant to Sheila Taylor she wrote "even though it says I agreed to stay on the tills until Phil arranged a transferor it is inadmissible if we end up in court as it has not been signed and agreed…" It is clear from the factual matrix found by the Tribunal on the balance of probabilities that the claimant did agree to stay on the self-service tills and returns until the transfer was arranged, and her attempts to dilute and misrepresent this evidence calls into question her credibility and historical inaccuracy.

177 On the 18 September 2019 ACAS issued the EC Certificate.

178 Proceedings were received by the Tribunal on the 18 September 2019.

179 Between the 19/09 –14/10/19 the claimant travelled to Peru where she had a "holiday of a lifetime." This was the holiday Andrew Fraser had explored the possibility of getting the claimant full pay to cover the period she had booked off.

21/10/19 Grievance meeting with Claire Brown and the claimant

180 After the claimant's return from holiday a grievance meeting took place with Clare Brown at which there is no reference by the claimant to the difficulties she had with toilets or toilet accidents at work and her main concerns appeared to be the discrimination alleged

against Roger Braun. The claimant's shifts were discussed, and the claimant referred to working a shift on Thursday had a "flare up, diarrhoea no pain." The meeting culminated in the claimant thanking Clare Brown for listening to her, and Claire Brown stating she was due to be away on holiday but would interview the three managers the week on her return. The claimant was therefore made aware that there was to be some delay.

181 In a 22/10/19 GP Fit Note the claimant was signed off for the period 16/10/19 to 13/11/19 with no adjustments were recommended.

182 On the 28/10/19 Claire Brown obtained statements from Joanne Foulds, Philip Stephen and Roger Braun as part of the grievance investigation. The Tribunal has considered the statements which it does not intend to repeat in any detail. It is notable in her statement Joanne Foulds described the meetings she had with the claimant, and denied the allegations raised as did Philip Stephen and Roger Braun. Notes were taken and it is apparent from the notes that Clare Brown put to the managers the claimant's grievances in full, which she then sent to HR for support having looked at the claimant's clocking in and out data, and the staff levels within the store was reviewed.

183 On the 15 November 2019 Claire Brown had arrived at her conclusion and recorded them in a letter of the same date setting out her findings and recommendation that the claimant, Philip Stephens and Joanne Foulds should enter mediation. By this date Roger Braun had left the business. In a three-page letter Claire Brown set out the following conclusions:

183.1 The claimant's move was discussed with the store management team and it was "agreed amongst the managers at your meeting your hours would be best suited to the Front-End Department." Reference was made to the claimant's initial move from front end to seasonal "due to you feeling not stretched or challenged in the role rather than a concern regarding the role impacting your condition. I therefore do not feel that the transfer was discriminatory. The front-end is a department that you had previously worked on and the management team did not see why the transfer itself would have an impact on your health condition." With the exception of Claire Brown's finding concerning who had discussed the claimant's move, it was unclear which manager had made the decision and the claimant has made much of this. However, if paragraph 1 was read in conjunction with paragraph 3 it is clear Roger Brawn made the ultimate decision and this was the evidence before the Tribunal as set out in the contemporaneous documents given to the claimant by the respondent at the time. The Tribunal took the view that Claire Brown was entitled to accept what she was being told by managers concerning events the claimant had no direct knowledge or experience, in preference to the claimant's unsubstantiated suspicions. She was satisfied that after "peak trading the Seasonal Department was over-deployed" and the claimant's hours were best suited to front-end where she had worked before, and the Tribunal concluded the grievance investigation was not "flawed" as submitted by the claimant.

183.2 With reference to the claimant's allegation that she had "requested to work a fair number of early shifts per week in comparison to other colleagues in the seasonal Department but had not been rota'd them. You stated that Roger told you this was because you might call in sick." Claire Brown set out details of heavy lifting including aggregates on an early shift and that the claimant was unable to lift heavy items "as this can aggravate your condition…. the decision in giving you such shifts as 10am to 2pm was to ensure you had support on the department to prevent you having to carry out tasks that would cause a flare up of your condition. This is the same reason you were not rota'd to work any late shifts." The Tribunal took the view that there was no

satisfactory evidence that the claimant had asked to work a "fair number of early shifts per week" and the evidence was the claimant had asked a maximum of one per week if that. It appears that there was some confusion with Clare Brown's findings as she accepted the claimant had not worked early shifts when she had, and that she had not worked late shifts when she had and this can to some extent be attributed to the contradictory information the claimant provided in respect of her grievances which can be confusing. Clare Brown's key finding which was that Roger Braun did not take the decision regarding early shifts because the claimant might call in sick, and she was entitled to reach this conclusion accepting Roger Braun's explanation as indeed did the Tribunal on the balance of probabilities.

183.3 Roger Braun denied commenting on the claimant's absence maintaining he had helped her with requests she made, and the only reason he could not accommodate the claimant's requests for early shifts was "for operational issues, more to do with Niamh not being able to lift heavy objects. I never planned late nights where she would be left on her own due to her illness." Roger Braun's evidence was that he wanted to ensure the claimant had other people working on the shift, so that she could have help which would be the mid-shifts. Roger Braun did not say the claimant had not worked late shifts. He also explained how the claimant had been selected "it was my decision to put her name forward." Roger Braun essentially gave the same evidence to Clare Brown as he did to the Tribunal, Claire Brown accepted his evidence as did the Tribunal. In her capacity as a decision maker Clare Brown was entitled to prefer Roger Braun's evidence to that of the claimant.

183.4 With reference to the Informal Action Form 24 September 2018 Claire Brown referred to not finding any evidence and Roger Braun had no recollection. Claire Brown invited the claimant to provide evidence of the meeting and Informal Action Form so "I will investigate accordingly." The claimant did not provide a copy of the form which was in her possession at the time and the logical conclusion to be drawn is that she was not concerned about any further investigation into her complaint taking place.

183.5 Clare Brown investigated all the relevant grievances raised, and concluded "overall, in reviewing the above incidents, I can find no evidence to suggest Roger discriminated against you. When speaking to Roger he has always been supportive of your wellness" and she referred to texts which demonstrated "he has been accommodating your needs on the department." The Tribunal took the view Clare Brown was entitled to reach this conclusion.

183.6 With reference Joanne Foulds Claire Brown set out the four points Joanne Foulds recalled highlighted by the claimant when they spoke on 29 June 2019, and "other members of the seasonal department had been considered for the move however it would not be professional for Jo to discuss the cases with you. Jo did not feel it was the case that Roger had suggested you move due to your condition or levels of attendance. Jo did explain during the conversation she did not want to discuss this and this is may be why you felt she was dismissive…she had advised you to discuss your concerns with Philip Stephens and Jo was not able to change the decision." Claire Brown referenced the claimant being offered an appropriate room and in confidence to discuss her concerns, which was declined by the claimant. She concluded "Jo stated she did not comment on how many times you use the bathroom. Therefore, I can find no evidence to suggest that Jo behaved inappropriately towards you."

183.7 With reference to Philip Stephens Claire Brown recorded how he had agreed with the claimant on the 4 July 2019 that "Front-End was not the right move for you and Philip

would find you a more suitable role on the shop floor which was closer to the bathroom and with light duties. Philip said no time scale for this move was agreed and he made sure you were comfortable to continue working on front-end until he could put the move in case, which you confirmed that you were…Philip showed me your clock in sheet which showed following this meeting with him on 4 July 2019 you worked three shifts on the checkouts. Philip said he arranged a move for you on to lighting which is adjacent to the bathrooms and did not involve heavy lifting. The delay was due to having to move a further two colleagues on two other departments and they needed to be informed ahead of this. Whilst the move was being facilitated you knew that you could leave the tills and use the toilet at any moment and you'd confirmed that you were happy with this arrangement in the interim period. Therefore, I do not believe the time to arrange the move was excessive."

183.8 In Claire Brown's conclusion the claimant was told that "given the concerns regarding your health condition the store have already arranged to move you from the Front-end department to work on Lighting. This is close to the bathroom and includes light duties. Therefore, this role will be available for you on your return to work. Your new line manager will be Gareth Barr who will be in contact. I also recommend and will arrange a mediation session with you, Jo Foulds and Philip Stephens. I can confirm Roger Braun has left the business."

183.9 The claimant was offered an appeal which she did not take up. On the 18 November 2019 the claimant sent a WhatsApp message to Stephanie Taylor "I have received the outcome of my grievances. It's all lies and shit. Not one of my grievances have been upheld. I have been invited to appeal if I do not agree and **lighting department manager Gareth Barr will contact me soon to welcome me back to work and support my integration. I'd rather stick pins in my eyes**…. I'm determined to go all the way with this and won't back down…they have nothing to fight back with or defend themselves" [the Tribunal's emphasis].

<u>The claimant's resignation dated 20 November 2019</u>

184 In a 4-page letter the claimant resigned with immediate effect. She wrote "I've lost all faith, trust and confidence in my employer and managers due to their continued failings in following company policy, exposing me to risk and causing me physical and psychological injury and they are breaking the terms of my employment contract in respect of breaching the implied trust." The claimant alleged everything Roger Braun had said was "all complete lies and falsehoods" and referred to him allocating her early and late shifts. The claimant also accused Joanne Foulds of "telling lies" and with reference to Philip Stephens the claimant agreed with him that "no specific timescale was agreed" and that she had agreed to stay working on the Front-End maintaining that the claimant expected to be moved on 9 July, even though no such agreement had been reached. She criticised Claire Brown's findings as "too great a stretch of the imagination by far." The claimant described the "roles" in the plural, working at front-end "do not allow the same opportunity as you are aware" as she had accessing the toilet whilst "working in the gardening department."

185 The Tribunal noted that the claimant did not differentiate between working on the tills and working in returns and on self-service tills found by it to be reasonable adjustments

that put the claimant in the same position she had been whilst working in the gardening/seasonal department.

186 The claimant concluded Claire Brown's investigations were flawed, alleging she had overlooked occupational health reports, letters and the "missing Informal Action Plan" dated 24 September 2019 which he claimant had in her possession but failed to provide to Claire Brown when Claire Brown invited her to do in the grievance outcome letter in order that she could investigate further. Had the claimant wished Claire Brown to consider this document she had the opportunity but failed to take this up because she had no intention of ever returning to work in the lighting department and every intention of using Claire Brown's "fundamentally flawed investigation" in this litigation. The Tribunal found on the balance of probabilities the claimant resigned because she was not being transferred back to the seasonal department into a job which she enjoyed and had expertise, and instead would be bored working in the lighting department under a manager she disliked, so much so, that she believed he was "a smarmy little bastard full of his own self-importance and I just want to smack him in the mouth every time I see him."

187 The effective date of termination was 20 November 2019.

Law

Constructive unfair dismissal

188 Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

189 In "Harvey on Industrial Relations and Employment Law" at paragraph DI [403]. "In order for the employee to be able to claim constructive dismissal, four conditions must be met:(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach. (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law. (3) He must leave in response to the breach and not for some other, unconnected reason. (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."

190 The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal "made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer."

The implied term of trust and confidence

191 There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

192 The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

Last straw

193 A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken e together amount to a breach of the implied term?"

194 The claimant referred the Tribunal to the Court of Appeal decision in Omilaju v Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer.

Employee must resign in response to repudiatory breach

195 The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach … it is not enough that the employee expects the employer to repudiate the contract and leaves in anticipation. In Ms McGarry-Gribben's case the proscribed conduct took place on the 1 and 9 July 2019 and yet the claimant remained in employment until her resignation on 20 November 2019, over 4-months later during which she worked a number of shifts that incorporated agreed adjustments before she was absent sick until resignation.

196 In the well-known EAT case of Walker v. Josiah Wedgwood & Sons Ltd [1978] ICR 744, IRLR 105 the EAT held "… it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves … **And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him**" (per Arnold J). The Tribunal's emphasis as this point is relevant to Mrs McGarry-Gribbin's case as it took the view the claimant left for reasons other than the breach of contract when the respondent failed to put in place on two occasions reasonable adjustments.

Waiver of breach

197 Weston Excavating cited above; The employee "must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

198 In the well-known EAT case of W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443, EAT an employee censured by employer in July 1980 for taking leave without previously advising the employer. He demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract. This case is relevant to that of Mrs McGarry-Gribbin's as she was aware from her discussion with Philip Stephen on 10 July 2019 and subsequent discussions with various employees of the respondent including at her grievance meetings with Andrew Fraser that she was to be moved to lighting/décor and yet the claimant did not resign until much later.

199 In relation to her disability complaint, the claimant referred the Tribunal to Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19, an EAT decision also relevant to whether a delay in resigning following a repudiatory breach may indicate that the claimant has affirmed the contract. It may alternatively indicate that the repudiatory breach is not the effective cause of the resignation. In Da'Bell the EAT upheld an employment tribunal's finding that an employee had not been constructively dismissed when she resigned three months after her employer's fundamental breach of contract. The EAT reasoned: '[A] person who reacts to offensive conduct by an employer by writing a letter the next day will easily be adjudged to have acted by reason of it. But someone who leaves it for a year, who will not let bygones be bygones, who digs it up again, is likely to be acting for a reason which is not directly related to the breach. Those are matters of fact for an employment tribunal, to determine what the reason was.' On the facts, the claimant's delay indicated 'a detachment of that event from the reasoning

of the claimant when she resigned'. The Tribunal concluded that the same can be said of Mrs McGarry-Gribbin.

Discrimination

Direct discrimination

200 S.13(1) EqA provides that direct discrimination occurs where "a person (A) discriminates against another (B) if, because of a protected characteristic [race] A treats B less favourably than A treats or would treat others.

201 An actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from him. Para 3.23 of the EHRC Employment Code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matter is that the circumstances "which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator." This is relevant to the comparators relied upon by Ms McGarry-Gribbin who were not in the same or nearly the same circumstances as the claimant, and the Tribunal formulated a hypothetical comparator based on the evidence before it as invited to do so by the claimant in her submissions.

202 The claimant in submissions referred the Tribunal to Chief Constable of West Yorkshire v Vento (No.3) [2003] ICR 318 CA and Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19, EAT as a "case comparison" misunderstanding that every case is dealt with on its own individual merits. Further, there is no suggestion by the claimant that she relies upon a hypothetical comparator. In Vento the tribunal considered the circumstances of four other police constables (not all of whom were male) whose situations were not identical but were not wholly dissimilar either. It concluded that the claimant had been treated less favourably than a hypothetical male comparator. The EAT held that this was a permissible way of constructing a picture of how a hypothetical male comparator would have been treated. This approach was later approved by the House of Lords in the well-known case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL,

203 Section 13 EqA requires not just consideration of the comparison (the less favourable treatment) but the reason for that treatment and whether it was because of the relevant proscribed ground. These two questions can be considered separately and in stages; or they can have intertwined: the less favourable treatment issue cannot be resolved without deciding the reason why issue. As was observed by Lord Nicholls in Shamoon at paragraph 11: "…tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? … If the former, there will … usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others." As can be seen from its findings of facts, the Tribunal in the case of Mrs McGarry-Gribbin examined all of the facts in the case to ascertain whether the claimant was treated less favourably as she alleges both in relation to the actual comparators she relied upon, and a hypothetical comparator, drawing on its findings in relation to the actual comparators.

204 A Tribunal should not assume a finding of unlawful discrimination from a finding that an employer acted unreasonably; there may be other explanations (if only simply human

error): Bahl v Law Society [2004] IRLR 799 CA. More is required than simply a finding of less favourable treatment and a difference in the relevant protected characteristic. Where there is a comparator, the 'something more' might be established in circumstances where there is no explanation for the unreasonable treatment of the complainant as compared to that comparator; see per Sedley LJ in Anya v University of Oxford [2001] ICR 847 CA, and the discussion of those dicta in Bahl , per Maurice Kay LJ, observing (paragraph 101) that the inference of discrimination would not then arise from the unreasonable treatment but from the absence of explanation.

Disability discrimination arising from disability

205 Section 15(1) of the EqA provides-

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

(a) A treats B less favourably 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.

206 Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

1.1 In order for the claimant to succeed in her claims under s.15, the following must be made out: there must be unfavourable treatment;

1.2 there must be something that arises in consequence of claimant's disability;

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

1.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

207 Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT:

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

207.2 The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that

causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. In the case of Mrs McGarry-Gribbin the Tribunal examined closely the conscious and unconscious thought process of the respondent's witnesses who gave evidence before it, concluding the explanations they gave were untainted by disability discrimination.

207.3 Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

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

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

208 With regard to the objective justification test, when assessing proportionality, the Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer: Hensman v Ministry of Defence UKEAT/0067/14/DM.

Disability discrimination – failure to make reasonable adjustments

209 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA. The Code states that a PCP should be construed widely to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on.

210 The EHRC's Employment Code states that the term PCP 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future — such as a policy or criterion

that has not yet been applied — as well as a "one-off" or discretionary decision' -para 4.5. The protective nature of the legislation meant that when identifying the PCP, a Tribunal should adopt a liberal rather than an overly technical or narrow in order to identify what it is about the employer's operation that causes disadvantage to the disabled employee.

211 In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

Indirect discrimination section 19 EqA

212 Mr Pinnington succinctly set out the legal principles in his written submissions. In order for the Claimants to succeed in establishing indirect discrimination it is necessary for them to establish the following elements pursuant to s.19 EqA 2010:

a. The alleged conduct amounted to a provision, criterion or practice ("PCP");

b. The Respondent applied or would apply the PCP to persons whom the individual Claimants do not share their respective protective characteristics of age or disability;

c. The PCP puts, or would put, persons who each respective Claimant shares the characteristic at a disadvantage when compared to persons with whom the Claimants do not share such characteristics;

d. That PCP was applied to the Claimants;

e. The PCP put, or would put, the Claimants at that disadvantage; and

f. The Respondent cannot show the PCP to be a proportionate means of achieving a legitimate aim.

213 In identifying the appropriate pool for comparison, it is important to note that there must be no material difference between the circumstances relating to each case; s.23(1) EqA 2010. It is submitted that in relation to each Claimant the tribunal must have regard to their specific job role and the specific number of hours worked by them when undertaking the comparative exercise.

214 The EHRC Employment Code states at para 4.9 that 'disadvantage' is to be construed as 'something that a reasonable person would complain about'. Consequently, an unjustified sense of grievance would not qualify.

215 In Shamoon cited above, the House of Lords held that the test of disadvantage was whether 'a reasonable worker would or might take the view that he had… been disadvantaged in the circumstances in which he had thereafter to work'.

Harassment

216 The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place.

217 Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if:

A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and

•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 — S.26(1)(b).

218 The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

219 S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

Burden of proof

220 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the 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 provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

221 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748 to which the Tribunal was referred by Mr Piddington. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Conclusion – applying the law to the facts

Burden of Proof

222 With reference to the first issue, namely, has the claimant proved, on the balance of probabilities, facts from which the tribunal could decide, in the absence of any other explanation, that the respondent subjected her to the discrimination alleged, the Tribunal found that she has in relation to the alleged failure to make reasonable adjustments, the discrimination arising from disability, indirect discrimination and harassment and the burden shifted to the respondent to prove on the balance of probabilities that the claimant's disability was no part of the reason: Igen cited above.

223 With reference to the direct disability discrimination claims the burden of proof has not shifted. Mr Piddington referred the Tribunal to well-established law that "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination": Madarassy v Nomura International Plc [2007] ICR 867.

224 Mr Piddington submitted it is clear that the claimant simply points to alleged differences in treatment without any basis for identifying sufficient material from which the Tribunal could conclude, or infer, that respondent committed an unlawful act of discrimination, and the Tribunal concluded this was indeed the case with reference to the direct discrimination complaint only and it was possible to infer acts of unlawful discrimination, for example, the claimant's shift patterns, being transferred to the tills, the comment made by Joanne Foulds regarding the number of times the claimant went to the toilet and other allegations alleged by the claimant.

225 For the avoidance of doubt, even though the Tribunal found the burden had not shifted in respect of the direct discrimination claim, it had in respect of the other discrimination complaints brought under sections 15, 19 and 20-21 of the EqA. Nevertheless, he Tribunal has considered all of the facts in this case and the explanations given by the respondent and its witnesses as set out below in respect of all the disability discrimination complaints brought by the claimant.

226 In submissions the claimant referred the Tribunal to a first instance decision Williams v Ministry of Defence ET Case No.1318158/11 W, a nurse and senior officer in the Royal Air Force, complained that the failure to put her forward for promotion to a more senior role and to put forward a male doctor instead was direct sex discrimination. Upholding her claim, the tribunal inferred discrimination from, among other things, the lack of any evidence of equal opportunities training for decision makers and the 'incredulous' fact that the Air Vice Marshall in charge was not familiar with the guidance on avoiding discrimination in recruitment. The respondent had failed to show that there had been any attempt to comply with the Code by making an objective, competency-based assessment of W's suitability for promotion. The Tribunal took the view in Mrs McGarry-Gribbin's case it may be possible to draw inferences from the decision to place the claimant to work on the staffed tills as opposed to self-service or the returns desk, and the EHRC Code was relevant, however, upon reading the contemporaneous documents and hearing the explanation given by the respondent's witnesses, which were deemed by the Tribunal to be credible and untainted by disability discrimination, it found the evidence preclude an inference being drawn in relation to the section 15 EqA complaint that the alleged failures was for a prohibited discriminatory ground.

Jurisdiction: Time limits

227 The EC notification took place on 29/08/19. The EC Certificate was issued on 18/09/19. The ET1 was lodged on 18/09/19. With reference to the issue 3, namely, did any of claimant's complaints occur on or before 29/05/19, and therefore outside the primary limitation period within s.123 Equality Act 2010 (having regard to the extension of time for early conciliation in s.140B), the Tribunal found that the following allegations were lodged outside the statutory 3-month time limit:

7a. Issuing the claimant with an Informal Action on 24/09/18.

7b. Failing to send the claimant home when she strained her abdomen on a summer evening in 2018.

228 With reference to the fourth issue, namely, if so, does the complaint amount to conduct extending over a period with the end of the period being later than 29/05/19, the Tribunal found that it did not. Mr Pinnington submitted that pursuant to s.123(3)(b) EqA 2010, any alleged failure to do something is to be treated as occurring when the person in question decided on it. In considering whether conduct extended over a period the Tribunal should look at the substance of the complaints and determine whether they can be said to be part of one continuing act by the employer, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed; Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA.

229 The Tribunal was referred by Mr Pinnington to the Court of Appeal's decision in Aziz v FDA [2010] EWCA Civ 304, CA emphasised that in considering whether separate incidents form part of an act extending over a period, "one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents" and Barclays Bank plc v Kapur [1989] IRLR 387 at 392 reminding the Tribunal it was "in determining the existence of a continuing act, it is important to distinguish between the continuance of the discriminatory act itself (e.g. the schemes and practices in the above cases), and the continuance of the consequences of a discriminatory act, for it is only in the former case that the act will be treated as extending over a period and what claimant has to prove, in order to establish a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'". Mr Pinnington submitted that the allegations amount to a succession of unconnected or isolated specific acts, involving different people and that the following allegations were outside the primary limitation period:

229.1 Paragraphs 7(a) to (d), namely,

7a Issuing the claimant with an Informal Action on 24/09/18. As set out by the Tribunal above Roger Braun took informal action against the claimant for unilaterally changing her shift pattern, and this act was not linked to any other act by Roger Braun and an isolated act. The claim is out of time.

7b Failing to send the claimant home when she strained her abdomen on a summer evening in 2018, the Tribunal found on the balance of probabilities this act did not happen and further, had it taken place it was not linked to any other act by Roger Braun and was an isolated act. The claim is out of time.

7c Refusing to allocate the claimant early shifts. The evidence before the Tribunal was that the claimant was allocated some early shifts on 13/06/18 and 28/06/19, 02/12/18, 01/03/19, 09/05/19 and 13/06/19 a few weeks before she was transferred to the front end. It has been difficult to pinpoint exactly when the claimant requested an early shift and when it was refused due to vague and contradicting evidence given by the claimant who appears to be claiming she was not given the early shifts she wanted right up to the date she transferred to front end. In February 2019 the claimant referred to Roger Braun confirming there were early shifts for the claimant to take up following the resignation of a colleague and "it could mean that I get allocated a few shifts now…but also the middle shift suits me so I don't want to shoot myself in the foot." Given the unreliability of the claimant's evidence it was difficult for the Tribunal to pinpoint the date of the last alleged act. Taking the claimant's allegation that she was not allocated the shifts she wanted between 16 April 2018 until June 2019, the Tribunal was satisfied on balance that this could amount to conduct extending over a period of time and the time limit ran from when the rotas were prepared 4-weeks in advance, although there is evidence before the Tribunal that they were changed. Mr Pinnington submitted if the Rota was prepared 4-weeks in advance of June 2019 i.e. before 29 May 2019, the claimant's claim was out of time. There was insufficient evidence on when the June 2019 Rota was prepared and if there were changes to it, and the Tribunal was unable to satisfy itself with any certainty that the claimant's claim was brought outside the statutory time limit given the less than satisfactory evidence before it.

7d Roger Braun stating on various dates that he needed reliable staff. The Tribunal found the claimant was unable to adduce any satisfactory evidence that this had been said to her in connection with working the early shift, and if it was said, when it was said. The claimant was unable to give any approximate dates when Roger Braun committed the act alleged, and the date of the alleged acts have been difficult to pinpoint. Nevertheless, the alleged refusal to allocate early shifts and reliability of staff could be linked and part of one continuing act by Roger Braun which on balance brings the complaint in time.

202.2 <u>Paragraphs 11(b) to (e) and paragraph 20(b) to (e), namely,</u>

11b A requirement to have flexibility for early shifts.

11c A 'policy' on the allocation of shifts.

11d A refusal to allocate early shifts to C.

11e A requirement to lift heavy items.

229.2 <u>Paragraph 17 (b) to (e), namely,</u>

17b Perceiving C as unreliable due to disability related absences and/or lateness.

17c Not allocating C early shifts as she wanted between 16/04/18 and June 2019.

17d Not permitting C time off when she wanted it between 16/04/18 and June 2019.

17e Not sending C home when unfit for work on a summer evening in 2018.

<u>Paragraph 25(b), namely,</u>

25(b) RB repeatedly telling C that she was not reliable due to her ringing in sick.

230 With reference to paragraphs 11(b) to (e), 20(b) to (e), 17 (b) to (e) and 25(b) set out above, the Tribunal repeats its observations made in relation to Roger Braun's refusal to allocate the claimant early shifts and stating he needed reliable staff, and it can be said that the allegations taken together could be part of one continuing act by Roger Braun as distinct from a succession of unconnected or isolated acts in contrast to issuing the claimant with an Informal Action on 24/09/18 and failing to send the claimant home when she strained her abdomen on a summer evening in 2018, specific acts totally unconnected to the other allegations.

231 With reference to issue five, namely, if the answer to (3) and/or (4) above is no, is it just and equitable to extend time in respect of claimant's complaints, the Tribunal found it was not just and equitable taking into account the balance of prejudice between the parties, where the respondent's prejudice outweighed the claimant's due to the passage of time and the difficulties witnesses, including the claimant, had in recollecting if events going back to the summer of 2018 took place. The claimant accused Roger Braun of failing to complete the accident book which would have recorded the date; the problem with this is that the claimant made no reference to the accident herself in any contemporaneous documents, and the fact Roger Braun did not complete an accident report for an accident he does not remember ever taking place underlines the prejudice caused by the claimant raising a discrimination complaint over a year after the event. The claimant was unable to offer an explanation as to why she failed to issue proceedings within the statutory time period when she was aware of the statutory time limits having issued discrimination proceedings in the Employment Tribunal in relation to previous employers.

232 In the event of the Tribunal incorrectly applying the balance of prejudice between the parties, it has gone on to consider in the alternative issue 7a and 7b to decide on the balance of probabilities whether the claimant was subject to the less favourable treatment alleged, finding that she was not.

233 The constructive unfair dismissal claim was lodged in time and there is no time limit issue in respect of it.

Direct Disability Discrimination

234 With reference to issue 7, the respondent having accepted from April 2018 onwards the claimant was a disabled person pursuant to s.6 EqA 2010 due to diverticular disease and that it had knowledge of the same, the Tribunal found as follows with reference to whether the claimant was subjected to less favourable treatment relied upon in paragraphs 7a to 7f as follows under the individual paragraphs.

235 The claimant relies upon the following actual comparators: The other staff working in the Seasonal Department: Sheila Kennedy, Steven Smith, Faye Roberts, Rachael Potts, Stephen Edwards, Scott Davies, Paul Rutherford, Lawrence Dowell, Callum Braford, Kyle Low, Sam Isaac, Robert Devereux and Christopher Hill., in respect of allegation (a), (c), (d) and (f); Sheila Kennedy, in respect of allegations (b); and Steven Smith, Sheila Kennedy, Faye Roberts and Rachael Potts in respect of allegation (e).

236 Mr Piddington denied that any of the named comparators are actual comparators on the grounds that they were not in materially the same circumstances as the claimant; the Tribunal agreed. As indicated above, Sheila Kennedy worked 28-hours per week and had a historical fixed shift pattern on "earlies". Steven Smith worked 23 hours per week and had set hours to fit around a second job. Faye Roberts worked 30 hours, no

fixed pattern and was fully flexible. Rachael Potts worked 10-hours and had been transferred temporarily from another department, having failed a secret shopper assessment whilst on tills. Stephen Edwards worked 30 hours per week and was mainly on earlies because he was fork-lift driver trained. Scott Davies worked 30 hours and was flexible around care of his disabled son. Paul Rutherford worked 8 hours on a fixed shift, Lawrence Dowdall worked 39 hours mainly on earliest because fork-lift driver trained, Callum Bradford from decor worked 16-hours during peak months only, Kyle Low worked 30-hours fully flexible mid to late shifts, Sam Isaac worked 39-hours in the greenhouse, Robert Devereux worked 30-hours normally in the outside garden area and Christopher Hill worked 30 hours consisting of varied shifts.

237 Mr Pinnington reminded the Tribunal in submissions iin order to make a finding of direct discrimination it is necessary for it to conclude the respondent (a) had treated the Claimant less favourably than it treated or would treat other employees; and (b) the difference in treatment was **because** of her disability; s.13 EqA 2010. The Tribunal accepted in identifying the appropriate pool for comparison there must be no material difference between the circumstances relating to each case; s.23(1) EqA 2010 and in relation to the claimant it must have regard to her role as a customer adviser and the specific number of hours worked by her when undertaking the comparative exercise using a hypothetical comparator. The Tribunal agreed with Mr Pinnington that the claimant had failed to identify an appropriate actual or hypothetical comparator who worked the same 20 hours over 4 days as she did and were restricted in their ability to carry out heavy lifting as was the claimant. The Tribunal accepted Mr Pinnington's submission the claimant had failed to establish any basis upon which it can be asserted that any treatment was 'because of' her disability.'

238 If the Tribunal has incorrectly analysed the comparator and comparative exercised, it would have gone on to find the following in respect of the individual allegations of direct discrimination.

239 In determining whether any alleged treatment was because of the protected characteristic(s) the Tribunal must ask itself if the treatment was inherently discriminatory, what were the facts that the discriminator considered to be determinative when making the relevant decision, and if the treatment was not inherently discriminatory what were the mental processes, conscious or subconscious, of the alleged discriminator and what facts operated on his or her mind; *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors* [2010] IRLR 136, SC. With reference to Mrs McGarry-Gribben the Tribunal took the view that the alleged treatment was not inherently discriminatory and it considered the mental processes of Roger Braun, Joanne Foulds, Philip Stephens and Claire Brown.

Paragraph 7a: Issuing the claimant with an Informal Action on 24/09/18 (the out of time claim).

240 The evidence before the Tribunal was there was no actual comparators on which the claimant could establish her claim. The claimant was the only person who changed her shift without informing a manager, and she left the department short staffed. Even at its highest, were the Tribunal to consider a hypothetical comparator of somebody in the same position as the claimant i.e. a customer advisor who had changed his or her rota without consent and failing to inform their manager of the changes, with the

consequences that the department was left short staffed, and who were not disabled with the claimant's disability, they would also have received an Informal action on the 24 September 2018. Further, the WhatsApp message sent by Roger Braun to employees in the department, clearly arose as a result of the claimant's own actions as set out in the factual matrix above.

Paragraph 7b: Failing to send the claimant home when she strained her abdomen on a summer evening in 2018 (the out of time claim).

241 This incident was not recalled by Roger Braun. Mr Pinnington submitted no clear and comparable situation had been evidenced by the claimant who was unable to provide a date for the alleged incident until giving oral evidence, which the Tribunal found surprising given the fact it had allegedly taken place on the 17 July 2018. The medical records before the Tribunal recorded the claimant had been presenting with pains for 4-days before the alleged accident, and it must follow is a matter of logic the accident did not occur and so the Tribunal found.

Paragraph 7c: Refusing to allocate the claimant early shifts.

242 The Tribunal took the view that the claimant did not want to change from her fully flexible contract which has resulted in her working flexibly to meet the needs of the business across all shifts until the respondent adjusted the claimant's shift working to mid shifts with her agreement as an adjustment. It was open to the claimant to seek a formal change via the availability matrix and for example, reach an arrangement with the respondent that she worked early shifts. The claimant did not do so because mid-shift working suited her. On the balance of probabilities, the Tribunal accepts the claimant requested and was given some early shifts, but not to the extent the claimant put forward later in her grievances or in these proceedings. It is notable she did not make a written request until 22 November 2018 when the claimant asked for all the shifts, the early, middle and late, be allocated on "an even-handed basis."

243 As indicated earlier, the claimant worked early shifts from 7am on 13/06/18 and 28/06/19, from and 8am on 02/12/18, 01/03/19, 09/05/19 and 13/06/19 a few weeks before she was transferred to the front-end tills. The clocking in records confirmed the claimant worked early shifts, and the Tribunal accepts Mr Pennington's submission that there was no evidence other employees were always allocated the shifts they requested, except for Sheila Kennedy's pre-existing agreement which in fact changed according to the claimant's WhatsApp messages sent early in 2019. In February 2019 Faye Roberts transferred to gardening department and she worked various shifts, including some early shifts at the same time as another colleague resigned which left more shifts available in the department. The claimant sent WhatsApp messages to Stephanie McGarry Gribbin "Well I have had my chat with Roger…so that means there will be early shifts for me BUT Rob the store manager wants us working five days a week….it could mean that I get allocated a few early shifts now. I think I need to put it to Roger about discrimination. But also, the middle shifts do suit me so I don't want to shoot myself in the foot…"

244 The Tribunal did not entirely agree with Mr Pinnington's submission that Roger Braun's conscious or unconscious mental processes did not take into account the fact the claimant was unable to lift heavy items and preferred the claimant's submission on this point. The claimant referred the Tribunal to Roger Braun's written statement that referenced the early shift in the seasonal department meant coming in at a time when it was "most likely heavy lifting to be done" and the claimant could not do heavy lifting if she had a flare up, when Roger Braun gave the claimant "light duties" to do, which the

Tribunal found to be the case, as was the fact that the seasonal department usually had one person working the early shift.

245 The Tribunal also accepted the claimant's submission that Roger Braun consciously or subconsciously took the view the claimant, as a result of her disability, missed shifts without giving him notice and he could not take that risk in the early morning shift when there was one person on duty and if they did not turn up in the words of Roger Braun "the department did not get re-stocked…through no fault of her own, Niamh's attendance record was not good because of her diverticulitis, and would sometimes be forced to miss a shift without giving me notice of that."

246 Mr Pinnington submitted any non-disabled person unable to lift heavy items would have been treated in exactly the same way as the claimant. The Tribunal agreed. The claimant was unable to point to an actual comparator, and the Tribunal concluded on the evidence before it that a hypothetical comparator in the same or similar circumstances as the claimant would have been treated in the same way by being allocated in the main mid-shifts. The hypothetical comparator would be customer advisor on a 20-hour fully flexible contract with an expertise in plant knowledge who wanted to work the mid shift and had done so since 16 April 2018 on request, with some no heavy lifting and the mid-shift being the busiest in the department where her expertise was best used for the customers. The fact the hypothetical comparator could not carry out heavy lifting meant if possible, she should not work alone with a view to seeking assistance if heavy lifting was required. The hypothetical comparator may be absent without notice, for whatever reason. Taking into account all of these factors the Tribunal found on the balance of probabilities, the claimant was not treated less favourably. The primary reason for the claimant being allocated few early shifts was operational on the part of Roger Braun who was aware the claimant wanted to work mid shifts as a reasonable adjustment from 16 April 2018 and at no stage did she move away from this shift pattern or request any formal change to it. Occupational health on the 17 April 2018 confirmed the claimant could not carry out moving and lifting tasks and should undertake "her usual hours…" Roger Braun made reasonable adjustments in order for this to be achieved, including giving the claimant light duties when necessary For the avoidance of doubt, at no stage did the claimant request early shifts as a reasonable adjustment and when occupational health referenced management may well consider early shifts in the report dated 29 November 2018 it was on the basis of a misapprehension that more staff would be available to assist the claimant on the early shift, when in fact staff were lone working.

Paragraph 7d: Roger Braun stating on various dates that he needed reliable staff.

247 The Tribunal accepted Mr Pinnington's submission that the claimant has failed to identify when Roger Braun allegedly made this comment to her, and as indicated above, it has been difficult to pinpoint the limitation period. Mr Pinnington is correct that there is no contemporaneous evidence in the bundle to support the claimant's allegation and that the claimant was considered to be an unreliable witness. However, the Tribunal noted reference in Roger Braun's written statement at paragraph 12 where he referenced the claimant's attendance record not being good and that she would "sometimes" miss a shift without giving him notice, the inference being that the claimant could leave the seasonal department understaffed or without staff if she worked the early shift. There was no satisfactory evidence before the Tribunal that this was said by Roger Braun or that the claimant was singled out. The claimant has been unable to adduce any actual or hypothetical comparator showing less favourable treatment and whether it was on the proscribed ground.

248 Mr Pinnington reminded the Tribunal that the claimant's disability related absences were treated by Roger Braun and respondent as "white" absences, and they were disregarded when it came to the respondent's absence management procedure. The claimant was never subjected to any formal processes, and she did confirm that she was never late as did the respondent.

249 Taking the evidence in the round including Roger Braun's witness statement, the Tribunal concluded Roger Braun was subconsciously concerned with the possibility that the claimant may not turn up to an early shift, however, there was no satisfactory evidence he stated to the claimant "on various dates" that he needed reliable staff. In the alternative, had he used these words to the claimant as alleged, a hypothetical comparator in the same or similar position as the claimant i.e. unable to inform Roger Braun until the day of their shift that they could not come into work, and if working the early shift leaving the seasonal short-staffed or with no staff if lone working, would have been treated in the same way. In conclusion, the Tribunal accepted Mr Pinnington's submission that even if the comments were found to have been made, the claimant has failed to establish any comparator with the same level of absence or that the reason for comments was her disability.

Paragraph 7e: Failing investigate claimant's grievance properly

250 Failing to investigate claimant's grievance properly is an allegation clearly falling within the statutory limitation period. It has been difficult to establish what the failure to investigate comprised of as it appears the claimant's real issue was that Claire Brown did not find in her favour and transfer the claimant back to the seasonal department.

251 The additional pleaded claim casts some light on the allegations, paraphrased as follows;

251.1 The grievance investigation was "fundamentally flawed because the respondent even after admitting mistakes had been made" insisted the onus was on the claimant for putting herself at risk by working under protest on the front-end". The Tribunal found the grievance was not fundamentally flawed and mistakes had not been admitted as alleged.

251.2 Managers' statements were not followed up. The Tribunal found Clare Brown had taken what the managers had said into account having interviewed them individually.

251.3 Managers fabricated, lied and colluded, and were interviewed together. The Tribunal found there was no evidence of this, and the claimant had no direct knowledge basing her allegations of supposition only.

251.4 There was no attempt to determine "precisely what shifts the claimant had worked". The Tribunal found Clare Brown had carried sufficient investigation to understand the claimant's shift pattern.

251.5 "The outcome of the grievance "states that the claimant was not hindered in accessing the toilet in times of urgent need stating she could go whenever she wanted…" the Tribunal has dealt with this below.

251.6 "The missing Informal Action Plan…hints at the possibility of corruption…" The Tribunal has dealt with this below,

251.7 The three managers had committed acts of gross misconduct and were not disciplined. Claire Brown having carried out a grievance investigation untainted by discrimination took the view the managers could be criticised, and she was entitled to reach this view based on the evidence before her.

251.8 The claimant also questioned why other store managers investigated "should not the whole grievance process and investigation been undertaken by someone more senior to those whose grievances were about?" Claire Brown was senior and independent.

252 In submissions the claimant clarified that Andrew Fraser's notes could not be found and he had requested "that the Claimant overturn a doctor's fit note and return to work overlooking the fact she was off sick with work related stress, the causes of which he had not addressed. Claire Brown had during the Tribunal hearing admitted her grievance investigation was flawed. She failed to investigate the claims made by the Claimant in respect of shifts she had been allocated by Mr Braun who…could have adequately staff the department without transferring the claimant and subjecting her to risks that he was very much aware of, and in breach of contract. Claire Brown failed to interview Ms Foulds' witness at the health review meeting, and failed to unearth the failure to report accidents and incidents the Claimant had had. The investigation was not a fair and unbiased process with Ms Brown preferring to make judgement on the lies of the three agents who were attempting to evade disciplinary measures. Had the investigation been just, thorough and fair Ms Brown would have invoked the disciplinary procedure for gross misconduct in respect of all three of the agents concerned."

253 The Tribunal did not accept the claimant's submissions, concluding the respondent did not treat the claimant less favourably when investigating the grievance in comparison to a hypothetical comparator as the claimant did not adduce any evidence of an actual comparator in respect of the grievance process. It was not discriminatory for an independent manager from another store to investigate. Andrew Fraser's note of the two grievance hearings were irrelevant to Claire Brown as she carried out her own investigation within the grievance hearings conducted with the claimant. Had the claimant not raised a grievance against Andrew Fraser alleging corruption and biased, and had the grievance process been completed, his notes would then have been relevant. There is no evidential basis for claimant's allegation that Andrew Fraser admitted mistakes had been made, and the claimant's allegation that he said this undermines the complaint she made about him that he was "unfair, biased, skewed…"

254 Mr Piddington submitted that the claimant in her cross-examination of Claire Brown put to her she should have reviewed the notes prepared by Andrew Fraser. Given the claimant's allegations of bias and unfair treatment by Andrew Fraser it was entirely appropriate for Claire Brown not to seek to review notes AF prepared. The Tribunal agreed, concluding had Claire Brown reviewed Andrew Fraser's notes the claimant may have taken a view that she was prejudiced by them and the grievance investigation which followed was not independent. Given the serious allegations made against Andrew Fraser it was appropriate for Claire Brown to look at the grievance afresh and undertake her own independent investigations from the outset.

255 The claimant alleges there was a delay; the Tribunal found there was none taking into account the factual matrix of this case, which included the respondent's decision to arrange for Claire Brown, who was an independent senior manager, to take over. The decision not to proceed with the grievance during the claimant's absence from work was not discriminatory. The claimant has taken issue with the respondent not pursuing the grievance investigation whilst she was absent having been signed off work with stress.

The Tribunal took the view that as the claimant was too ill to work and would be required to attend a grievance meeting, it was appropriate in the circumstances for the respondent to initially wait for her return. Mr Pinnington submitted had the respondent sought to invite the claimant to grievance meetings at a time when she was unwell the claimant would no doubt have been critical of the respondent's action, with good reason. It would have been a simple enough matter for the claimant to have been asked if she wanted the grievance proves to continue during her absence, and when she made it clear to the respondent she did, the grievance investigation commenced.

256 After the claimant's return from holiday a grievance meeting took place with Clare Brown she was told Clare Brown was due to be away on holiday but would interview the three managers the week on her return. The claimant was therefore made aware that there was to be some delay. On the 28/10/19 Claire Brown obtained statements from Joanne Foulds, Philip Stephen and Roger Braun putting to them independently the claimant's grievances in full, which she then sent to HR for support having looked at the claimant's clocking in and out data, and the staff levels within the store was reviewed.

257 Claire Brown the took HR advice and set out her conclusion in a three-page letter which was concise and to the point. Claire Brown was entitled to accept what she had been told by the managers and the view she took of the claimant, which was she did not want to transfer to front-end because of boredom, was referred in positive terms as the claimant "not feeling not stretched or challenged in the role rather than a concern regarding the role impacting your condition" She was entitled to find the transfer was not discriminatory, and had the claimant not been put to work on the staffed tills on two occasions on 1 and 9 July 2019, no discrimination would have taken place as found by the Tribunal.

258 With the exception of Claire Brown's conclusions concerning who had discussed the claimant's move, it was at first blush unclear in her findings which manager had made the decision. As indicated above, if paragraph 1 was read in conjunction with paragraph 3 Roger Brawn made the ultimate decision, and this fact would have been clear to the claimant had she read the contents of the grievance outcome letter objectively. The Tribunal took the view that Claire Brown was entitled to accept what she was being told by managers concerning events the claimant had no direct knowledge or experience of in preference to the claimant's unsubstantiated suspicions. She was satisfied that "peak trading the Seasonal Department was over-deployed" and the claimant's hours were best suited to front end where she had worked before. It appears that there was some confusion with Clare Brown's findings as she accepted the claimant had not worked early shifts when she had, and that she had not worked late shifts when she had and this can to some extent be attributed to the vast amount of information the claimant provided in respect of her grievances, which can be confusing. Clare Brown's key finding was that Roger Braun did not take the decision regarding early shifts because the claimant might call in sick, a finding also found by the Tribunal on the balance of probabilities. Roger Braun essentially gave the same evidence to Clare Brown as he did to the Tribunal, Claire Brown accepted his evidence as did the Tribunal.

259 Claire Brown's investigation can be criticised in that she did not look at the shift rotas which reflected the claimant working some earlies and some lates, however, nothing hangs on this as the claimant had not requested to work a "fair number of shifts per week". The Tribunal found that had Claire Brown looked at the shift rota it would have made no difference to the outcome. The grievance investigation must be looked at in preceptive; it need not be perfect and Clare Brown was an objective independent senior manager looking at the claimant's grievance, and had carried out as much investigation

as was necessary in the circumstances. A grievance is about resolving a workplace issue, and conflict resolution. Contrary to the claimant's expectation it is not a forensic evaluation of all complaints raised. The grievance investigation was found by the Tribunal to be adequate in all of the circumstances, and the resolution offered was an acceptable one, namely mediation. As Roger Braun had left the business, in terms of resolution any investigation into him was redundant. The claimant had misunderstood the ambit of a grievance process and what it was designed to achieve. The Tribunal found the basis of her misunderstanding was that the claimant was seeking not a resolution but means by which to (a) punish the managers for the transfer from seasonal (b) achieve redeployment to seasonal, and (c) obtain further evidence to support her litigation, and the Tribunal's view was supported by her WhatsApp messages. In short, the claimant sought removal of the three managers from B&Q Wallasey Warehouse, a transfer to the seasonal department and compensation; nothing less would suffice. On the balance of probabilities, the Tribunal found the claimant resigned because Claire Brown had not redeployed her to the seasonal department and she sought compensation for this.

260 With reference to the Informal Action Form 24 September 2018 Claire Brown referred to not finding any evidence which Roger Braun had no recollection of, and she invited the claimant to provide evidence of the meeting so "I will investigate accordingly." The claimant did not provide a copy of the form in her possession and her allegation that "the missing Informal Action Plan…hints at the possibility of corruption…" reflects the less than balanced view the claimant took. It was open to the claimant to take up Claire Brown on her invitation so that a further investigation would then take place, but the claimant chose instead to use the missing Informal Action Form to formulate a baseless allegation of possible corruption to strengthen this litigation.

261 Clare Brown was entitled to accept the explanation given to her by Joanne Foulds, that the claimant on 29 June 2019 had attempted to discuss other employees in the seasonal department and to do so would be unprofessional, she was not able to change the decision made in respect of the claimant's transfer and suggested the claimant spoke with Philip Stephens. Claire Brown was entitled conclude there was "no evidence to suggest that Jo behaved inappropriately towards you," as did the Tribunal on the balance of probabilities. Given the claimant's communications (including those set out in her WhatsApp messages) and complaints about Faye Roberts, it is likely the claimant attempted to repeat these in her discussion on the shop floor with Joanne Foulds and was told it would be unprofessional for her to do so. The Tribunal found on the balance of probabilities Joanne Foulds did not minimise the claimant's disability as the claimant alleges; she attempted to put the claimant's mind at rest over the move and reassure her. The Tribunal did not find the claimant's evidence that Joanne Foulds had refused to discuss allegations of discrimination, and it was not discriminatory for Joanne Foulds to suggest the claimant spoke with Philip Stephens when he was back in the store on the Monday as he was the store manager and the only person capable of resolving the situation.

262 In conclusion, an objective and independent grievance investigation took place by Claire Brown, a senior female manager who the claimant accepted was suitable from the outset, and the claimant had not been treated less favourably than any comparator, whether actual or hypothetical.

<u>Paragraph f: Transferring the claimant from the seasonal department to the Front End with effect from 01/07/19. The decision was communicated to the claimant on 26/06/19.</u>

263 In relation to this allegation the claimant relies on Steven Smith, Sheila Kennedy, Faye Roberts and Rachael Potts, who were not in materially the same circumstances as the claimant. Sheila Kennedy worked 28-hours per week and had a historical fixed shift pattern on "earlies". Steven Smith worked 23 hours per week and had set hours to fit around a second job. Faye Roberts worked 30 hours, no fixed pattern and was fully flexible. Rachael Potts worked 10-hours and had been transferred temporarily from another department, having failed a secret shopper assessment whilst on tills.

264 The claimant was the only member of the team who worked 20 hours fully flexible 5 hours a day over 4-days and this differentiated her from the comparators she relies upon. She was not the only employee relocating as part of a regular transfer between departments reflecting staffing requirements throughout the store which varied seasonally. Seven members of staff were moved from the seasonal department. The claimant alleges she was moved because of her disability, and the Tribunal found the burden had not shifted in respect of the direct discrimination claim as there was no satisfactory evidence the claimant's disability formed any part of the respondent's decision-making process when she was selected for deployment purely based on the contractual hours she worked and the fact she had worked front-end on the tills in the past. The Tribunal took the view that a hypothetical comparator in the same position as the claimant where there was no material difference including the hours of work and redeployment of hours between departments, would not have been treated any differently. In arriving at this decision, the Tribunal considered closely the explanation given by Roger Braun which it found was untainted by disability discrimination.

265 Mr Pinnington in submissions reminded the Tribunal that the "heart of the issue" for the claimant was the respondent's knowledge that at the time of the proposed transfer she had difficulty accessing the toilet, and therefore could not work on the tills. The 29 November 2018 Occupational Health report recommended access to disabled toilet facilities and light duties when the claimant was experiencing a "flare up" of her condition. It did not recommend the claimant could not work on front end, and when Roger Braun was informed of the decision to transfer her the claimant's first reaction was that she would be bored. As indicated above, the Tribunal took the view boredom was central to the claimant's objections and she knew this from when she had previously worked bored on the tills before a transfer to the seasonal department which better suited her skills and expertise in plants

266 Mr Piddington further submitted the claimant had been informed on a number of occasions she could leave the front-end at any time, in the same way she had left seasonal, to go to the toilet which was an equidistant away from both departments. In short, a transfer to working at the front-end did not amount to less favourable treatment in comparison to any comparators, actual or hypothetical, and with the exception of staffed tills, the claimant was in no different position than when she worked in seasonal with the exception of her boredom levels. She was not bored in seasonal, she was bored in front end and this had no connection with her disability despite the claimant's best endeavours at persuading Philip Stephens in her letter of 30 June 2019 she would feel working front end and "**my psychological well-being becoming compromised with boredom…"**. On the balance of probabilities, the Tribunal found the respondent had knowledge of the toilet issue before the 1 July 2019 for the reasons already stated, but there was no causal connection with her disability and the reasons behind the claimant's transfer to front end.

267 With reference to issue 10, namely, was the reason for the less favourable treatment the claimant's disability, the Tribunal found the claimant had not been treated less favorably, and if she in the alternative, the claimant's disability did not form part of Roger Braun's decision-making process (or that of the respondent) to transfer the claimant to the front-end.

Failure to Make Reasonable Adjustments (s.20 & s.21 EqA 2010)

268 The EHRC's Employment Code, states the term 'provision, criteria or practice ''should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions…' (para 4.5). The protective nature of the legislation meant that when identifying the PCP, a Tribunal should adopt a liberal rather than an overly technical or narrow. The Tribunal has adopted this approach in the case of Mrs McGarry-Gribbin by interpreting the PCP relied upon as set out at 11(a) which references all tills and does not differentiate staffed tills from self-service tills. The Tribunal has given the PCP relied upon by the claimant a wide interpretation to include the requirement that customer advisors were required to work on staffed tills, and it is this requirement alone that caused the claimant a substantial disadvantage. Had the Tribunal not given the claimant's PCP a wide interpretation it could not be said the claimant was substantially disadvantaged by working on the tills because there was no disadvantage when she worked on the self-service tills.

269 The claimant relies upon the following PCPs:

11(a) A requirement to work on the tills and Front-End department. Whilst the respondent does not accept that there was a requirement for all Customer Advisers to work on the tills and Front-End department, it is accepted that those Customer Advisers in the Front-End department were required to work on the tills. The Tribunal on the facts before it concluded that (a) all customer advisors could be asked to work on the tills as there appeared to be no exemptions (other than the employee who had worked on tills previously and underperformed) when hours were reallocated and staff moved around departments on the basis of hours only, and (b) working on front-end largely consisted of working on tills by the very nature of the department and customer advisors working in the front-end were required to work on staffed tills, self-service tills and the returns desk.

270 The substantial disadvantage relied upon by claimant is in respect of 11(a) above, being placed at a significant risk of anxiety, distress, pain of her condition and humiliation by being required to frequently leave the till and/or having an accident was accepted by the Tribunal.

271 The Tribunal is required to identify what it is about the employer's operation that causes disadvantage to the disabled employee and it found there was a distinction between a staffed till and the self-service till/returns desk which the claimant does not draw upon in the PCP she relies upon. The problem for the claimant is that she did not differentiate in her PCP between staffed and self-service tills. A staffed till is different to the self-service tills/returns desk, the latter being autonomous on the shop floor compared to the staffed till which was not. The self-service tills require a member of staff to stand around and wait for the customer using the self-service to have a problem, and in this regard, it would be a reasonably straightforward matter for the claimant to walk away if she had a "flare-up" and her position was the same as it would have been when dealing with customers in the seasonal department.

272 Turning to the staffed tills, the Tribunal did not accept Mr Piddington's submission that working on the staffed till was no more of a disadvantage than any other customer advisor role the claimant would experience. The Tribunal did not find it credible that another employee would be available to jump on the till and replace the claimant with the immediacy she needed, and the evidence before it was that on the 9 July 2019 the claimant was put to work on the staffed till because a customer advisor was ill and she was the only person on the staffed till as she was working was the early shift. It was unrealistic for the deputy/store manager to say lock the till and go; the Tribunal took the view that in a flare-up situation the claimant was in an untenable position. It only takes the claimant being unable to find a replacement and/or have time to lock the till and given her excuses to the customer for her to be in a pretty desperate position. The staffed till presents unique difficulties for the claimant given her disability, which she did not have when working on seasonal, the self-service tills, returns desk or in the lighting/décor department, and in this regard the Tribunal preferred the claimant's evidence to that of the respondent.

273 Mr Pinnington further submitted that the alleged disadvantage was not linked to directly to working on the tills but to the business of the store at a particular time i.e. if the claimant were working the early shift (between 7am and 8am) when there were few customers in the store, a staffed till would not expose the claimant to the alleged substantive disadvantage. The claimant worked beyond 8am, and the Tribunal took the view an early start may provide some assistance but there remained a risk to the claimant being severely embarrassed whatever time of day she worked, especially if less staff were on duty in the early shift when there were less customers and nobody to take over the staffed till part way through seeing to a customer.

274 The Tribunal did not accept Mr Pinnington's submission that the alleged disadvantage suffered by the claimant did not appear to be any different to a non-disabled employee who experienced a similar need to visit the toilet urgently. In the 29/11/18 Occupational Health assessment the claimant was found to experience "flair ups of her condition at least once a month…experiencing severe abdominal pain, acute diarrhoea with urgency and can require the toilet up to 8 times a day. When experiencing symptoms, she is unable to lift anything heavy, push or pull…is unable to bend or twist and finds her mobility slows down…she reported a more severe flare up in August this year…and was in hospital overnight." The extent and severity of the claimant's disability is incomparable to a non-disabled employee experiencing a need to visit the toilet urgently. If the respondent was in any doubt as to the seriousness of the claimant's position in respect of the staffed tills, the claimant's letter of 28 June 2019 to Philip Stephens clarified the position further when she wrote "My concerns are that I should need to use the toilet in an emergency working on the tills, I am unable to reach it with the immediacy required. This undoubtedly compromises my dignity and is causing me a great deal of distress worrying about it…You may be aware of my occupational health assessments that state during a flare up I need work light duties only what with being unable to bend, lift. Stretch, pull or push. On these occasions I foresee that working on the self-service till would be beneficial…"

275 The claimant's position at the time of her transfer was not that the alleged PCP of working on tills disadvantaged her and resulted in less favourable treatment as working on the self-service tills would not cause the same disadvantage, and would in fact benefit the claimant. In short, being put to work on the tills per se did not result in less favourable treatment, but working on the staffed tills for two short periods of time on the 1 and 9 July 2019 amounted to less favourable treatment in consequence of the claimant's disability.

276 On the evidence before the Tribunal it was apparent that there was little or no difference between working on the self-service till or returns and seeing to customers in the seasonal department; either way if the claimant had a "flare-up" and an urgent need for the toilet, she would make her apologies to the customer and go. There was however an issue with the claimant working on staffed tills but not self-service, with bending, stretching, lifting and pulling during a flare-up and it was more difficult and embarrassing for the claimant to stop and log out of her till part-way through scanning the customer's trolley, and catch the attention of an employee working front-end in order that they could take over from her on the till. Philip Stephens was put on notice by the claimant, and in the 29 November 2018 occupational health report.

277 The respondent possessed sufficient knowledge to set in hand the reasonable adjustment before the claimant transferred to front-end on the 1 July 2019, and when it placed the claimant to work on a staffed desk that day it was in breach of its duty to make reasonable adjustments and so the Tribunal found on the balance of probabilities. Contrary to Mr Pinnington's submissions, the Tribunal preferred the claimant's argument that the adjustments offered to her of locking her till, making her excuse to customers and leave to use the toilet" did not alleviate the substantial disadvantage she suffered by worrying about the situation in the knowledge the steps she had to take before leaving a staffed till could result in humiliation and embarrassment, especially if she did not get to the toilet on time. The Tribunal did not accept Mr Piddington's submission that the adjustments were made in a timely manner once the respondent had knowledge, and found the claimant should have been put to work on either the self-service till or returns desk as a reasonable adjustment from the first day she worked at front end on 1 July 2019.

278 As found by the Tribunal above, the claimant complained about the twisting and turning when working on the staffed tills when she realised for the first time it exacerbated her medical condition and informed a supervisor, whereupon she was immediately taken off the staffed tills and set to work on self-service, which was a reasonable adjustment. In a letter to Debbie Hayes dated 2 July 2019 the claimant reported that the "repetitive twisting motion…has caused extreme left abdominal pain extending down my left leg and aggravating my condition…worrying about needed toilet facilities when I have a flare up of my condition in an acute episode." The claimant reported how the supervisor, had "made the wise decision to move me onto the self-service tills…Even with my experience and medical knowledge in nursing I have to say that I had not anticipated that actually working on the tills would aggravate my condition."

279 In conclusion, with reference to 12(a) above, being placed at a significant risk of anxiety, distress, pain of her condition and humiliation by being required to frequently leave the till and/or having an accident, the Tribunal found there was a distinction between the job being partially autonomous on the shop floor compared to the staffed till, and it is not credible that another employee would be available to jump on the staffed till and replace the claimant with the immediacy she needed. It was unrealistic for the store manager to say lock the till and go; the Tribunal took the view that it was not tenable. It only takes one of those activities to be delayed and the claimant could have been in a pretty desperate position. The staffed till presents unique difficulties for the claimant given her disability. The respondent had failed to make reasonable adjustment on the 1 July 2019 for a period of approximately 3-hours, following which the claimant worked on self-service/returns which were reasonable adjustments.

280 On the 9 July 2019 despite the events of the 1 July 2019 and Philip Stephen's agreement that from thereon that the claimant would work only on the self-service tills and/or returns desk and his instructions to supervisors to this effect, the claimant was put to work again

on the staffed tills by a supervisor. Mr Piddington's submission that the claimant had the option of working on the self-service or returns desk was not supported by the evidence. The claimant was put to work on the staffed tills to cover sickness absence and that was where she remained until she had a "flare-up" and was moved to self-service tills for the reminder of her shift and her employment.

281 The respondent had failed to make reasonable adjustment on the 9 July 2019, following which the claimant worked on self-service tills/returns which were reasonable adjustments.

11(b) A requirement to have flexibility for early shifts, 11(c) a 'policy' on the allocation of shifts and 11(d) refusal to allocate early shifts to the claimant

282 The respondent denies that this amounts to a PCP and/or that it applied such a PCP, and the Tribunal agreed with Mr Piddington on the evidence before it that there was no evidence of the respondent having a PCP requiring a flexibility for early shifts, refusing to allocate the claimant with early shifts as she was allocated such shifts including the 7am shift upon being transferred to the front-end and there was no "Policy" on the allocation of early shifts, save in respect of the seasonal department where heavy lifting was required for which the respondent had already set in hand the reasonable adjustment of (a) the claimant working mid-shift with her agreement, and (b) the claimant not lone working in order that she had get help if any lifting was necessary. The evidence before the Tribunal was that the claimant worked mainly the mid-shift and was not require to work early shifts, although did so on occasions following a request made by her, and it cannot be the case that the claimant was refused early shifts per se.

283 The Tribunal accepted Mr Piddington's submission that the respondent "simply" had a business need for redeployment of hours at appropriate times during the day, and there was no satisfactory evidence that the substantial disadvantage relied upon by the claimant in respect of 12(b) above being perceived as unreliable and/or being at greater risk of ringing in sick had any basis and the claimant has failed to establish a prima facie case and shift the burden of proof to the respondent.

284 In respect of 12(c) the substantial disadvantage relied upon by the claimant was it put her in an unfavorable position, she needs access to the toilet and being on the tills ended that access, which has already been dealt with the by the Tribunal above; in short being placed on "tills" plural did not end the claimant's access to toilets.

285 In respect of the alleged disadvantage of 12(d) above, being more likely to be symptomatic at work during later shifts the claimant produced no medical evidence to this effect, and the Tribunal was unable to accept her oral evidence without supporting evidence as it was directly undermined by the claimant's communications to the respondent including the 22 November 2018 discussion with Roger Braun followed by the claimant's letter of 23 November 2018 when she wrote with no mention of her being less symptomatic during earlier shifts as she did not eat breakfast; "I am more than flexible being able to work early, middle or late shifts over a seven-day period, I just ask that the shifts are allocated on an even-handed basis." In the February 2019 WhatsApp messages to Stephanie McGarry Gribbin "Well I have had my chat with Roger…so that means there will be early shifts for me BUT Rob the store manager wants us working five days a week….it could mean that I get allocated a few early shifts now. I think I need to put it to Roger about discrimination. But also, the middle shifts do suit me so I don't want to shoot myself in the foot…"

286 The Tribunal accepts Mr Pinnington's submission that at the time he prepared the rota's Roger Braun had no knowledge of the alleged disadvantage the claimant now relies upon, and he had knowledge of the reasonable adjustment requiring the claimant to work the middle shift, which as far as Roger Braun was concerned, remained the position when he transferred to the department as department manager.

287 In respect of alleged disadvantage in respect of 11(e) above: (1) Being unable to lift heavy items and/or being at greater risk of physical pain and aggravation of her medical condition, and (2) Not being permitted to work in the seasonal department, the respondent accepts that absent adjustments customer advisors in the seasonal department were required to undertake heavy lifting particularly if working the early shift, and the evidence before the Tribunal bears this out. The respondent accepts that a requirement to lift heavy items may place those with the claimant's disability at a substantial disadvantage of being unable to lift heavy items and being at risk pf physical pain and aggravation of her medical condition. As found by the Tribunal above, the respondent was not in breach of its duty to make reasonable adjustments in respect of the claimant heavy lifting.

288 The claimant's allegation that she had no health and safety training and the respondent breached its own obligations in this respect had no basis, and in any event, Roger Braun had agreed with the claimant that she was not required to carry heavy items the respondent having become aware that reasonable adjustments were required as set out in the 17 April 2018 occupational health report; "**other than heavy moving and lifting tasks, there are no further medically determined adjustments or restrictions needed to her role based on risk**…does have an underlying health condition. It is not disputed the respondent immediately put the reasonable adjustments in place succinctly described by Mr Piddington as "telling the claimant that she was not to undertake such activity; informing her that she could ask for support from other customer advisers if lifting were required; allocating her tasks which did not involve heavy lifting; and so far as practicably possible rostering her on the mid-shifts which did not require replenishment of stock or other tasks most likely to require 'heavy' lifting'.

289 Turning to the issue of not being permitted to work in the seasonal department, there was no evidence before the Tribunal that the claimant was not permitted to work in the seasonal had any connection with the requirement to lift heavy items, and this is supported by the fact that the claimant was to return to seasonal when the allocated hours were increased in spring/summer and the claimant had worked in the seasonal department without issue from 5 April 2018 until 30 June 2019. The requirement of heavy lifting did not mean the claimant could not work in the seasonal department, it meant reasonably adjustments had to be put in place and the evidence before the Tribunal was that Roger Braun had no issue with this, and was more than happy, for example, to place the claimant on light duties when the occasion arose. It is notable at no stage has the claimant ever complained before the transfer to front end that heavy lifting meant that employees with the claimant's disability were not permitted to work in seasonal, and the reason for this is simply because this was not the case and so the Tribunal found.

290 With reference to issue 14, namely, did the respondent fail to take such steps as were reasonable to have taken to avoid the disadvantage, the Tribunal found that it did and further, with reference to issue 15, allowing the claimant to continue working in the Seasonal Department was not a reasonable adjustment and when the claimant was transferred to front end working on self-service till and returns desk, and then the anticipated transfer to décor/lighting the claimant was in exactly the same position she would have been in had she remained in the season department with the exception of

her boredom threshold. In fact, a transfer to décor/lighting was more beneficial because that department was immediately adjacent to the toilets and so the claimant could get there quicker in an emergency.

291 As set out above, the respondent failed to take such steps as were reasonable to avoid the disadvantage by ensuring the claimant was not required to work on staffed tills. Ensuring the claimant was require to work in the front end department on self-service tills or the returns desk only were reasonable adjustments. The respondent did ensuring the claimant had urgent access to a toilet and flexibility in breaks when symptomatic between 16/04/18 and June 2019. The respondent had set in hand reasonable adjustments to deal with the requirement of heavy lifting and the claimant has failed to adduce any evidence that it had not provided appropriate, fit for purpose, equipment to assist with heavy lifting. The claimant could seek assistance with lifting if necessary whenever she wanted. The Tribunal has dealt with the claimant's allegations concerning assigning her to early shifts and being aware and sympathetic to her condition and allowing her to go home if not fit for work and it does not intend to repeat itself other than to confirm assigning the claimant an early shift was not a reasonable adjustment and the respondent was aware, sympathetic and allowed her to go home when she asked to do so, as set out in the factual matrix.

Issue 16: Discrimination Arising from Disability (s.15 EqA 2010)

292 With reference to issue 16 the claimant relies upon the following 'something arising' from her disability: (a) Difficulty lifting heavy items and (b) taking disability related absences.

293 Mr Pinnington reminded the Tribunal that in order to succeed in her claim for discrimination arising from disability, the claimant must make out that:

293.1 There was something that arises in consequence of her disability;

293.2 She was subjected to unfavourable treatment;

293.3 The unfavourable treatment was because of the something that arises in consequence of the disability; and

293.4 respondent cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

293.5 A comparator is not required: Pnaiser cited above.

294 When carrying out this exercise the Tribunal had in mind the guidance set out in Pnaiser by asking itself whether there was unfavourable treatment and by whom. It must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of the decision makers. An examination of the conscious or unconscious thought processes of Roger Braun is likely to be required, just as it is in a direct discrimination case. The Tribunal, rather than repeats its finding made after it had examined the conscious and unconscious thought process of the respondent's witnesses, particularly Roger Braun, makes reference to the factual matrix set out above and the findings reached in the allegation of direct discrimination. On the balance of probabilities, it found not only did the claimant fail to establish unfavourable treatment, and in the alternative, the "something" that may have caused the

unfavourable treatment did not have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. The Tribunal disregarded motive, which requires a different consideration to the conscious or unconscious thought processes, although they can often become confused.

295 The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of the claimant's disability'. That expression 'arising in consequence of' could describe a range of causal links and in Ms McGarry Gribbin's case objectively assessed, no causal connection was established.

296 Mr Piddington submitted the claimant has failed to establish that her disability caused her difficulty lifting heavy items, and the evidence appears to be that if claimant undertook heavy lifting she risked an exacerbation of her underlying health condition. The Tribunal concluded Mr Pinnington was splitting hairs, and it was satisfied the claimant had succeeded in establishing her disability caused her difficulty lifting heavy items when she was experiencing a "flare up" and this was supported by the contemporaneous medical record and the claimant's oral evidence. The difficulty the claimant had in lifting heavy items was one of the reasons relied upon by the respondent for making the reasonable adjustments previously referred to, and it was irrelevant for that purpose whether the claimant's condition was exacerbated or she had a flare up and was unable to lift heavy items at all.

297 The respondent accepts that any disability related absence would amount to 'something arising' as a result of claimant's disability, and the Tribunal took the view that the claimant's difficulties lifting heavy items amounted to 'something arising.'

298 Turning to issue 17, namely, was the claimant subjected to unfavourable treatment, the Tribunal found she was not on the balance of probabilities.

299 The claimant relies on the following allegations of unfavorable treatment:

300 268.1 17(a) Transferring the claimant to the Front-End Department and requiring her to work on tills with effect from 01/07/19. For the reasons already set out above, the Tribunal found it did not amount to unfavourable treatment and in any event, the reason for the transfer and requirement to work on the tills had no causal connection with the claimant's disability absence or difficulty lifting heavy items. As set out in the factual matrix, the claimant was transferred due to the operational requirement of redeployment of hours, which was a regular occurrence affecting many employees not limited to the claimant including seven in the seasonal department. The claimant was not transferred to work at the front end in consequence of her disability and the claimant has not proven facts from which the Tribunal could conclude that the unfavourable treatment alleged of transferring the claimant to the front-end department was because during flare-ups she had difficulty lifting heavy items and ha taken disability related absences.

301 268.2 17(b) Perceiving the claimant as unreliable due to disability related absences and/or lateness, for the reasons set out above the Tribunal did not find this to have been the case on the balance of probabilities. It is undisputed the claimant was never late, and she confirmed that only disability related absences were being relied upon. Turning to the 24/0918 Informal Action Form this does not establish Roger Braun had concerns with the claimant's absence. He had concerns over the fact that she decided unilaterally to change her shift pattern without the consent or and informing Roger Braun, with the result that the claimant's original shift was not covered and "about Niamh's flexibility with

regards to working 5/7" i.e. that the claimant worked 20 hours per week over 4-days and not 5 when Roger Braun wanted her to work five and provide even more flexibility.

302 268.3 17(c) Not allocating the claimant early shifts as she wanted between 16/04/18 and June 2019 for the reasons set out above the Tribunal did not find this to have been the case on the balance of probabilities. It accepted the respondent's submission that in any event it does not amount to unfavourable treatment. Mr Piddington described the claimant's evidence on this point to have been exaggerated and inaccurate. As set out in the factual matrix, the claimant working "middle shifts" suited her.

303 268.4 17(d) Not permitting the claimant time off when she wanted it between 16/04/18 and June 2019 the Tribunal found there was no evidence adduced by the claimant in either her witness statement or oral evidence to this effect and the burden of proof has not shifted. The evidence before the Tribunal was that the claimant was permitted to go home when she requested.

304 268.5 17(e) Not sending the claimant home when unfit for work on a summer evening in 2018., an alleged incident the Tribunal found had not taken place according to the claimant's own evidence. The WhatsApp message to which the Tribunal was referred, described how the claimant was waiting for a surgeon, it was part-kidney part-bowel related and in a post sent at 10.18 the claimant confirmed it was her kidneys and could be kidney stones. There is no reference to any accident at work and the Tribunal found the alleged accident did not take place, the claimant had at no stage asked Roger Braun to go home ill after an accident, and she had not been refused a request to go home.

<u>In the alternative - Proportionate means of achieving a legitimate aim</u>

305 Having reached the findings above, there is no need to for the Tribunal to consider proportionate means and then legitimate aim. In the alternative, had it concluded there was the alleged unfavourable treatment because of the 'something arising' from claimant's disability (which it did not for the avoidance of doubt) it would have gone on to find the following.

306 With reference to issue 19, was the alleged unfavourable treatment was a proportionate means of achieving a legitimate aim, the respondent relies upon one or more of the following legitimate aims of the appropriate deployment / distribution of employee hours across the various departments of the store, minimizing the risk of the claimant working alone as a reasonable adjustment, allocating the claimant tasks which did not involve 'heavy' lifting as a reasonable adjustment and utilizing the claimant's gardening knowledge at times of the day when there was greater footfall of customers i.e. the mid-shift. The Tribunal found as set out within the factual matrix that the legitimate aims were made out.

307 With regard to the objective justification test, when assessing proportionality, the Tribunal must consider and analyse in detail the working practices and business considerations involved, having particular regard to the business needs of the employer: <u>Hensman</u> cited above. The Tribunal found it was proportionate for the respondent to transfer the claimant to the front end where she had worked before to manage the reallocation of hours and ensure the seasonal department minimised its loss of hours and staff, with a view to the claimant returning in the spring/summer months when the client footfall increased along with the work and her plant knowledge was made use of.

308 Had the claimant been put to work exclusively on the self-service till and returns desk with the reasonable adjustments agreed in place, which was the case by the middle of the claimant's shift on 9 July and the 10 July 2019 at the latest, she was in the same position she would have been had the claimant remained in the seasonal department as far as managing her disability was concerned and the reasonable adjustments necessary for her to carry out her contractual duties. The claimant's proposed transfer to lighting/décor was even more beneficial to her as it involved no risk of heavy lifting and was much closer to the toilets. The respondent's decision to transfer the claimant to front end was thus both rational and responsible when balancing the business needs and economic effectiveness against the discriminatory effect on the claimant. However, its failure to ensure that the claimant was not put to work on the staffed tills as a reasonable adjustment from the outset was not proportionate, and the transfer could have been carried out in a less discriminatory way.

309 In short, the Tribunal found on the balance of probabilities, the claimant's transfer to front-end was a proportionate means of achieving a legitimate aim and the respondent had not discharged its burden in proving the unfavourable treatment when it placed the claimant to work on the staffed tills pursued a real need on the part of its undertaking, albeit taking into account the period was a short one before reasonable adjustments were permanently put in place.

310 The EHRC Employment Code provides: 'If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified' — para 5.21. The Tribunal found as set out above the respondent was in breach of its duty to make reasonable adjustments on the 1 and 9 July 2019 for a relatively short period of time in the claimant's shift following which reasonable adjustments were made, a number of reasonable adjustments had been agreed in order that the claimant's substantial disadvantage caused by her disability when working on staffed tills was addressed and alleviated when it came to the claimant returning to work at the front end on the 10 July 2019 and into the future through to redeployment to lighting/décor department thus meeting the respondent's continuing obligation. The claimant's transfer to the front-end was a proportionate means of achieving a legitimate aim on the basis that she worked on the self-service tills and returns desk, but not on the staffed tills as a reasonable adjustment.

311 In conclusion, the Tribunal found on the balance of probabilities the respondent was unable to show the treatment of the claimant when she worked on the staffed tills was objectively justifiable as a result of the reasonable adjustments that were not made for a short period of time on the 1 and 9 July 2019. It was not proportionate for the respondent to have put the claimant to work on the staffed tills when she could have been put to work exclusively on the self-service tills and returns desk from the outset without any difficulties caused to the respondent and the way it ran its business. The claimant suffered discrimination for a short period of time on the 1 and 9 July 2019, following which the respondent put matters right by permanently placing the claimant to work on self-service tills and/or the returns desk, which it should have done at the outset and this would have been less discriminatory, balancing the needs of the claimant and the respondent and taking into account the fact the claimant worked on the staffed tills with other adjustments put in place for a short period of time before she was placed on the self-service tills.

Indirect Discrimination (s.19 EqA 2010)

312 Mr Pinnington submitted that in order for the claimant to succeed in establishing indirect discrimination it is necessary for her to establish the following elements pursuant to s.19 EqA 2010:

g. The alleged conduct amounted to a provision, criterion or practice ("PCP");

h. The respondent applied or would apply the PCP to persons whom the individual claimant does not share their respective protective characteristics of disability;

i. The PCP puts, or would put, persons who the claimant shares the characteristic at a particular disadvantage when compared to persons with whom the claimant did not share such characteristics;

j. That PCP was applied to the claimant;

k. The PCP put, or would put, the claimant at that disadvantage; and

l. The respondent cannot show the PCP to be a proportionate means of achieving a legitimate aim.

313 The claimant relies upon the PCPs outlined in para 11 above, which the Tribunal has already dealt with. The disadvantage asserted by the claimant were found to be the case by the Tribunal, namely: (a) Needing the toilet more urgently, and (b) putting the claimant at risk of humiliation, degradation and loss of dignity.

314 With reference to issue 22, namely, were the PCPs alleged applied to the claimant the Tribunal repeats its findings set out above.

315 With reference to issue 23, namely, the PCP would have put the claimant at a substantial disadvantage. The substantial disadvantage relied upon by claimant is in respect of 11(a) above, was being placed at a significant risk of anxiety, distress, pain of her condition and humiliation by being required to frequently leave the till and/or having an accident and the Tribunal accepted this was the case in relation to staffed tills only for the reasons already stated. 'Disadvantage' is to be construed as 'something that a reasonable person would complain about': EHRC Employment Code para 4.9 and Shamoon referenced above. the Tribunal on the balance of probabilities found a reasonable person would have complained about the requirement to work on the staffed till, and the claimant in so complaining did not have an unjustified sense of grievance which would not qualify.

316 Mr Piddington submitted none of the alleged PCP's put the claimant at a substantial disadvantage "because the cause of such urgency was her condition." The Tribunal did not agree, accepting the claimant's evidence that when she worked on the staffed tills for the two short periods on 1 and 9 July 2019 she had concerns about managing the affects of her disability in a flare-up, and on the 9 July 2019, she experienced a flare-up as feared. The requirement to work on "the tills" including the staffed tills put the claimant at a disadvantage in comparison to other customer advisors working front-end who did not share the claimant's protected characteristic that required no lifting heavy objects, twisting or bending and urgent access to a toilet when experiencing a flare up. The claimant was put to a particular disadvantage for the reasons already explored by the Tribunal.

Proportionate means of achieving a legitimate aim

317 With reference to the respondent demonstrating the PCP was a proportionate means of achieving a legitimate aim, the Tribunal repeats its findings above, concluding an act of indirect discrimination took place limited to the period when the claimant worked on the staffed tills on 1 and 9 February 2019, and the respondent did not discharge the burden of proving placing the claimant to work on all tills was a proportionate means of achieving a legitimate aim.

Harassment

318 In order to succeed in her harassment claims it must be established the claimant was subjected to unwanted conduct; the unwanted conduct related to her disability; and that it had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant ("the offending purpose / effect"). Mr Riddington reminded the Tribunal that in considering the 'effect' in (c) above, the Tribunal are entitled to consider whether it was reasonable for the conduct to have the stated effect. The conduct relied upon by claimant is set out below.

319 (a) Expecting the claimant to work on a till. Mr Piddington submitted the claimant's transfer to the front-end did not come with an expectation that she would work on a staffed till. The Tribunal did not agree. Joanne Foulds had informed the claimant during the meeting on 29/06/19 that she would be able to work on the self-service tills and the returns desk, but she also referenced the steps the claimant could take if she needed to leave the staffed till as a matter of urgency, and the Tribunal found there was an expectation the claimant would work on the staffed tills, had this not been the case Joanne Foulds in her deputy manager capacity, would have ensured the claimant was not put to work on the staffed tills, which did not happen.

320 Mr Piddington is correct that on the 01/07/19 the claimant began working on the tills without objection, ignoring the fact that she had raised a number of objections beforehand including at the 29/06/19 meeting with Joanne Foulds. The claimant objected again on the 1 July 2019 after she had worked on the staffed tills, and in her written statement described the supervisor's "empathetic and understanding" reaction when the repetitive twisting motion of working the staffed till, the effects of which the claimant had not foreseen, caused her pain. It is undisputed the claimant was immediately transferred to the self-service tills as soon as she had spoken to the supervisor.

321 In her written statement the claimant described how she came to be working on the staffed till for the second and last time on the 9 February 2019; "I fully expected to be told I was returning to the gardening department or was transferred to the décor department so I could be near the toilets. I reported for duty to find I was still working on front end. Someone had rung in sick and there was no one to work on the tills…"

322 Mr Piddington submitted that in the absence of any objection from the claimant when she turned up for work on the staffed tills on the 1 and 9 February 2019, such conduct was not unwanted. The Tribunal did not agree, the claimant having clearly set out her objections to working on the staffed till before her transfer. In respect of working on the self-service checkouts, he submitted, the claimant clearly agreed to do so in the meeting on 04/07/19 and therefore such conduct was not unwanted, which the Tribunal agreed was the case.

323 The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. The Tribunal is aware that acts of harassment can include allocating work which, as a result of his or her disability violates dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) EqA. It is possible that placing the claimant to work on the staffed tills could fall under this definition. However, on the balance of probabilities the Tribunal found no evidence Roger Braun, Joanne Foulds or Philip Stephens were engaged in unwanted conduct related to the claimant's protected characteristic. The claimant was put to work on the tills front end because that was the job and she had carried it out before. As indicated earlier, the Tribunal considered their decision-making process, closely analysing the evidence before it as set out in the detailed findings of facts, and found transferring the claimant to work on tills, more specifically the staffed tills did not have the purpose or effect of (i) violating the claimant's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The sole intention was for the claimant to carry out the front end role due to a reallocation of hours to the front end, and on 9 February stand-in for someone who was sick as the only person on the staffed till.

324 The word 'unwanted' conduct means conduct that is unwanted by the employee assessed subjectively, and there is no doubt the claimant did not want to be working on any tills, whether it be self-service or staffed, she wanted to be working in the seasonal department because the tills were boring. The expectation that she worked on the tills was not related in any way to the claimant's disability. Objectively assessed, the alleged act of harassment had not taken place, despite the claimant's perception that she was transferred by the three managers conspiring together because of her disability, which the Tribunal has found not to have been the case.

325 Mr Piddington submitted that any alleged expectation of the claimant working on the tills did not have the offending purpose, and in the circumstances, it would not be reasonable for such an expectation to have such an effect. The Tribunal agreed with his analysis.

326 Turning to the remaining allegations of harassment (b) to (g) and drawing on the factual matrix set out above, the Tribunal found the claimant has not made out her case on the balance of probabilities.

327 (b) As set out above, the Tribunal found Roger Braun had not repeatedly told the claimant she was not reliable due to her ringing in sick.

328 (c) The claimant's written and verbal concerns about her disabilities were not disregarded and whilst the adjustments suggested were not to the claimant's liking, for example, adjustments suggested by Joanne Foulds and Philip Stephens because they did not include a move back to the seasonal department, it did not follow that the claimant's concerns were dismissed as she now alleges. Mr Piddington reminded the Tribunal that the claimant had found Joanne Foulds "empathetic and understanding" and the Tribunal note the same can also be said about Claire Brown when she took over the claimant's grievance hearing. Philip Stephens spent a great deal of time and effort with the claimant to ensure that reasonable adjustments were put in place as set out in the factual matrix above.

329 (d) The respondent did not ignore the opinions of medical professionals, and despite the claimant's interpretation of the occupational health reports, a transfer back to seasonal was an adjustment suggested by occupational health who was relying on incorrect information provided by the claimant relating to proximity to the ladies' toilet and the real

issue being staffed tills and not tills per se. The respondent was entitled to take a view of the reasonable adjustments that were necessary in order for the claimant to carry out her role; and whist it failed on two short occasions to make reasonable adjustments, thereafter it complied fully with its duty.

330 (e) The claimant was not asked intrusive questions concerning her medical condition.

331 (f) The respondent had not conducted a flawed grievance investigation process.

332 (g) Having 3 different store managers allocated to determine claimant's grievance was justified and unrelated to the claimant's disability.

333 In conclusion, throughout the period of confrontation and dispute between the claimant and respondent, at no stage did the conduct of Roger Braun, Joanne Foulds and Philip Stephens objectively assessed, have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for claimant. All three managers went to great lengths to resolve the claimant's issues, Roger Braun was caring and thoughtful, attempting to minimize the effect of the claimant's disability when she was experiencing a flare-up by making her job easier. Joanne Foulds tried to put the claimant's mind at ease when she was worried about the move to the front-end, and ignored the claimant's aggressive and confrontational behavior at the health review meeting on the 19 August 2019. Philip Stephens treated the claimant patiently and sensitively when trying to resolve the adjustments she required in the workplace, getting her agreement and putting it in place. Claire Brown was found by the claimant to be sympathetic, she kept the claimant informed of the stages in the grievance investigation and timings and the claimant appreciated the fact that Clare Brown understood her condition from experiencing similar with her Father.

334 In conclusion, the respondent did not harass the claimant in respect of allegations 25 (a), (b), (c), (d), (e), (f) and (g) and the claimant's claim of harassment brought under section 26 of the Equality Act 2010 fails and is dismissed.

Constructive Dismissal

335 With reference to the first issue, 29(a) did the respondent breach the implied term of trust and confidence, the Tribunal found the respondent was in fundamental breach of contract when failed in its duty to make reasonable adjustments and committed an act of indirect discrimination for two distinct short periods of time on the 1 and 9 July 2019.

336 In submissions the claimant made reference to the "whole sequence of events, finalised with the flawed grievance investigation amounted to a last straw…all trust between the claimant and respondent had broken down."

337 It is a well-known legal principle that the last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited cited above. The Court of Appeal in Omilaju also cited above, held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct" but it must contribute "however slightly, to the breach of the implied term of trust and confidence". On the balance of probabilities, the Tribunal found that the last straw relied upon by the claimant was the grievance outcome. Contrary to the claimant's submissions it was not "flawed" and the Tribunal found Claire Brown's investigation and outcome were "entirely innocuous act on the part of the employer" and cannot be a final

last straw, even though the claimant mistakenly interpreted the act as hurtful and destructive on her own trust and confidence in the respondent.

338 The claimant in submissions also referred the Tribunal to the 2018 decision in Kaur v Leeds Teaching Hospitals NHS Trust. The Tribunal took into account the Court of Appeal decision in [2019] ICR 1, CA that individual grievances do not need to breach the contract of employment on their own for the claim to be established: the employee can resign in response to a 'last straw' and base his or her claim on the totality of the employer's conduct. If the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign. The Tribunal found in Mrs McGarry Gribbin's case after the breach of contract arising from the respondent's acts of disability discrimination on the 1 and 9 February 2019 the respondent did not committed a series of acts that amounted to a breach of the implied term of trust and confidence.

339 The Court of Appeal in Kaur offered guidance to Tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

339.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation, to which the answer is the grievance outcome dated 15 November 2019 received by the claimant on the 18 November 2019.

339.2 Has he or she affirmed the contract since that act, to which the answer is that the claimant has not. The claimant resigned on 20 November 2019.

339.3 If not, was that act (or omission) by itself a repudiatory breach of contract, to which the Tribunal found it was not.

339.4 If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence, to which the Tribunal found that was not.

339.5 Did the employee resign in response (or partly in response) to that breach, to which the Tribunal found she did not.

An important point to draw from Kaur is that, where there is a genuine last straw that forms part of a cumulative breach of the implied term of trust and confidence, there is no need for any separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign. The focus of enquiry should be on whether the act that precipitated the employee's resignation was part of a cumulative breach (as opposed to a one-off), rather than on whether past breaches had been waived. That is not to say that an employee's response to past breaches is completely irrelevant: it is part of the background information that a tribunal should take into account when determining whether the last straw incident was a sufficient trigger to revive earlier acts in the series.

340 With reference to issue 29(b), namely, transferring the claimant to the Front-End Department, the respondent was not in breach of contract and it was entitled to transfer the claimant, who had a fully flexible contract and could be moved around the store.

341 With reference to issue 29(c), namely, failing to heed the claimant's complaints regarding the transfer, the respondent was not in breach of contract. It took into account what the claimant had to say, did not always agree with her and made adjustments to her duties that were agreed.

342 With reference to issue 29(d), namely, failing to consult with the claimant about a proposed transfer to the Lighting Department when she was due to return from sickness absence, the respondent was not in breach of contract. Consultation did take place, and placing the claimant to work in the Lighting/Décor department was a reasonable adjustment which benefited her medical condition, and it did not take her by surprise as she expected it. The fact the claimant found it boring and did not like the manager was not a relevant consideration given she was contractually obliged to transfer between departments within the store as and when required on the fully flexible contract she had agreed.

343 With reference to issue 29(e) there was no collusion between Roger Braun, Joanne Foulds and Philip Stephens regarding the reason for claimant's transfer to the front end department. Roger Braun alone took the decision.

344 With reference to issue 29(f) Claire Brown was entitled to reject the claimant's grievance and it was not a breach of contract when she failed to uphold it.

345 With reference to issue 29(g), namely, failing to invoke disciplinary proceedings against Roger Braun, Joanne Foulds and Philip Stephens, there was no basis on which disciplinary proceedings could have been taken against the named managers and the respondent's failure to do so has no bearing on the implied term of trust and confidence between it and the claimant.

346 With reference to issue 30, namely, was the breach sufficiently serious to amount to a repudiatory breach, the Tribunal found the respondent's failure in its duty to make reasonable adjustments and the act of indirect discrimination for two distinct short periods of time on the 1 and 9 July 2019 amounted to a repudiatory breach.

347 With reference to issue 31, namely, had the claimant affirmed any breach, the Tribunal found she had waited too long after the respondent's breach of contract before resigning and therefore lost the right to claim constructive dismissal. The Tribunal has reached this finding not by looking at the period of time between the fundamental breach on 1 and 9 July 2019 to the claimant's resignation on 20 November 2019 over four months later, but her conduct which showed every intention to continue in employment rather than resign. For example, the claimant continued working on the 1 July and after the 9 July when the respondent had made it clear reasonable adjustments had been put in place as set out in the factual matrix; adjustments which the claimant agreed to.

348 A delay in resigning following a repudiatory breach may indicate that the claimant has affirmed the contract, and may alternatively indicate that the repudiatory breach is not the effective cause of the resignation: Da'Bell. On the facts of that case the EAT found the claimant's delay indicated 'a detachment of that event from the reasoning of the claimant when she resigned' and the Tribunal took the view the same could be said of Mrs McGarry-Gribbin.

349 With reference to issue 32, namely, did the claimant resign as a result of the breach, the Tribunal found she did not. The well-established legal principle is that the employee must resign in response to the employer's breach of contract and show the necessary link between the employer's actions and his or her constructive dismissal. If the employee left because of other conduct by the employer that did not amount to a

serious/fundamental breach of contract, he or she has suffered no loss by reason of the constructive dismissal and the claim must fail.

350 The claimant believed throughout the period 1 July 2019 to the date when she received the grievance outcome which the claimant did not agree with, the respondent was under a legal obligation to transfer her to the seasonal department as a reasonable adjustment because it had been referenced in the occupational health report, which the claimant believed incorrectly legally bound the respondent. The claimant was prepared to wait and see the outcome of the promise made by Philip Stephens that she would be moved as a reasonable adjustment, and when she was informed this was to be on light duties in the lighting department (the nearest department to the toilets) and to return to the seasonal department and spring and summer, she decided on no account would she move, preferring instead to "stick pins" in her eyes. Had the claimant been transferred back to the seasonal department by Claire Brown as she expected, the Tribunal found on the balance of probabilities, she would not have resigned. The claimant resigned because she did not want to work in the lighting/décor department, a reasonable adjustment she had previously discussed and accepted. The claimant found the lighting/décor department boring in comparison to working in the seasonal department, and she disliked the "smarmy" manager of the lighting/décor department to such an extent that she wanted to "smack him in the mouth" every time she saw him.

351 In conclusion, the respondent was in breach of its duty to make reasonable adjustments in respect of allegation 11(a), a requirement to work on the tills and front-end department in respect of working on staffed tills only, on the 1 and 9 July 2019. The reasonable adjustment was ensuring the claimant was not required to work on the staffed till in the front-end department. The claimant's claim of failure to make reasonable adjustments brought under sections 20-21 of the Equality Act 2010 succeeds.

352 The claimant was indirectly discriminated against on the grounds of her disability in relation to agreed issue 11(a) when she was put to work on the staffed tills on 1 and 9 February 2019, the claim brought under section 19 of the Equality Act 2010 succeeds the respondent having failed to demonstrate that the provision, criteria or practice of requiring customer advisors to work on staffed and self-serviced tills was a proportionate means of achieving a legitimate aim.

353 The claimant's claim of disability discrimination set out in agreed issues number 7(a), and (b) and 17(e) are out of time brought under section 13 of the Equality Act 2010 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done), such complaint is out of time, and in all the circumstances of the case, it is not just and equitable to extend the time limit. In the alternative the claims not well-founded and are dismissed.

354 The respondent was not in breach of its duty to make reasonable adjustments in respect of allegations 11(b), (c), (d), (e) and 15(a), (c), (d), (e), (f) and (g) and the claimant's claim of failure to make reasonable adjustments brought under sections 20-21 of the Equality Act 2010 fails and is dismissed.

355 The claimant was not treated less favourably because of her protected characteristic of disability and her claims of direct discrimination set out in agreed issues 7(c), (d), (e) and (f) brought under Section 13 of the Equality Act 2010 are not well founded and dismissed.

356 The claimant was not treated less favourably because of something arising in consequence of her disability in respect of allegations 16(a), (b) and (c), and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed.

357 The claimant was not indirectly discriminated against on the grounds of her disability in relation to agreed issues 11(b), (c), (d) and (e) and she was not subjected to unfavourable treatment and her claims brought under section 19 of the Equality Act 2010 fail and are dismissed. In the alternative, the respondent demonstrated that the provision, criteria or practice was a proportionate means of achieving a legitimate aim.

358 The respondent did not harass the claimant in respect of allegations 25 (a), (b), (c), (d), (e), (f) and (g) and the claimant's claim of harassment brought under section 26 of the Equality Act 2010 fails and is dismissed.

359 The respondent has not breached the implied term of trust and confidence in relation to agreed issues 29(b), (c), (d), (e), (f) and (g). The respondent was in fundamental breach of contract in relation to agreed issue 29(a) sufficiently serious to amount to a fundamental breach. The claimant affirmed the contract and she did not resign as a result of the breach. The claimant was not unfairly dismissed and her claim for constructive unfair dismissal is not well-founded and is dismissed.

Remedy

360 Having made a finding of limited finding discrimination that had occurred over two short periods of time on 1 and 9 July 2019, the successful claim is adjourned to the remedy hearing to take place by CVP listed for one-day on the **23 March 2021.** The parties will advise the Tribunal if the estimated time for hearing can be reduced.

361 The schedule of loss requires substantial amendment to reflect the Tribunal's findings, and in order the assist the parties prepare for the remedy hearing the following case management orders are to be complied with:

1. The claimant will send to the Tribunal and respondent an amended schedule of loss and remedy witness statement no later than 2-weeks after this judgment with reasons is sent to the parties.

2. The respondent will sent to the Tribunal and claimant a counter-schedule of loss one-week after it receives the claimant's amended schedule of loss.

3. The parties will indicate to the Tribunal if any documents are required, other than this judgment and reasons, for the remedy hearing. If there are, the parties will ensure that all relevant documents are exchanged no later than two weeks after the judgment and reasons is sent to the parties.

4. If documents other than the bundles already before the Tribunal are to be referred to by the parties, the respondent will prepare the paginated agreed bundle and it must also ensure that the claimant and the Tribunal have an electronic version of the hearing bundle in a form which complies with paragraph 24 of the Presidential

Guidance on Remote and In-Person Hearings issued on 14 September 2020 no later than two-weeks before the remedy hearing.

31.1.2021
Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 February 2021

FOR THE SECRETARY OF THE TRIBUNAL