Case Number: 3303500/2015

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondent**
Miss Jacqueline Gunning		Mr Javid Hussain (trading as Swift One Hour Dry Cleaners)

Held at: Watford **On:** 20 February 2017

Before: Employment Judge Southam

Appearances:

Claimant: Mr David Rommer, Solicitor
Respondent: In Person

RESERVED JUDGMENT

1. The respondent and Mr Raj Mehta as the claimant's employers subjected to the claimant to discrimination arising from her disability, contrary to sections 15 and 39 Equality Act 2010.

2. The respondent unlawfully harassed the claimant, contrary to section 26 Equality Act 2010.

3. The respondent made an unlawful deduction from the claimant's pay in the sum of £53, but the claimant's claim was submitted out of time in that respect and the tribunal does not have jurisdiction to hear it.

4. The respondent constructively dismissed the claimant from her employment.

5. When the claimant commenced these proceedings, the respondent was in breach of his obligation under section 4 Employment Rights Act 1996 to give to her a statement of the particulars of a change to the terms of her employment.

6. At the termination of her employment, the claimant was entitled to a payment in respect of four weeks' accrued but unused holiday entitlement.

7. The respondent is ordered to pay to the claimant the following sums:

   7.1 An award for compensation for discrimination composed of the following elements:

      7.1.1 Loss of earnings during employment, by reason of the discriminatory failure of the respondent and his predecessor, Mr Mehta to pay the claimant at least at the rate of the National Minimum Wage, the sum of £31,014.00;

      7.1.2 Loss of earnings after constructive dismissal, in the sum of £38,843.00;

      7.1.3 Compensation for failure to allow the claimant to take rest breaks and holiday, in the sum of £500.00;

      7.1.4 An award for injury to feelings in the sum of £18,150.00; and

      7.1.5 Interest on the above sums, in the further sum of £7,036.44.

   7.2 A basic award for unfair dismissal in the sum of £7,540.00.

   7.3 An award of two weeks' pay under section 38 Employment Act 2002, because of a failure to provide a statement of particulars of the variation of the claimant's terms of employment, in the sum of £754.00.

   7.4 A award of compensation for accrued, but unused holiday entitlement, in the sum of £1,263.00.

8. The tribunal recommends that the respondent provides to the claimant, within 28 days of the date upon which this judgment is sent to the parties, a favourable work reference and a letter of apology.

9. The recoupment provisions do not apply to the above awards.

10. The respondent is further ordered to pay to the claimant the sum of £950.00 in respect of a tribunal fee paid by the claimant for the hearing of her claim.

11. The total sum payable by the respondent to the claimant is the sum of £106,050.44.

REASONS

Claim and Response

1. The claimant presented her claim to the tribunal on 24 November, 2015. She did so, having entered into early conciliation with ACAS by sending them the requisite information about her intended claim on 28 September, 2015. The ACAS certificate of early conciliation was issued by email on 28 October.

2. In the claim, the claimant brought complaints about unfair dismissal, discrimination on the grounds of disability, failure to pay holiday pay, arrears of pay, other payments and another type of claim which the tribunal could deal with. She had been employed from 8 September, 1999 until 13 July, 2015 as a Sales Assistant. In an attachment to the claim form, the claimant said that she had multiple health problems, including learning difficulties, anxiety, depression, Graves disease, hypertension and asthma. She contends that she is disabled. She said that she had been employed in a business called Swift One-Hour Dry Cleaners since 1999 and that ownership of the business has changed over time. Originally it was David A Deans Ltd. The business was transferred in 2008 to Raj Mehta. In 2010, the respondent became Mr Mehta's business partner. In 2011 he took over ownership of the business and thereby became the claimant's employer. The claimant alleged that, on taking over the business, he denied her rest breaks, paid holiday and payslips. She was paid in cash. In 2012 her hours were increased to 48 hours per week. From 2013, the claimant was allowed no holiday at all, whether paid or unpaid. The claimant alleged that she was bullied by being subjected to an excessive workload, having to work long hours, shouting and swearing, belittling her, by threats of dismissal, and by Mr Hussain telling her that she is too stupid to get another job.

3. The claimant further alleges that, in May 2014, her hours of work were increased further to 58 hours per week and the claimant became exhausted and depressed. In April 2015 the claimant alleges she was denied the sum of £53 from her pay and was refused a week' s holiday. She alleges that, on 30 July, 2015, Mr Hussain said to her "I am fed up with you, I've had enough of you". The claimant left her employment. It was her choice to do so. On termination of her employment, the respondent failed to pay her for accrued holiday and failed to give her a P45. The claimant became ill with anxiety and depression. Mr Hussain sought to persuade her to return to her employment. The claimant submitted a grievance on 8 September and there was no reply. Accordingly, she entered into early conciliation with ACAS as indicated above. The claimant instructed solicitors and they wrote to the respondent on 5 October, 2015. The respondent still tried to contact the claimant. On 4 November Metropolitan Police issued Mr Hussain with a harassment warning.

4. Since the claimant left her employment she had been certified by her doctor as unfit to work because of severe anxiety and depression. On the basis of those facts, the claimant contends that she was constructively dismissed and subjected to direct disability discrimination, or discrimination arising from her disability, or indirect disability discrimination, or harassment. She seeks a declaration, compensation, including for

personal injuries and a recommendation. She also seeks an award in respect of pay because of the failure of her employer to pay her the National Minimum Wage, and for the £53 unlawfully deducted from her pay. She also seeks an award in respect of rest breaks denied to her, for holiday pay, for the failure of the respondent to provide her with notification in writing of changes to her terms of employment and an uplift on all of her claims by reason of the respondent's failure to consider her grievance.

5. Originally, the claim was resisted. In a response filed on 8 January, 2016, the respondent said that the claimant was contracted to work 16 hours per week. He said that the claimant dismissed herself and left on one week's notice. She was paid three days' pay on her last day. He called her after she left and asked her how she was. All claims were denied. Mr Hussain insisted that the claimant took holiday and worked no more than 16 hours per week. He said the claims were all wrong.

Case Management

6. After the issue of the proceedings, notice was sent to the parties that there would be a Preliminary Hearing for case management purposes on 8 February, 2016. In preparation for that hearing, the claimant delivered a list of issues. At the hearing, listed before Employment Judge Mahoney, he identified the complaints the claimant wished to pursue. The complaints were as listed above. He also identified the issues the tribunal would have to determine at a full merits hearing of the claimant's claim. In case management orders he made, he said that a document produced by the respondent at the preliminary hearing (which I have not seen) was to be treated as an additional part of the response and both documents are to be read together. Furthermore, the respondent was given the right to provide a further amended response by 29 February. The claimant was ordered to disclose all her medical records held by her GP, to a professional nominated by the respondent, by the same day. The respondent was also required, again by 29 February, to provide further information in relation to any justification defence which he might seek to advance in relation to the complaint about discrimination arising from disability.

7. In a judgment issued on 12 February, Judge Mahoney held that the respondent had failed to pay the claimant in respect of holiday taken by her during her employment, that he had failed to provide her with a written statement of changes to her particulars of employment as regards the identity of her employer, her working hours, pay and holiday entitlement and that the respondent had failed to provide the claimant with itemised pay statements. The claimant's remedies in respect of those matters would be considered at a later hearing.

8. He listed a further preliminary hearing, to take place on 18 April, 2016. The respondent provided an amended response. In this document, the respondent sought to answer the complaint of discrimination arising from disability based on the alleged failure to pay the claimant at a rate of pay at least in accordance with the National Minimum Wage, and the other

complaints under this heading, all listed at paragraph 6.1 of the notes of the preliminary hearing prepared by Employment Judge Mahoney. The respondent denied that any of the allegations were true and said the claimant was paid £150 in cash in hand for her 16-hour working week. He denied that the claimant was required to work excessive hours. He denied that she was prevented from taking holidays and he denied that she was prevented from taking rest breaks. He said that the claimant took holiday around the Christmas period, that the claimant was entitled to take breaks when the shop was quiet, but that the claimant was not entitled to rest breaks because her working day did not exceed six hours, and that the claimant was provided with details of the hours she had worked each week and for which she was paid in cash. He also said that the claimant sometimes stayed in the shop after her contracted hours, when there was no obligation upon her to do so.

9. There was a delay on the part of the claimant in supplying copies of her GP records and an extension of time for this purpose was granted.

10. The respondent sought to postpone the second preliminary hearing listed for 18 April, on the ground that he wanted to have a legal representative, had to pay fees for the representative and needed time to obtain funds to pay the representative. The postponement application was granted and the preliminary hearing was postponed until 21 June. There was a delay on the part of the claimant in disclosing the GP medical records once they were obtained because, her representative said, the respondent failed to nominate a professional representative to receive them. That matter was then expressly reserved to be dealt with at the hearing on 21 June

11. At that hearing, which was listed before Employment Judge Lewis, he made orders relating to the question of the claimant's alleged disability, which entailed the obtaining of a report from the claimant's GP and the disclosure of some of the medical records. On the basis of that information, the respondent was directed to inform the tribunal by 31 August whether or not he accepted that the claimant had become disabled by any material time. There was to be a further preliminary hearing on 29 September, which was for the purpose of determining whether or not the claimant had become disabled. Judge Lewis also made case management orders relating to determination of the claimant's claims as a whole and listed a full merits hearing for seven days to commence on 20 February, 2017.

12. The preliminary hearing listed for September was abandoned, it would seem, on the basis that the claimant's solicitor contended that the issue of disability remained a live issue, that the respondent considered that there was a need for independent medical evidence and that the claimant agreed with that. He therefore proposed that the preliminary hearing listed for 29 September be postponed and that instead there be a separate preliminary hearing for case management purposes by telephone, for directions to be given regarding the obtaining of expert medical evidence. The September hearing was vacated but no other hearing was listed and the parties appear to have proceeded on the basis that they should now

comply with Judge Lewis' directions in relation to the full merits hearing. In November, the claimant's solicitor informed the tribunal that the respondent had failed to disclose any documents, and that the timetable had therefore slipped. He made proposals to get matters back on track. That application was not referred to a judge until 7 December. Employment Judge Bedeau directed that there should be an unless order against the respondent requiring him to serve copies of his documents in his possession relevant to the case by 29 December and in default, the response would stand dismissed without further order. That order was sent to the parties on 19 December, 2016.

13. On 30 December, and again on 8 January, 2017, the claimant's solicitor informed the tribunal that the respondent had still failed to disclose his documents to the claimant. There had been a communication from the respondent to the claimant's solicitor, apparently seeking an extension of time to 6 January, on the basis that the respondent needed professional advice from a solicitor, and was not in a position to get it. He said that he had now spoken to a solicitor who advised him correctly and he would have a solicitor to represent him at the hearing. He sought an extension of time of 14 days. His application was not submitted to the tribunal.

14. This correspondence was referred to Employment Judge Bedeau on 12 January. Before he made any decision, the respondent wrote to the tribunal a letter dated 23 December, but only delivered to the tribunal on 24 January, in which he said that it was not possible for the respondent to file his documents because it had been agreed between the parties that there would be a joint medical expert. He said that he proposed that matters be stayed until the expert was appointed and it would not be right to file his disclosure without there being a full medical report.

15. Judge Bedeau was unimpressed with that response and he directed that the parties be informed that, by reason of the effect of the unless order made on 19 December, the response was struck out. The parties were so informed by a letter sent to them on 2 February. That letter stated that the respondent would be entitled to notice of any hearings and decisions of the tribunal but would only be entitled to participate in any hearing to the extent permitted by the employment judge. Judge Bedeau also decided that the hearing as listed should proceed on 20 February but he reduced the length of hearing from seven days to one day.

The Hearing

16. It was against the background of that complex case management history that the case came to be listed before me on 20 February as a one-day full merits hearing with the respondent only to be permitted to take part in the proceedings to the extent that I allowed. The claimant attended with her solicitor. Mr Hussain also attended. There was a bundle of documents, prepared by the claimant’s solicitor. In these reasons references to page numbers are to the numbered pages of that bundle. I heard evidence from the claimant. I did not allow Mr Hussain to give evidence, but I allowed him to make submissions at the end. The evidence and

submissions were completed just before lunch on the hearing day and I told the parties that my judgment and the reasons for it would be reserved.

17. Thereafter I considered my decisions. I had to consider all of the issues set down by Employment Judge Mahoney for consideration at the full merits hearing, and deal with the claimant's remedies in respect of the claims the subject of his February judgment.

The Issues

18. I reproduce below the list of issues, as set out by Employment Judge Mahoney in the notes and orders he made on 12 February 2016, after the hearing on 8 February, using his numbering:

3.1 **Constructive Dismissal - s95(1)(c) ERA 1996**: Did the claimant terminate the contract under which she was employed in circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct, i.e.

3.1.1 Did respondent's alleged conduct, namely:

3.1.1.1 criticism of the claimant and attitude towards her on 30th July 2015 (as alleged at paragraph 15 of the Particulars of Claim);

3.1.1.2 failure to pay the claimant the NMW;

3.1.1.3 insistence that the claimant worked 58 hours per week;

3.1.1.4 refusal to allow the claimant to take any holiday;

3.1.1.5 refusal to allow the claimant to take rest breaks;

3.1.1.6 bullying (as alleged at paragraph 10 of the Particulars of Claim), amount to a repudiatory breach of respondent's contractual obligation to act in such a way so as to maintain trust and confidence between employer and employee?

3.1.2 If so, did the claimant resign in response to that repudiatory breach?

3.1.3 If so, did the claimant resign promptly in relation to that repudiatory breach (or its final straw)?

3.1.4 Was the respondent's conduct in all the circumstances unreasonable within the meaning of s98(4) ERA 1996?

4 **Disability Status - s6 EqA 2010:**

During the period from 2008 until 30th July 2015:

4.1 Did the claimant have one or more physical or mental impairments, (namely learning difficulties, anxiety, depression, Graves' disease, hypertension and asthma)?

4.2 If so, did that impairment (or those impairments) have a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities?

4.3 Was the respondent aware or should the respondent have been aware of all or any of those disabilities?

5 **Direct Disability Discrimination – s13 EqA 2010?**

5.1 Did the respondent treat the claimant less favourably than the respondent would treat a hypothetical non-disabled Sales Assistant by allegedly:

5.1.1 paying the claimant at a rate lower than the NMW?

5.1.2 requiring the claimant to work excessive hours?

5.1.3 not permitting the claimant to take holidays?

5.1.4 not permitting the claimant to take rest breaks?

5.1.5 bullying the claimant (as alleged at paragraphs 10 and 15 of the Particulars of Claim)?

5.1.6 constructively dismissing the claimant?

5.2 If so, was the above treatment done because of the protected characteristic of disability?

6 **Discrimination Arising from Disability – s15 EqA 2010?**

6.1 Did the respondent treat the claimant unfavourably by allegedly:

6.1.1 paying the claimant at a rate lower than the NMW?

6.1.2 requiring the claimant to work excessive hours week?

6.1.3 not permitting the claimant to take holidays?

6.1.4 not permitting the claimant to take rest breaks?

6.1.5 bullying the claimant (as alleged at paragraphs 10 and 15 of the Particulars of Claim)?

6.1.6 constructively dismissing the claimant?

6.2 If so was the aforesaid treatment done because of the claimant's alleged lack of knowledge and understanding of her rights and her lack of confidence?

6.3 If so, was the claimant's lack of knowledge and understanding of her rights and her lack of confidence something arising in consequence of her disability?

6.4 If so, can the respondent show that the treatment listed at 4(a) above was a proportionate means of achieving a legitimate aim? The respondent asserts

6.4.1 as to the business aim or need sought to be achieved…[particulars to be provided].

6.4.2 as to the reasonable necessity for the treatment….[particulars to be provided].

6.4.3 as to proportionality….[details to be provided].

7 **Indirect Disability Discrimination - s19 EqA 2010:**

7.1 Did the respondent apply to the claimant the following one or more provisions, criteria or practices (PCPs), namely:

7.1.1 that the claimant had to work excessively long hours?

7.1.2 that the claimant was not permitted to take leave?

7.1.3 that the claimant was not permitted rest breaks?

7.1.4 that the claimant was not paid SSP?

7.2 If so, would the respondent have applied that same PCP to a sales assistant regardless of that sales assistant‘s disability status?

7.3 If so, did that PCP put disabled workers at a particular disadvantage when compared with non-disabled workers, namely that disabled workers are more likely to suffer health problems and or lose money as a result of that PCP?

7.4 If so, did that PCP put the claimant to the disadvantages specified at (c) above?

7.5 If so, can the respondent show that the PCP were a proportionate means of achieving a legitimate aim?

8 **Harassment – s26 EqA 2010:**

8.1 Did the respondent engage in unwanted conduct related to disability by allegedly:

8.1.1 shouting, swearing and banging the counter in anger right in front of the claimant?

8.1.2 belittling the claimant in the presence of customers?

8.1.3 threatening to dismiss the claimant?

8.1.4 telling the claimant, *“You are too stupid to get another job. That’s why you’re here”?*

8.1.5 repeatedly telephoning the claimant between early August 2015 and early November 2015 despite being told that the claimant did not want to speak to him and that she found the respondent’s calls distressing.

8.2 If so, did that conduct have the purpose of:

8.2.1 violating the claimant's dignity, or

8.2.2 creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

8.3 If not, did the conduct have the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

8.4 In considering whether the conduct had that effect, the Tribunal will take into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9 **Burden of Proof – s136 EqA 2010**

9.1 In relation to all of the claimant’s complaints under EqA 2010:

9.1.1 Are there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened the provision concerned?

9.1.2 If so, can the respondent show that he did not contravene that provision?

10 **Unauthorised Deductions from Wages / Breach of Contract: NMWA – s13 ERA 1996 and s1 NMWA 1998:**

10.1 In relation to the pay reference periods between the middle of May 2008 and 30th July 2015, did the respondent (and, before him, Mr Mehta) remunerate the claimant at a rate less than the prevailing NMW?

10.2 If so, did this amount to a series of unauthorised deductions from wages and or a breach of the claimant's contract of employment?

11 **Unauthorised Deductions from Wages - s13 ERA 1996 / Breach of Contract:** Did the respondent make an unauthorised deduction of from the claimant's wages contrary to s13 ERA 1996 and or breach the claimant's contract of employment by allegedly deducting £53 from her wages on 4th April 2015?

12 **Right to Rest Break – reg 12 WTR 1998:** Did the respondent refuse to permit the claimant to exercise her right to a 20 minute rest break in each shift lasting at least 6 hours?

13 **Right to Paid Holiday - regs 13 and 13A WTR 1998:** Did the respondent (and Mr Mehta before him) refuse to permit the claimant to exercise her right to 5.6 weeks' paid holiday per annum?

14 **Outstanding Holiday Pay - reg 14 WTR 1998:** Did the respondent fail to pay the claimant in lieu of holiday accrued but outstanding as at the date of termination of the claimant's employment?

15 **Limitation:** In relation to any complaint that was not presented before the end of the relevant period of three months:

15.1 For any of the claimant's complaints other than her complaints under EqA 2010:

15.1.1 Is the Tribunal satisfied that it was not reasonably practicable for that complaint to be presented before the end of the relevant period of three months?

15.1.2 If so, was that complaint presented within such further period as the Tribunal considers reasonable?

15.2 For the claimant's complaints under EqA 2010:

15.2.1 Does that complaint form part of conduct extending over a period?

15.2.2 If so, did that period end on such a date so as to render the complaint in time by the action of s123(3)(a).

15.2.3 If not, was that complaint presented within such other period as the employment tribunal thinks just and equitable?

16 **Remedy:**

16.1 If the respondent is found liable in relation to any of the above complaints, what is the appropriate Remedy?

16.2 If, as part of any Remedy, the claimant is awarded compensation:

16.2.1 Did the respondent fail to comply with its obligations under the ACAS Code in relation to the claimant's grievance:

16.2.2 If so, was that failure unreasonable?

16.2.3 If so, what is the appropriate uplift to the claimant's compensation pursuant to s207A TULRCA 1992?

16.3 Should the respondent pay any ET Fees incurred by the claimant?

17 The respondent accepted

17.1 he knew the claimant had learning difficulties and suffered from anxiety and depression for most of the time she was employed by him, which was from about 2011.

17.2 that the claimant had not received payment for holidays taken, which he asserted were 2 to 3 weeks every Christmas.

17.3 that he had not provided the claimant with a written statement of changes to employment particulars and

17.4 had failed to provide the claimant with itemised pay statements.

19. The extent to which I had to decide these issues, given that the response had been dismissed and the claims were in effect undefended, will appear in my conclusions below.

Relevant Law

20. In reaching my decisions, I applied the following legal provisions.

Disability

20.1 By section 6 of the Equality Act 2010, a person has a disability if they have a physical or mental impairment which has a substantial and long-term effect on her ability to carry out normal day-to-day activities. By paragraph 1 of schedule 1 of that Act, the effect of an impairment is long-term if it has lasted for at least 12 months, or is likely to do so.

20.2 Section 6 of the Equality Act incorporates the provisions of schedule 1 to the Act. Part 1 includes some provisions relating to the determination of disability. By paragraph 5 of that schedule, an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and but for that, it would be likely to have that effect. Measures include medical treatment and the use of a prosthesis or other aid.

20.3 In paragraph 12, which is in part 2 of that schedule, it is provided that the tribunal must take account, in determining whether a person is a disabled person, of such guidance as it thinks is relevant.

20.4 The Secretary of State has issued, in 2011, Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability. I was aware of paragraphs B1-3, B11, B18-19, section D and the appendix.

20.5 In B1, the guidance states that the requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. The latter refers to a provision in section 212 of the Equality Act. The tribunal should also bear in mind that the time taken by person with an impairment to carry out normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial: see B2. It should be compared with the

time it might take a person who does not have the impairment complete an activity. In paragraph B3, it is said that another factor to be considered is the way which a person with an impairment carries out normal day-to-day activity. Again, the comparison is with a person who does not have the impairment.

20.6 In relation to what might be regarded as normal day-to-day activities, I reminded myself of section D of the guidance. Day-to-day activities are things people do on a regular or daily basis. Examples include shopping, reading and writing, having a conversation or using the telephone. They include walking and travelling by various forms of transport and taking part in social activities. They do not include activities which are normal only for a particular person or a small group of people.

20.7 I also bore in mind the appendix to the guidance which sets out two groups of examples of difficulty which, respectively, would and would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities..

Discrimination: Prohibited Conduct

20.8 By section 15 of the same Act, a person (A) discriminates against a disabled person (B), if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is justified, by showing that is a proportionate means of achieving a legitimate aim.

20.9 A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment or B. In deciding whether the conduct has the effect described above, the tribunal must take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. The relevant protected characteristics include disability.

Prohibited Conduct in and after Employment

20.10 In employment, by section 39(2) of the same Act, an employer must not discriminate against an employee by subjecting them to a detriment.

20.11 By section 40 an employer (A) must not, in relation to employment by A harass a person (B) who is an employee of A.

20.12 By section 108(2), a person must not harass another if the harassment arises out of and is closely connected to a relationship which used to exist between them, and where the conduct would, if it had occurred during the relationship, have contravened the Act.

National Minimum Wage

20.13 By section 1 National Minimum Wage Act 1998, a person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage. A person qualifies for the national minimum wage if they are an individual who is a worker, works ordinarily in the United Kingdom and has ceased to be of compulsory school age. The rate of the national minimum wage is set from time to time by the Secretary of State.

Rest Breaks

20.14 By regulation 12 Working Time Regulations 1998, where a worker's daily working time is more than six hours, he is entitled to a rest break consisting of an uninterrupted period of not less than 20 minutes which may be spent away from their workstation if they have one.

Constructive Dismissal

20.15 Section 95 Employment Rights Act 1996 provides:

> "(1) For the purposes of this Part, an employee is dismissed by his employer if (and, subject to section (2) and section 96, only if) –
>
> …(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

20.16 The above is the statutory formulation of constructive dismissal. I reminded myself that the leading authority in cases of constructive dismissal remains Western Excavating (ECC) Ltd -v- Sharp [1978] IRLR 27 and in particular the observations of Lord Denning where he said:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

20.17 The employee must resign in response to the repudiatory breach: see Norwest Holst Group Administration Ltd v Harrison [1984] IRLR 419, a decision of the EAT in which it was held that:

> "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…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".

20.18 In Nottinghamshire County Council v Meikle [2004] IRLR 703, the Court of Appeal held that once a repudiation of the contract is established, the proper approach is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer.

20.19 In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 the Employment Appeal Tribunal held that it was clearly established that "there is implied into a contract of employment a term that the employer will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The [Employment] Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

20.20 In Lewis v Motorworld Garages [1985] IRLR 465 it was held that where an employee has not treated the breach of an express contractual term as a wrongful repudiation, he is entitled to add such a breach to other actions which, taken together, may cumulatively amount to a breach of the implied obligation of trust and confidence.

20.21 In London Borough of Waltham Forest v Omilaju [2005] IRLR 35, the Court of Appeal held, in relation to a series of actions alleged to amount to a fundamental breach of the implied term of trust and confidence, justifying an employee's resignation, that the "final straw" need not itself be a breach of contract, but must be an act in a series of acts which cumulatively amount to a breach of the implied term. It does not have to be of the same character as the earlier acts. It must contribute to the breach, and although it may be relatively insignificant, an utterly trivial matter will not suffice. It need not be in itself unreasonable or blameworthy. It would however be unusual to find a wholly reasonable action that amounts to a final straw. An entirely innocuous act cannot be a final straw. The test is an objective one.

Time Limits

20.22 Section 123 Equality Act 2010 provides that a complaint of discrimination may only be brought to the tribunal within the period of three months beginning with the date of the act to which the complaint relates, unless the tribunal considers that it is just and equitable to extend time. For the purpose of the time limit, conduct extending over a period is to be treated as having been done at the end of the period.

20.23 It was also held in Nottinghamshire County Council v Meikle [2004] IRLR 703 that a constructive dismissal falls within the scope of dismissal in the discrimination legislation. That decision referred to relevant provisions of the Disability Discrimination Act 1995, but since section 39 Equality Act 2010 also refers to dismissal, it seems that the decision applies equally to the later Act. It was held that a constructive dismissal can be regarded as being in itself a discriminatory act. This would assist the claimant faced with the time limit of three months from the date of the act complained of, because, in case of a constructive dismissal which is discriminatory, time runs from date of the constructive dismissal itself.

20.24 In relation to complaints about unlawful deductions from pay, section 23 Employment Rights Act 1996 provides that the tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with, in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made. Where there is a series of deductions, the claim must be brought within the period of three months beginning with the date of the last of the series.

Remedies

20.25 By the combined effect of sections 119 and 124 Equality Act 2010, the Tribunal's power in respect of remedies for discrimination is to make a declaration as to the rights of the complainant, order the respondent to pay compensation to the complainant and make an appropriate recommendation that, within a specified period, the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relates. In relation to compensation, the power of the tribunal is to make awards which are the same as those which could be granted by the High Court in proceedings for tort, and an award of damages may include compensation for injured feelings, whether or not it includes compensation on any other basis.

20.26 By regulation 2 Employment Tribunals (Interest on Awards in Discrimination Cases) Regulation 1996, where a tribunal makes an award in respect of discrimination, it may include interest on the

sums awarded and it should consider whether to do so without the need for any application by a party in the proceedings. The rate of interest to be awarded is 8%. In the case of any sum awarded for injury to feelings, interest is to be for the period beginning on the date of the contravention or act of discrimination complained of. In the case of all other sums of damages or compensation, interest is for the period beginning on the midpoint date and ending on the day of calculation, where the midpoint date is the day which falls halfway through the period beginning with the date of the contravention and ending on the day of calculation.

20.27 An employee who is unfairly dismissed is entitled to a basic award for unfair dismissal, calculated in accordance with section 119 Employment Rights Act 1996. The tribunal must determine the period during which the employee has been continuously employed, reckon backwards from the end of the employment the number of years falling within the period when the employee was not below the age of 41 and the number of years when she was not below the age of 22. 1.5 weeks' pay are allowed for the former, and one week's pay for the latter.

20.28 By the provisions of section 38 Employment Act 2002, where a claimant brings proceedings which include complaints about unfair dismissal, unlawful deductions from pay or discrimination and, at the time the proceedings were begun, the employer was in breach of his duty to the employee under section 4 Employment Rights Act 1996, (duty to give a written statement of particulars of change in terms of employment), the tribunal must make an award of the minimum amount, which is two weeks' pay, to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount, which is four weeks' pay, instead. Where awards are already made in respect of other jurisdictions, those awards are to be increased by the appropriate amount. The duty does not apply if there are exceptional circumstances which would make an award or increase unjust or inequitable.

20.29 By the combined effect of regulations 14 and 30 Working Time Regulations 1998, where a worker's employment is terminated during his leave year and on the date of termination, the proportion he has taken of the leave to which he is entitled in that leave year differs from the proportion of the leave year which has expired and is less than that proportion, the employer must make a payment in lieu of leave calculated in accordance with regulation 14. That calculation requires a payment representing the accrued but unused leave to which the employee was entitled for the part of the year for which he was employed.

20.30 By section 207A Trade Union and Labour Relations (Consolidation) Act 1992, where, in the case of proceedings to which this section applies, which include proceedings for unauthorised deductions

from pay, unfair dismissal and discrimination, it appears to the employment tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, the employer has failed to comply with the code and the failure was unreasonable, the employment tribunal may if it considers it just and equitable in the circumstances to do so, increase any award it makes to the employee by no more than 25%. The ACAS Code of Practice 1 Code of Practice on Disciplinary and Grievance Procedures 2015 applies to employees, in particular the provisions of that code setting out keys to handling grievances in the workplace.

20.31 In Abbey National Plc v Chagger [2009] IRLR 86, in relation to provisions of the Employment Act 2002, which were the predecessors of the provisions of the 1992 Act, and which allowed for uplifts upon tribunal awards of between 10% and 50%, where there was a failure to comply with statutory dismissal and/or grievance procedures, it was held that it was not an error of law to provide an uplift of only 2% having regard to the large amount of the award being made. There was no reason why the fact that an award is of exceptional size should not itself be a relevant consideration.

20.32 The consensus of the recent authorities on the question of whether awards for discrimination should be increased by 10% now seems to be in favour of such an increase. I refer in particular to the decisions in Beckford v London Borough of Southwark [2016] IRLR 178 and Sash Window Company v King [2015] IRLR 348.

Findings of Fact

21. Having heard evidence from the claimant, I reached the following findings of fact:

21.1 The claimant was born on 26 May, 1964 and was therefore 51 years of age on the date of the termination of her employment on 13 July, 2015. She attended Dollis Infant School in Mill Hill from the age of five but, at seven years of age, she was transferred to a special school for children with learning difficulties although she did not appreciate that at the time. That was Northway School in Mill Hill, where she remained until she was 17. She attended Hendon College for one year then found work as a packer in the packing department at Neal and Cooper, a clothes warehouse in Neasden.

21.2 The claimant was in her 20s when she discovered that she had learning difficulties. Her mother explained what had happened. She continued at Neal and Cooper for 17 years but was made redundant at the age of 35 years and, a few months later, went to work at Swift One-Hour Dry Cleaners, where she remained until July 2015.

21.3 The claimant's learning difficulties mean that she is sometimes confused and finds it difficult to understand instructions. She has problems with maths and has difficulty with calculations or handling money. Her memory is poor. For instance, she has difficulty remembering important dates and to do things on time. She forgets to pay direct debits, birthdays and appointments.

21.4 The claimant's anxiety and depression means that she does not like crowds, people shouting or places that she does not know. Her symptoms are worse when she is stressed. That is only from time to time. Occasionally she has panic attacks. She had a breakdown after her mother died just before her own 40th birthday and was prescribed citalopram and sleeping pills. From time to time the claimant has self-harmed.

21.5 The claimant also has asthma. From time to time she has attacks which lead to shortness of breath, coughing and she tends to panic in those circumstances. She uses an inhaler in order to prevent attacks. The claimant also has high blood pressure which creates a problem when she is unwell, depressed or upset. She takes ramipril for this condition.

21.6 The claimant has Graves' Disease, which is a thyroid condition. Undiagnosed or untreated, it leads to fainting and dizzy feelings. The claimant was then prescribed carbimazole, which controls the condition effectively so long as she takes it.

21.7 The claimant's mother died in 2004 and her father died in March 2016.

21.8 When the claimant first went to work at Swift One-Hour Dry Cleaners, her employers were the Deans family. She had a contract of employment and worked 41 hours per week. The claimant reports that, in all respects, she was treated properly, paid the national minimum wage and given proper payslips. She was allowed to take holiday, which was paid, and lunch breaks. If she was ill, she received sick pay.

21.9 In about 2008, the Deans family sold the business to Mr Mehta. From then, things began to go wrong.

21.10 In 2010, Mr Mehta began to involve his business partner, the respondent, in the running of the business. For a period of time, they were running the business together. Then in December 2011 Mr Hussain took over the business in his own right. I am satisfied that both Mr Mehta and Mr Hussain knew that the claimant had learning difficulties, anxiety, depression and about the claimant's other illnesses. They knew this because the claimant told them.

21.11 When Mr Mehta was in charge of the business, it was agreed that claimant would work 30 hours per week, 8am to 2pm Monday to

Saturday with a one-hour lunch break. The lunchbreak was unpaid. She was paid £120 per week, less than the National Minimum Wage at that time. If she was ill, she did not receive sick pay.

21.12 After Mr Hussain took over the business, the claimant was no longer allowed a lunch break. Her hours of work increased to 48 hours per week and her pay was increased £130 per week. The claimant did not say what particular hours she worked each week. The claimant found it a struggle to get by on this money and was at times unable to find the money to pay for her prescriptions. This led to her consultant Dr Jonathan Katz writing to her GP Dr Tang to request that her prescriptions be given in sufficient amounts to last for six months instead of two months. I was shown a letter to this effect sent to Dr Tang on 24 October, 2012, at pages 114-5.

21.13 As regards holidays, Mr Hussain allowed the claimant to take two weeks holiday at Christmas 2011 and 2012, but thereafter did not allow her to take any holiday at all, even unpaid holiday. He did not pay her for the two weeks taken at Christmas in those years.

21.14 I am satisfied that Mr Hussain shouted at the claimant, and sometimes he swore at her. Sometimes he banged the counter in front of her and sometimes he made fun of her in front of customers. Many times he threatened to sack her. On one occasion he told her: "you are too stupid to get another job. That is why you are here". The claimant provided a copy of her diary, which gives examples of Mr Hussain's behaviour towards her. For instance, on 28 March at 6pm the claimant records that "Javid went mad and banged his fist on the counter". At 6:30pm the same day, her diary records that Mr Hussain swore at her for giving a customer his money back. On 4 April, her diary records that Mr Hussain deducted £53 from her wages as punishment for giving a customer his money back. It appears from the diary that the claimant protested this decision but Mr Hussain's decision was that he would not give her her money. Her diary entry for 1 April, 2015 records that she broke down in tears and could not cope any more. The entry for 11 April records that Mr Hussain shouted at her again because she was talking to a customer. On 15 April an entry records that Mr Hussain swore at her and blamed her for what a tailor did. An entry for 14 May, 2015 records that Mr Hussain "more or less accused me of stealing from the till". A later entry said that it turns out that it was his son who removed money from the till. A further entry for that week records that "he picks on me all the time do not know how much more I can take from him".

21.15 The claimant's duties were to serve in the shop. However, Mr Hussain required the claimant to undertake dry cleaning work as well as serving in the shop.

21.16 In May 2014, Mr Hussain required the claimant to work even longer hours. He required her to work from 8am until 5pm Mondays to

Thursdays and 8am to 7pm Fridays and Saturdays, a total of 58 hours each week. Her pay was increased to £150 per week. She did not really wish to work those hours, but agreed to do so. Mr Hussain did not issue the claimant with any notice in writing of the variation to her terms of employment, at any time.

21.17 The incident referred to above in relation to the deduction of £53 from her pay related to a Nigerian customer who left some money in the pocket of his clothes brought in for dry-cleaning. Mr Hussain would normally keep such money for himself but the claimant decided to give the customer his money. That was why Mr Hussain deducted £53 from the claimant's pay.

21.18 The claimant's employment came to an end on 30 July, 2015. She had worked in the shop by herself for the whole morning. Mr Hussain returned about 1pm. He was angry and raised his voice at her and blamed her for the shop being untidy. The claimant thought this was unfair. Responsibility for the shop being untidy lay, she thought, with Mr Hussain himself, and she gave reasons in her witness statement. He said to her: “I’m fed up with you. I’ve had enough of you”. This was the final straw for the claimant. She decided that she could not take this treatment anymore and said to Mr Hussain: "If I go now, you will not have to worry about it". She put on her jacket and went to leave. Mr Hussain gave her £75 in cash for the three days she had worked that week. She handed over the key and left her employment for the last time. Mr Hussain did not give her a P45.

21.19 As a result of these events the claimant's anxiety and depression intensified and she was diagnosed with a new antidepressant, sertraline 50 mg.

21.20 Mr Hussain called her numerous times to persuade her to go back to work but she refused. He continued to try to persuade her and the claimant instructed a solicitor to write a letter to tell Mr Hussain to stop calling her. He ignored the letter and it was necessary for the claimant to go to the police, who issued Mr Hussain with a harassment warning. Thereafter he stopped calling her. The claimant's sertraline was increased to 150 mg per day.

21.21 Since leaving her job, the claimant has been in receipt of Universal Credit. She has been assessed as not fit for work because of severe anxiety and depression.

21.22 Insofar as the claimant speaks of the events of July and the effect thereof on her health, her evidence is supported by her medical records, which I was shown. For instance, she was seen on 10 August, 2015 for anxiety with depression and she was issued with questionnaires to assess the level of her anxiety and depression. On the anxiety scale she scored 15/21 and on the depression scale 12/21. Her PHQ 9 score was 14/27. I saw records of the

medication prescribed for the claimant in the medical records, which substantiates what she told me about that.

Conclusions

22. I now give my conclusions. It is important that I remind myself that there is already a judgment in principle in relation to failure to pay the claimant in respect of holiday taken during her employment, failure to provide the claimant with a written statement of changes to the particulars of her employment and failure to provide the claimant with itemised pay statements. The claimant is in principle entitled to a remedy in respect of those matters.

23. However, the remedy sought by the claimant in relation to holiday pay is properly restricted to the final year of her employment, and the wording of the judgment is inappropriate to cover that entitlement. The judgment speaks of holiday taken, in respect of which the claimant was not paid anything. On my findings of fact that could only apply to the two weeks of holiday taken in December 2011 and December 2012. The claim in respect of those matters was submitted out of time. Mr Rommer appeared to accept that to be the position because, in respect of historic failures by the claimant's employer to allow her to take holiday, which could include 2011 and 2012, but which would also include 2013 and 2014, he seeks only a remedy as part of the claim for discrimination. The only outstanding holiday pay sought is for the final year of employment. I will deal with that below.

24. As regards the failure to provide a written statement of the new particulars of the claimant's employment, this is straightforward. Section 38 Employment Act 2002 provides the appropriate remedy. Liability, as Employment Judge Mahoney found, results when, at the time the proceedings are begun, the employer is in breach of his duty to provide the appropriate statement. The award will be either two or four weeks' pay.

25. As regards the failure to provide the claimant with itemised pay statements, Mr Rommer accepted that the only remedy is a declaration as to what particulars the pay statements should have included. There is no financial remedy available and Mr Rommer does not seek any.

26. With those considerations dealt with, I turned to the substantive decisions I had to make. In relation to the claims set out above in the list of issues, and apart from the matters already considered, Mr Rommer abandoned the complaints of direct and indirect disability discrimination.

Disability

27. The first question I had to decide was whether the claimant had become, by any material date, a disabled person. I accept that the claimant has had learning difficulties from an early age and that she has suffered from anxiety and depression almost as long. The evidence was contained in the claimant's disability impact statement and in medical records, in

particular the entries for 20 November, 2009, at page 178, 29 October, 2014, at page 157, 19 December, 2014 at page 156, 10 June, 2015, at page 152, and 12 August, 2015 at page 150. I am satisfied that this evidence shows the claimant had a mental impairment, for which medication was prescribed.

28. The effects on the claimant of those conditions are described in her impact statement. In relation to anxiety and depression, she cries very easily, does not like crowds or shouting voices or going to places that she does not know. I am also satisfied that her learning difficulties affect her memory and she has long-standing difficulties with reading, writing, spelling and mathematics, all as set out by Dr Kennedy in his report dated 30 September 2015. Occasionally she does not eat or sleep and is suicidal and self-harms. She has panic attacks occasionally.

29. My view is that the panic attacks, self-harming and not eating are substantial adverse effects, which are not present all the time. They are effects which are however likely to recur in her case, on the evidence presented to me. I do not agree that difficulty in sleeping is a substantial adverse effect. Her difficulties with reading, writing and mathematics are all substantial adverse effects.

30. As regards the other conditions, I think that the Graves' Disease and asthma also amount to disabilities. Fainting is a substantial adverse effect. The possible consequences of asthma attacks are well-known. Death can result. Both of these conditions are controlled by medication. I must consider the effects as they would be without the beneficial effects of medication. I do not consider that hypertension itself gives rise to any disability. Hypertension is raised blood pressure. Of itself, the claimant did not report any substantial adverse effects by raised blood pressure and I believe that to be consistent with other cases of hypertension.

31. The next question I have to consider is whether these effects are long-term. Clearly, the claimant has had these substantial adverse effects for a considerable period of time. I am satisfied that, even by 2008, those effects had lasted more than 12 months. My conclusion is that the claimant had become a disabled person long before 2008.

Knowledge of Disability

32. The next question in the list of issues was in fact the subject of a concession. At paragraph 17 of the list of issues, Employment Judge Mahoney recorded that the respondent knew that the claimant had learning difficulties and suffered from anxiety and depression for most of the time she was employed by him from 2011. I find, because it is the claimant's evidence, which I accept, that Mr Mehta also knew of the claimant's learning difficulties, her anxiety and depression. His knowledge of her disability is relevant because the claim for underpayments by reference to the National Minimum Wage is pursued as a complaint of discrimination, for which the respondent, as a successor employer is

liable. I am satisfied also that Mr Mehta and Mr Hussain also knew about the claimant's Graves' Disease and her asthma.

Discrimination Arising from Disability

33. The complaints of direct and indirect disability discrimination having been abandoned, I next considered the complaint of discrimination arising from disability. There are six instances relied upon of alleged unfavourable treatment. They are: paying the claimant at a rate lower than the National Minimum Wage; requiring her to work excessive hours each week; not permitting her to take holidays; not permitting her to take rest breaks; bullying and constructive dismissal.

34. Requiring the claimant to work excessive hours would not be unfavourable treatment if the employee was willing to work additional hours and was paid. In this case, the claimant was reluctant to work the additional hours and was not paid the National Minimum Wage for the hours that she originally worked, let alone for the additional hours. On my findings of fact, her hourly rate of pay when Mr Mehta was her employer was £4 per hour. After Mr Hussain took over, her hourly rate of pay fell to £2.71 per hour. After the increase to 58 hours per week, her hourly rate of pay fell further still, to £2.59 per hour. On any analysis, these two matters, taken together, are unfavourable treatment.

35. Furthermore, it is unreasonable not to permit the claimant to take holidays and it is unreasonable not to allow her to take rest breaks. There was bullying. All of these matters amount to unfavourable treatment. The constructive dismissal is a technical example of unfavourable treatment. It is the culmination of all the above matters. The claimant resigned, as will be seen below, because of that treatment. In terms of complaints, the constructive dismissal adds nothing to the other unfavourable treatment, but it permits the claimant to argue that her constructive dismissal was an act of discrimination, so that compensation for such a dismissal can be included in the compensation for discrimination.

36. Liability for such unfavourable treatment under section 15 Equality Act 2010 occurs if the unfavourable treatment is because of something which arises in consequence of the disability. Liability only exists if the alleged discriminator knows or could reasonably be expected to know of the disability. The submission made is that the claimant had a lack of knowledge and understanding of her rights and lacked confidence, and that these matters arose in consequence of the disability.

37. If the respondent had been permitted to take part in the proceedings, he might have said that he treats all his employees in this way. I am entitled to rely on all of my findings of fact in coming to a conclusion in relation to this matter. I found as a fact that Mr Hussain said to the claimant that she was too stupid to get another job and that was why she was working there. This demonstrates, in my view, the causal connection between Mr Hussain's knowledge of the claimant's limited intellectual ability and his treatment of her. He knew that he could treat her in the way that he did

treat her, because she lacked the insight to know that employers should not behave in that way. There is no evidence that the claimant knew her rights in relation to the National Minimum Wage. The fact that Mr Mehta and Mr Hussain were able to get away with not paying her the National Minimum Wage in the early period of her employment by them led them inevitably to think that the claimant did not understand her rights, which in turn led to further exploitation of the claimant.

38. I am satisfied for those reasons, that the claimant was treated as she was treated because of something arising in consequence of her disability, namely her limited intellectual ability and knowledge of her rights.

39. The list of issues talks about the possibility of justification. It is hard to see how the respondent could possibly justify treatment of a vulnerable woman in this shameful way, but, since the respondent was not permitted to take part in the proceedings, there can be no justification. The claimant succeeds with this part of her claim.

Harassment

40. The next matter I had to consider was the complaint of harassment. In this respect, the complaints made are as follows: that Mr Hussain shouted, swore at the claimant and banged the counter in front of her; that he belittled her in the presence of customers; that he threatened to dismiss her; that he told her that she was too stupid to get another job and that was why she was there and repeatedly telephoned her after she left her employment. With regard to the last of these, liability could arise under section 108(2) Equality Act 2010. Some of these matters overlap with the bullying relied on in relation to discrimination arising from disability.

41. I am satisfied that all of these matters are made out. The frequency is difficult to discern, although I have seen some diary entries which support the claimant's case. I am satisfied that the respondent engaged in unwanted conduct as alleged. I am also satisfied that that conduct was done with the purpose of violating her dignity and, in respect of various different aspects of her general treatment, of creating intimidating, hostile, degrading, humiliating and offensive environments for her. I believe that it is reasonable to infer from this behaviour that it was deliberate.

42. I am also satisfied that this treatment was related to the claimant's disability. The remark about the claimant being too stupid demonstrates clearly the perception which Mr Hussain held about the claimant and explains why he treated her in the way that he did treat her. The claimant's complaint of harassment is made out.

Other Claims

43. It will be obvious from my findings of fact above that the claimant was paid at rates substantially below the rate of the National Minimum Wage. Mr Hussain also unlawfully deducted some £53 from her pay in respect of the Nigerian customer.

44. I am also satisfied that Mr Hussain denied the claimant her rest breaks. Since her shifts did exceed six hours per day, she was entitled to rest breaks. No remedy is sought in respect of this matter other than through the complaints of discrimination.

45. It is true that both Mr Mehta and Mr Hussain denied the claimant the right to take holiday, or all of her holiday entitlement, but, as mentioned above, Mr Rommer concedes that there is no remedy in respect of that matter which can be pursued today. Part of the holiday pay claim is out of time and the claimant is only entitled to a payment in respect of accrued, unused holiday entitlement in the last year of her employment.

Constructive Dismissal

46. The complaints listed at paragraph 3.1.1 in the list of issues are by now familiar ground, and I do not have to repeat my earlier findings, save to say that, in my judgment, the conduct listed there amounts to treatment of the claimant that is without proper cause, and which is calculated or likely to destroy the trust and confidence that any employee is entitled to have in their employer. And so it proved in the claimant's case. The final straw consisted of the events of 30 July (referred to at paragraph 3.1.1.1). The claimant was entitled to resign her employment at that point and she did so.

47. Insofar as it might be said that she had condoned her employer's earlier behaviour and waived her right to treat herself as constructively dismissed, Lewis v Motorworld Garages comes to the claimant's rescue. The final straw revives all the conduct that has gone before so that the claimant can rely on it in order to claim that she was constructively dismissed. The claimant resigned promptly in response to the final straw event. She was constructively dismissed.

Limitation

48. The last of the events recorded in the claimant's diary, apart from the incident of 30 July were in mid-May. The claimant went to ACAS for early Conciliation on 28 September, and the EC certificate was issued by email on 28 October (Day B). The claim was presented on 24 November, less than one month after Day B. The claim was presented in time for any event which occurred on or after 29 June 2015.

49. As regards complaints of discrimination, I think it highly unlikely that the behaviour of which the claimant complains suddenly ended in May, but in any event the events of 30 July served to revive earlier events so that, taken together, they amount to conduct extending over a period within the meaning of section 123(3) Equality Act 2010. If that were to be a wrong analysis, since the claimant's constructive dismissal was discriminatory, that event makes everything else that is part of the reason for her resignation discriminatory conduct ending with the dismissal, such that the claim was submitted in time: see Nottinghamshire County Council v Meikle.

50. As to the complaints that are not pursued as part of the discrimination complaints, the complaint about constructive dismissal (where only a basic award is sought) is in time. The isolated wages claim for £53 is out of time. The failure to provide a written statement of employment particulars and the outstanding holiday pay claims run from the date of the constructive dismissal and are in time. The wages claim can only be pursued if it was not reasonably practicable for the claimant to have presented a claim (or more correctly, gone to ACAS) about that by 3 July 2015. I heard nothing about that. I think that claim must fail for that reason.

Remedies

51. I therefore come to remedies. The claimant's schedule of loss appeared in the bundle at page 66A-K.

52. The claimant seeks the bulk of her compensation through the complaints of discrimination. She does so, as she is entitled to do, so as to avoid the cap which applies to unfair dismissal compensation. Section 124 Employment Rights Act 1996 restricts the compensatory award to a year's pay. In the claimant's case, her claim for deductions from pay by reference to the National Minimum Wage and her claim for compensation for constructive dismissal are pursued under the heading of disability discrimination for that reason.

Discrimination

53. Mr Rommer presented on the claimant's behalf detailed calculations of the claimant's loss. I accept his submissions in relation to the calculation of the underpayment of pay by reference to the National Minimum Wage, although I note that Mr Rommer has not factored into his calculations the entitlement to additional remuneration provided for by section 17 National Minimum Wage Act 1998. That is either an oversight on his part, or the provision is not directly applicable where the claim is pursued as part of a discrimination complaint. Either way, I have not included the additional remuneration allowed by section 17.

54. As to the calculations themselves, they extend back to 2008. The calculations are on a net basis, because the claimant was paid in cash, so what she received was net pay. This is the right approach also if the claimant is to be compensated for discrimination in the form of failure to pay her the NMW. Mr Hussain could have challenged the calculations if he had wanted to do so in the submissions I allowed him to make, but there was no challenge from him, and I accept the calculations. The first element to the order I make for compensation for discrimination is therefore £31,014.00: see page 66A and the detailed calculations at pages 66E-66K.

55. The next element sought relates to loss of earnings consequent upon the claimant's dismissal. Her dismissal was discriminatory, so this is a legitimate claim. Before her constructive dismissal, the claimant was fit to work and did work. After her dismissal, she was declared unfit to work. I

am satisfied that the loss of earnings was caused by the discriminatory constructive dismissal. The claimant is entitled to the loss of earnings as claimed. It is based on an assumption that the claimant could not have carried on working for 58 hours per week, so the calculation is for the loss of net pay for 48 hours per week. The calculations are detailed and there is little point in my repeating them here. I accept the premises upon which the calculation is based, including assumptions that the claimant will be able to work part-time after six months and full time after a further 12 months. The claimant is the best person to judge when she will be fit to return to work. The total net loss of earnings is £38,843.00.

56. I do not include an amount for the loss of statutory rights, which is peculiar to the compensatory award for unfair dismissal, which the claimant does not seek. Nominal sums are claimed in respect of the failure to allow rest breaks and holiday, in the sum of £250.00 each. I allow these as part of the discrimination award.

57. Finally, in relation to discrimination, I am bound to consider making an award for injury to feelings. This was certainly not a one-off event. It was a consistent pattern of treatment over a reasonably long period. In some respects, it includes treatment by Mr Mehta in respect of low payments. I think that Mr Rommer is right to place this at the upper end of the middle Vento band. There was ample evidence in the claimant's evidence of the distress she was caused. I must, however, I think, factor into this award the fact that I am including compensation for failure to pay the NMW as part of the compensation. This acts as some mitigation for one element only of the discrimination. The top limit of the upper band, before the application of an 10% uplift is £18,000.00. I do not think that the upper limit is appropriate in this case. I am conscious that the upper limit should be reserved for the most serious cases to fall into that category and I do not think that this case is such a case. I consider that the appropriate level of compensation for injury to feelings is £16,500.00, to which an uplift of 10% must be added as determined in Beckford v London Borough of Southwark and Sash Window Company v King.

58. The above awards carry interest at 8%, calculated as follows, where the calculation date is 24 March 2017:

Award	**Amount**	**Period**	**Interest**
Injury to feelings:	£18,150.00	30.07.2015 – 24.03.2017: 602 days	£2,394.81
Other awards	£70,357.00	301 days to 24.03.2017	£4,641.63
Total Interest:			£7,036.44

59. Mr Rommer wanted me to make recommendations, but I can only do so if the purpose of the recommendation is to obviate or reduce the adverse effect on the claimant of any matter to which the proceedings relate. He proposed that the respondent provide a favourable work reference to assist the claimant and an apology. There is no continuing employment relationship. I agree that those steps might well assist the claimant. If the respondent is impecunious, then recommendations might be the only benefit the claimant sees from this litigation. I am willing to make the recommendations requested.

Unfair Dismissal

60. The claimant seeks a basic award only for constructive unfair dismissal. She is entitled to that. The national Minimum Wage Act deems an employee's contract to include the NMW as her rate of pay if the contractual rate is less, so the calculation is based on her deemed pay rather than her actual pay. Mr Rommer presented a calculation of this sum, which produced the sum of £377.00 per week gross pay. I do not understand why, in the calculation of the basic award, he has referred to the sum of £388.60. I agree that the weekly pay, which is less than the maximum should be multiplied by 20 to take account of her age and length of service. I think that the basic award should be £7,540.00, which is the amount included in the schedule, so Mr Rommer's calculation is correct. He has merely referred to an incorrect figure.

Employment Act 2002

61. Mr Hussain failed to provide the claimant with notice of the change to her particulars of employment, when she agreed to increase her hours to 58 per week. There are no exceptional circumstances that would make an award unjust or inequitable. I must increase the awards by the amount of two weeks' pay, and I may, if it is just and equitable increase the awards by four weeks' pay. The default relates to notice of a variation. I see no reason why the award should be any more than two weeks' pay: £754.00.

Holiday Pay

62. I adopt the calculation of accrued unused holiday pay which appears at section 6 of the schedule of loss, at page 66C. The amount payable is £1,263.00.

Uplift

63. The above awards are substantial. Mr Hussain ignored the claimant's grievance, but it was submitted after the end of her employment, not during it. I can award an uplift to any award that I make, so long, as in this case the claim includes a complaint within schedule A2 of the 1992 Act. That schedule includes complaints about unfair dismissal, unlawful deductions and discrimination.

64. The case of Chagger is authority for the proposition that awards might be uplifted by a very small percentage where the award itself is substantial.

The total amount of the awards so far is, without interest, the sum of £98,064.00. If I were to accept the respondent's submission that he has no assets or income, uplifting these awards will not benefit the claimant, who may yet receive nothing for her trouble. That will be a matter for her solicitors in the enforcement of these awards. I can award an uplift if the failure to comply with the provisions of a relevant Code is unreasonable. I can go up to 25%. Mr Rommer sought 15%. A failure to deal with a grievance during employment is much more serious than a failure to deal with one after the employee has left. The purpose of the Code and the attached guidance is to facilitate resolution of grievances while the employee is still employed. The claimant did not submit a grievance during her employment. She may not have appreciated that it was her right to do so. The employer might have argued that the claimant herself was in breach of the Code by not submitting a grievance during her employment.

65. Having regard to those considerations, I have decided not to make any uplift to the above awards.

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Employment Judge Southam

Date: 4 April 2017

JUDGMENT SENT TO THE PARTIES ON:

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FOR THE TRIBUNAL OFFICE