EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms R Ekeh **v** **London Cyrenians Housing Ltd**

Heard at: London Central
On: 3 – 14 September 2014

Before: Employment Judge Hodgson
Mr J Carroll
Ms J Cameron

Representation

For the Claimant: in person

For the Respondents: Mr P Fortune, counsel

JUDGMENT

The unanimous judgment of the tribunal is as follows:

1. **The claim of unfair dismissal fails and is dismissed.**
2. **The claim of unlawful deduction from wages is not well founded and is dismissed.**
3. **The claim of breach of contract fails and is dismissed.**
4. **The claim of unlawful direct discrimination fails and is dismissed.**
5. **The claim of unlawful indirect discrimination fails and is dismissed.**
6. **The claim of victimisation pursuant section 27 Equality Act 2010 fails and is dismissed.**
7. **The claim of harassment pursuant to section 26 Equality Act 2010fails and is dismissed.**
8. **The claim of failure to make reasonable adjustments pursuant to section 20 Equality Act 2010 is fails and is dismissed.**
9. **The claim of discrimination arising from disability pursuant to section 15 Equality Act 2010 is fails and is dismissed.**

REASONS

Introduction

1.1 By two claims presented to the London Central Employment Tribunal on 11 June 2017 and 31 October 2017 the claimant brought various claims. The claims were heard together.

The Issues

2.1 During the hearing the issues were considered. This was not a straightforward process and the detail is set out below.

2.2 The issues we have considered are set out at appendix 1. We have produced the record of the issues as given to and agreed by the parties. Where appropriate we have tidied up obvious typographical errors and we have removed the tracked changes. There are claims of unfair dismissal, victimisation, harassment, direct discrimination, indirect discrimination, failure to make reasonable adjustments, discrimination in consequence of something arising from disability, breach of contract, and failure to pay wages.

Evidence

3.1 The claimant gave evidence and relied on a written statement.

3.2 For the respondent we heard from Mr Eamon Irvine; Mr Joseph Angwella; Mr David Gambie; Ms N Akomeah; Mr Jeremy Williams; Mr Mohammed Tejani; Ms Eve Kontos; Mr John Deegan; and Ms Sally Brown.

3.3 In addition, the respondent produced statements for the following witnesses who were not called: Ms Ruth Alake, Ms Rebecca Coates, Mr James McNicholas, and Ms Shirley Williamson.

3.4 We received a bundle and various other documents, as referred to where necessary below.

Conduct of the hearing/applications

4.1 On day one of the hearing, both parties indicated they may wish to call witnesses that day, as they may not be available for the remainder of the hearing. We did not allow any witnesses to be called on the first day. The claims were not clear. We had not read the witness statements. It was unclear whether either witness would give relevant evidence, or in relation to which issue. Allowing evidence to be given before the claimant had clarified the claims risked wasting significant time by allowing irrelevant evidence. Further, there was an equal risk that the witnesses would not give relevant evidence, and as the issues were unclear, it would not be possible to determine relevance.

4.2 We confirmed that neither party had sought any witness summons. We noted that if the respondent considered that it had been materially disadvantaged, it could apply to adjourn.

4.3 On day one of the hearing, we sought to identify the issues. The parties had not agreed a statement of the issues.

4.4 The tribunal confirmed that there were two claims, 2206025/2017, and 2207571/2017. It was unclear whether the claims had been consolidated. It was agreed that the second claim dealt with the dismissal; all agreed the claims should be consolidated. The tribunal explained that they remained separate claims, but would be heard together. It was agreed both would be heard in the ten days allowed.

4.5 It was agreed that the claims were contained within four documents: the original claim form; the first schedule, as incorporated by amendment on 14 August 2017; items 3, 5, and 8 of the second schedule, as incorporated by amendment on 4 January 2018; and the second claim form.

4.6 As the parties had failed to agree a list of the issues, and as no list had been agreed by the tribunal, we indicated we would consider the four documents, extract the specific claims, and produce a list of issues, as far as practicable. We confirmed we would consider any other documents which purported to clarify the issues, as far as they were helpful.

4.7 On day one, the respondent admitted that the claimant's mental health issues were a disability. It was ordered to provide a statement setting out the impairments admitted, the effect on day to day activity, and how and when each became long term.

4.8 The respondent denied any physical disability.

4.9 On day two of the hearing, we read the witness statements during the morning. The parties were asked to attend at 12:00. The parties were given the list of issues prepared by the tribunal to consider before the hearing, which started again at 14:00.

4.10 The respondent confirmed that the issues appeared to be accurate, but further consideration would be given to the matter overnight.

4.11 The claimant's position was less clear. She accepted the tribunal had recorded accurately there was no disability claim attached to the dismissal. The claimant withdrew the allegation that the injury to her eye socket created a disability. The respondent accepted that paranoid schizophrenia, and bipolar disorder are lifetime conditions and as such, the disability occurred the moment they were diagnosed.

4.12 The claimant indicated that she did not understand the issues. She stated she did not understand the difference between victimisation and harassment. She indicated that she wished to amend, as she did not believe that the issues as set out reflected the way she wished to put her

claim. She said she wished to take advice, so she could understand the issues further. We discussed her concerns in detail. Following enquiry, we noted the claimant did not understand the basic concepts of direct discrimination, harassment, victimisation, and indirect discrimination. We explained the legal basis of each claim.

4.13 We also explained to the claimant that the purpose of the issues is to distil the matters pleaded in the claim form. The issues as drafted had been carefully extracted from the four documents that formed the claims and the tribunal believed the issues accurately reflected the claims.

4.14 The claimant wished to know whether we would be able to decide other matters of discrimination if, during the course of the hearing, we identify them. We explained that only those matters which appear in the claim form, and therefore are set out in the issues, can be decided by the tribunal. It would be an error of law to decide anything else.

4.15 The claimant did not seek an adjournment. We suggested that it would be sensible for the claimant to consider the matter overnight before the issues were finalised and she gave her evidence. We noted that the claimant should consider each of the allegations of direct discrimination, harassment, and victimisation. She should identify any specific allegations not included. Further, she should seek to provide the clarification we indicated was needed for the specific allegations. It would then be necessary to consider if amendment was needed. If the claimant wished to add further allegations of any type of discrimination, she would need to apply to amend. That application should be in writing.

4.16 It was clear the claimant had a much stronger understanding of the requirement to make reasonable adjustments. We discussed the nature of reasonable adjustments with the claimant and also the nature of an indirect discrimination claim. We adjourned at approximately 15:20 to allow the claimant an opportunity to further consider the list of issues. We indicated we would review the matter the next day.

4.17 On day three of the hearing, we checked whether the parties had reviewed the list of issues. The claimant stated she had sent a 20-page document with her response. She did not have a hardcopy. She confirmed that the documents included further extensive information. It appeared that the purpose was, in part, to add additional claims.

4.18 In order to resolve the difficulty, we considered with the claimant each of the specific allegations of direct discrimination, harassment, and victimisation. We also considered in detail the claims of indirect discrimination and failure to make reasonable adjustments. We clarified that the second claim did not include any disability discrimination claim. Following discussion, it became clear that the claimant was alleging that the dismissal was, in part, because she believed an assumption about her behaviour was made because she is disabled.

4.19 We adjourned at approximately 11:30, in order to amend the issues.

4.20 All parties agreed that there was no desire to vacate the hearing. We noted, therefore, that to the extent that the claimant had made any applications to amend, those applications could not be granted, in principle, if they would require further evidence that would lead to the hearing being vacated. As all agreed no new evidence should be needed or allowed, we agreed that it was appropriate to proceed with the cross examination, whilst the claimant further considered her position. We confirmed we would read the claimant's response, but as no further evidence would be produced, there was no reason why the claimant should not present her case.

4.21 We resumed at approximately 13:30. The parties were given the amended list of issues. It was specifically confirmed that the respondent should make its position clear, particularly on the section 15 claim (discrimination in consequence of something arising from disability dismissal). If the respondent wished to allege that any of the matters now contained in the issues required amendment, it should make its position clear by day four.

4.22 The claimant started to give evidence on the afternoon of day three.

4.23 Following day three, the tribunal considered the claimant's response to the first draft of the list of issues. The claimant's response alleged that the tribunal had curtailed the claims and had misunderstood them. Further, she alleged the tribunal had not given proper consideration to the second schedule, which had been considered by Employment Judge Tayler.

4.24 The tribunal did not accept that there had been a curtailment, or misunderstanding, of the claims. As to the second schedule, items three, five, and eight, had been allowed by way of amendment. The remainder of the schedule is not an amendment. The amendments allowed by EJ Tayler had been fully considered in the issues.

4.25 The claimant did accept the tribunal had set out the "obvious" allegations of discrimination, harassment and victimisation. In her response she had made a number of comments and produced some clarification. That response was considered carefully. The tribunal was satisfied it had included, in the second draft list, all of the relevant clarifications to the extent they did not constitute entirely new claims.

4.26 The claimant had accepted in the hearing that there was no claim of disability discrimination raised in the second claim. She appeared to dispute this in the response. On day three, the tribunal had identified that the claimant wished to allege the dismissal was a section 15 claim. It was clear this was a new claim. The elements of it were identified by the tribunal and set out in the second draft list of issues. The respondent was invited to say whether it required a formal amendment. It follows that the net result of the discussion leading to the second list of issues was that a number of the claims were clarified and expanded upon, albeit formal amendment was not required. The tribunal identified a significant section 15 claim, set it out, and dealt with the requirement for an amendment. It

follows that the claims were not curtailed, they were significantly clarified and expanded upon, including identifying a wholly new section 15 claim.

4.27 On day 4, the claimant filed an application to amend both claims. The claimant was still giving evidence; as we had previously agreed that no amendment would require further evidence, we requested written comments from the respondent.

4.28 On day five, prior to deciding the application to amend, the respondent indicated that the claimant had stated that she only wished to interview five of the respondent's witnesses, and then only briefly. We considered the second draft of the list of issues. The claimant confirmed that the second draft contained all of the claims which were detailed in both claim forms and the two amendments allowed. She confirmed that the application for amendment was to deal with the matters which had not been particularised in the claim forms.

4.29 We also considered how long the claimant would need to cross-examine witnesses. We had previously agreed, on day four, that the claimant would have approximately two days to cross-examine all of the respondent's witnesses. The respondent had been allocated one day to cross-examine the claimant and had, essentially, met that target. The tribunal noted that a number of the witnesses dealt with small or discrete points. It was not necessary for the claimant to cross-examine each witness on every aspect of the claim. It was only necessary to cross-examine on those matters where the individual could give relevant evidence. The tribunal would assist the claimant to identify the relevant evidence. The claimant requested 30 minutes to cross-examine each of the witnesses who were not involved with the dismissal. There were three witnesses who may be relevant to the dismissal. It was agreed that they would be cross examined over a period of one day (Monday, 10 September 2018.) The remaining five witnesses who would give live evidence dealt with discrete points relating to the remainder of the allegations. It was those individuals who would take no more than 30 minutes each. Having considered the nature of the issues, the claimant's representations, the witness statements of the respondent's witnesses, and the witness statement and oral evidence of the claimant, we were satisfied that this was more than sufficient time.

4.30 The dismissal itself did not raise complicated or extensive factual issues. It revolved around an allegation of misconduct that occurred at a bus stop on 30 May 2017, the subsequent investigation, and the decision. It was therefore a straightforward allegation of misconduct.

4.31 It is common for the entirety of such conduct claims to be heard in one or two days. In this case, the claimant was being given a full day to cross-examine witnesses who alleged they dismissed her because of single instant of misconduct. It should be possible to complete such cross-examination within a short period of time. Allowing a full day for cross-examination was more than sufficient, and constituted an adjustment

having regard to the difficulties the claimant may face as a litigant in person and as a disabled person.

4.32 On day 5, having considered these preliminary matters we than gave our decision on the application to amend. We considered the relevant written documents and heard brief oral submissions. We refused the application and gave oral reasons. We will summarise those reasons below.

4.33 The tribunal had spent a considerable amount time at the start of the hearing identifying the relevant issues. There were 18 separate allegations put as a combination of harassment, victimisation, and discrimination; they extended over a five-year period. In addition, there were further allegations of indirect discrimination, and failure to make reasonable adjustments. The second claim included a claim that the dismissal was both unfair and victimisation. We had identified and added a section 15 claim, which ultimately, we allowed by formal amendment.

4.34 It follows that since the original claim was issued, there had been amendments allowed by Employment Judge Glennie, Employment Judge Tayler, and by this tribunal. The claims before the tribunal were extensive and wide-ranging covering multiple aspects of the claimant's employment and her dismissal.

4.35 We considered the application to amend. The vast majority of the application was unclear and indistinct. By way of illustration, item 3 stated: "To further include all new omitted allegations or allegations that lacked clarity which the evidences are already in the bundle without adding any new further evidence from both parties?" There was reference to various further documents, including the second schedule (which had already been considered by Employment Judge Tayler) her background statement, and her position statement.

4.36 Allowing the claim to be amended to include all these documents as allegations of discrimination would have been to expand the claim in a way which was unclear and uncertain.

4.37 The claimant also raised general allegations. She wished to include old historical allegations of failure to deal with grievances, which would have potentially required significant additional evidence, and added little or nothing to the allegation there was a failure to deal with the grievance of 7 March 2017.

4.38 There was further reference to the suspension in January 2015 which added nothing to that which was already before the tribunal.

4.39 There was reference to the suspension of 16 June 2017 leading to the discriminatory unfair dismissal. This added little or nothing to the dismissal claim, but it would have potentially required an adjournment in order to get further evidence on the actual suspension.

4.40 A number of the applications to amend simply reiterated claims already before the tribunal, which themselves were unclear, e.g., there was further reference to failure to provide support following the incident of 30 May 2017.

4.41 There was a further unparticularised claim of failure to make reasonable adjustments arising out of the flexible working request; however, the basis for this was not set out and did not add materially to claim already before the tribunal.

4.42 There were further unparticularised claims that the dismissal was harassment, victimisation, direct discrimination, and a failure to make reasonable adjustments. The basis of these claims was unclear; it was not clear it added anything to the claim before the tribunal. In any event the dismissal had already been put as an act of victimisation and a section 15 claim. The basis on which it could be put as a claim of failure to make reasonable adjustments was not addressed. There was no attempt to identify the provision criterion or practice, or the material disadvantage.

4.43 There was further reference to failure to train and to promote. Had the application being granted it would have required further particularisation. In any event there were already claims before the tribunal of failure to train and failure to promote which had previously been clarified and which could be pursued.

4.44 There were applications to amend relating to cleaning, alleged physical harassment, using “commissioners, clients, staff, occupational health report on managers to initiate or build up case allegation[s].” There was no attempt to explain the nature of these claims.

4.45 There was further reference to failure to increase salary from January 2017 to August 2017, but the factual circumstances relied on were not set out.

4.46 There were unparticularised allegations about the conduct of the recruitment process.

4.47 The tribunal reminded itself that there are three general types of amendment. The first is a simple addition of facts, the second is the relabelling of facts as new claims, the third is allowing wholly new claims based on new facts. The overall process is one of balancing the hardship of allowing the amendment against the hardship of refusing it.

4.48 The tribunal was satisfied that the various amendments proposed added little or nothing to the claimant’s claims. They simply introduced further unparticularised allegations very similar in nature to those which were already before the tribunal and which were being considered in detail. On the other hand, the respondent would have suffered considerable hardship. First, it would have been necessary to spend further time trying to itemise and understand the various allegations, and to establish the alleged factual basis. To the extent there were new claims, it would be

necessary to seek further evidence. It was clear that obtaining that evidence was difficult as much of it was historic and related to individuals who were no longer employed. Therefore, it would have been very difficult for the respondent to obtain the evidence, and in any event, this would have necessitated obtaining further evidence and an adjournment or vacation of the hearing. Neither party wanted to vacate the hearing.

4.49 In the circumstances the tribunal concluded that the application to amend added little or nothing to the claims before the tribunal, but it would have had the effect of requiring yet further extensive analysis of the issues in an attempt to identify them. Such further identification would have been necessary to facilitate a fair hearing. The respondent would have been required to produce further evidence, which would have, inevitably, led to an adjournment, considerable delay, and further costs.

4.50 The amendment was refused.

4.51 Immediately following our ruling, the claimant sought to object and to "appeal." We explained that the decision was final and that any appeal would lie to the Employment Appeal Tribunal (EAT) in due course.

4.52 Following the refusal to allow the application to amend, the respondent called its first witness, Mr Eamon Irvine. The claimant did not suggest she needed longer than 30 minutes to cross-examine him. The cross-examination took approximately an hour, and the tribunal extended time. The extension of time was an adjustment to assist the claimant. Litigants in person often have difficulty cross-examining the first witness. There is a learning process, with guidance from the tribunal, individuals are often able to focus more clearly as the case progresses, and it may be appropriate to allow more time initially.

4.53 After the mid-morning break, the claimant started to cross-examine the second witness, Mr Joseph Angwella. The claimant had difficulty focusing on the relevant questions. The tribunal encouraged the claimant to focus on the appropriate issues and identified the areas where the witnesses could be relevant. However, it was apparent that the claimant did not accept the guidance. As the claimant continued to ask irrelevant questions, we used our powers to impose a timetable. After approximately an hour, the claimant was given until 12:45, approximately a further 10 minutes, to conclude the cross-examination. At 12:39, the claimant stated that she was becoming confused and she wished to have a three-minute break. When the tribunal suggested that we would take a one-hour lunch break and resume the cross-examination when the claimant returned, the claimant began to make general submissions about the conduct of the case. It appeared the claimant was not confused at the time she made these submissions. The tribunal indicated that, if the claimant was not confused, she should continue the cross-examination. However, if she did have difficulties it was inappropriate to continue to make submissions and we should break.

4.54 We returned after lunch. The claimant refused to continue with the cross-examination. The claimant said that she wished to have a "reasonable adjustment" which would allow her to "interview all the respondent's witnesses to [her] satisfaction."

4.55 As the claimant declined to proceed with her cross-examination, we considered in detail her current position, and her application for adjustments. We will give some detail of this below.

4.56 We adjourned to consider the application. At 15:00, we gave an oral judgment and refused the application for the adjustments sought. At 15:30, we asked whether the claimant was prepared to proceed with cross-examination. She refused.

4.57 The claimant then applied for the tribunal to recuse itself. The claimant identified a number of matters on which he relied.

4.58 She stated (incorrectly) that she had been cross-examine for eight hours. She alleged (incorrectly) that she had been required by the tribunal in relation to each and every question from the respondent to answer 'yes' or 'no.' She stated, (incorrectly) that the tribunal had questioned her disability. She alleged (incorrectly) that we indicated there was no evidence of disability. She alleged (incorrectly) that she had not agreed to the timetable set in the morning. She alleged (incorrectly) that it had not been agreed that the two claims be consolidated and heard together.

4.59 The claimant alleged that the tribunal did not understand her claims. The claimant further alleged (incorrectly) that she had not agreed that the second list of issues contained all of the claims in the claim form. She alleged (incorrectly) that the respondent had not objected to her application to amend. The claimant went on to say the tribunal should recuse itself.

4.60 We asked the claimant to complete a formal application setting out the basis of her allegations, so the tribunal could consider it on the Monday morning.

4.61 On day 6, we considered the claimant's application for adjustments. We gave full reasons and we will only summarise the position here.

4.62 It is the claimant's case that the medication she has taken has controlled any mental health issues, such that she has been able to lead a normal life and to function fully in her role as an employee. Beyond the claimant's reference to general stress caused by these proceedings, there is no indication that any mental health condition has prevented her full participation. There was no specific medical evidence.

4.63 The claimant sought a number of adjustments as follows: that she be able to interview all witnesses to her satisfaction; that the witnesses be required to reply to all questions 'yes' or 'no;' the tribunal should add to her time for cross-examination any time used by the tribunal in seeking clarification;

the time allowed for cross-examination of each witness be extended; and there be adjournments of at least an hour between each witness.

4.64 The claimant identified a number of reasons. Primarily, she noted that the process was causing her stress. She stated (incorrectly) she had been required to give 'yes' or 'no' answers. As she was a vulnerable litigant in person, she should be allowed to cross-examine to her own satisfaction. She withdrew her agreement that the second draft issues accurately identified the pleaded claims. She alleged the tribunal had misrepresented her evidence, in particular in relation to the events of 30 May 2017.

4.65 The tribunal must ensure a fair hearing for all parties. It is necessary to deal with matters proportionately, and to avoid unnecessary expense, and undue delay. A fair hearing must deal appropriately with the specific issues in the case. All parties should be able to participate appropriately. The claimant undoubtedly found the proceedings stressful. She remained concerned by the refusal of her application to amend and indicated that she would seek to appeal.

4.66 Those concerns should not prevent the tribunal from continuing the hearing. We confirmed that the issues had been identified correctly. It is necessary for the tribunal to control the hearing and ensure that matters are raised and dealt with properly. No party can be permitted to cross-examine on any matter for the satisfaction of that party, that would lead to difficulties in relation to fairness of the hearing.

4.67 We were concerned that allowing the claimant to cross-examine for a long period could lead to difficulties for the claimant. It would create stress. Prolonged cross-examination may make her me more stressed, upset, and possibly confused. We should avoid adding unnecessary stress to what was inevitably a stressful experience. Unnecessary stress could build during irrelevant cross-examination; it may prevent the hearing from been completed.

4.68 We had made reasonable adjustments. We noted those adjustments: first, a period of 10 days had been allowed, which is longer than would be necessary for this sort of case; second, we carefully analysed the issues and set them out in writing, the purpose was to enable the claimant to understand the precise claims the tribunal would consider and to act as a tool which can be used by the tribunal to assist the claimant present her own case; third, the claimant raised many irrelevant matters (it is inevitable from a litigant in person and this observation is not a criticism) we had given significant leeway as an adjustments to assist the claimant; fourth, sufficient time had been allowed to cross-examine the respondent's witnesses; and fifth, the tribunal had actively assisted the claimant by identifying the issues, identifying what matters should be raised with the witnesses, and by identifying the relevant evidence.

4.69 There is a balance to be struck between the legitimate attempt to assist a person, and the potential stress that the assistance may cause, if it is found unwelcome.

4.70 The purpose of an adjustment is to facilitate participation by an individual in a fair hearing. The hearing must be the hearing of the claims before the tribunal. Allowing an individual to question on any matter related to employment over a period of five years may not be appropriate. All claims must be dealt with proportionately. The adjustments must assist participation in the hearing.

4.71 It is not possible to entirely remove stress. Allowing irrelevant cross-examination which is likely to cause distress, may be counter-productive.

4.72 We had no specific medical evidence. However, we relied on the claimant's general representation that her condition is well managed by drugs and that she is able to deal with matters rationally. It did not appear to us that lengthy irrelevant cross-examination, with or without breaks, would materially assist the claimant to present her claim. Moreover, that extended and unnecessary process may cause additional stress. We considered the better way of proceedings was to minimise stress by ensuring that the claimant was able to focus on the relevant issues, and to assist her to do so. That would be likely to reduce the total stress experienced by the claimant.

4.73 We acknowledged that the claimant may find it difficult to accept the tribunal's intention was to assist. We therefore stated we would continue to provide a timetable. In general, there would be no more than 30 minutes for those individuals who were not involved in dismissal. As far as practicable, we would seek not to interfere with the cross-examination during that period. At the end of the period, we would review matters, or earlier if necessary, and provide any further guidance, unless it was clear the claimant did not wish to have any guidance. If necessary, we would allow further cross-examination. We would review these arrangements for each witness.

Application to recuse

4.74 On the morning of day six, we received an application from the claimant which identified two matters: it appealed the refusal of her application to amend; it requested the tribunal recuse itself. The claimant's application relied on a number of assertions or contentions.

4.75 The claimant continued to object to the tribunal's record of the issues. She alleged (incorrectly) that she had not agreed that both claims would be heard within the 10-day hearing. She suggested (incorrectly) that she had not been told the tribunal required a copy of her statement as a Word document. She alleged (incorrectly) we had been in contact with the respondent without her knowledge. She alleged (incorrectly) that she had not accepted the second draft of issues fully reflected the matters set out in the claim form. She suggested she had only been allowed a short time to cross-examine witnesses because we had, in some sense, agreed that the answers from the respondent's witnesses would be either 'yes' or 'no.' Neither point was true. We did not impose, at any time, on either party, an

obligation to answer only yes or no. There were occasions we made it clear to a number of witnesses that it was necessary to answer a question and confirm whether or not a proposition was accepted. However, there was no general requirement.

4.76 The claimant's written note referred to fabricated documents from Mr Joseph Anguilla, it is unclear what the claimant had in mind. The tribunal made no specific ruling on the inclusion of any document from him.

4.77 It was suggested we had failed to consider her application to amend. This is not true. The claimant took issue with the timetable, which she suggested had been imposed on her, when it had been agreed.

4.78 We were concerned to note the claimant stated she had a psychotic episode on 7 September which resulted in the brief visit to accident and emergency and medication with diazepam.

4.79 All these matters were cited in support of the request for the tribunal to recuse itself. The claimant made a further application for an "external agency" to carry out a building inspection. That application was not raised orally or pursued. It was unnecessary, and we refused it.

4.80 The tribunal refused to recuse itself. The reasons were reserved, and we deal with them here.

4.81 We must consider whether the circumstances would lead a fair minded and informed observer to conclude there was a real possibility that the tribunal was biased.

4.82 On a careful consideration of the claimant's oral and written representations, it can be seen that the application for recusal is based on a number of concerns, or allegations, as follows: the tribunal curtailed her claim; the tribunal wrongly identified the issues; the tribunal misrepresented the claimant's evidence; the tribunal undertook inappropriate case management; the tribunal required 'yes' or 'no' answers from the claimant; the tribunal failed to make reasonable adjustments; and the tribunal in some manner was complicit in allowing fabricated evidence. We will deal with each of these.

4.83 The allegations that we curtailed the claims and failed to identify the issues correctly are without foundation. We carefully identified the four documents which formed the claim, considered the relevant amendments, and identified the specific allegations and claims. Both the respondent and the claimant agreed that all claims were properly identified. The claimant's application to amend recognised she sought to add claims that had not been included. Further, we identified, codified, and allowed by amendment a section 15 claim of disability discrimination.

4.84 The assertions that we inappropriately case managed the claim and also failed to make reasonable adjustments overlap. The tribunal must make adjustments which allow a party to have a fair hearing. It is not possible to

remove all stress. It is an inherently stressful situation. The claimant's main complaint appears to be that we have not allowed extensive cross-examination of each witness. Many of the witnesses were marginal and their relevance limited. A proportionate amount of time was allocated to the claimant's cross-examination and the claimant was initially content with this. Allowing irrelevant cross-examination for a number of hours, followed by long and extensive breaks, was not reasonably necessary in this case to facilitate the claimant's participation, as ultimately, she proved.

4.85 The tribunal made numerous adjustments for the claimant including the following: listing a ten day hearing; actively identifying the factual allegations and relevant claims, and setting these out in writing so the claimant could prepare; assisting the claimant actively to identify the relevance of each witness, and ensuring that the cross-examination dealt with the relevant matters; allowing the claimant a considerable amount of leeway in the questions that she put and the manner in which he put them; allowing the claimant sufficient time to put questions; allowing breaks when requested; and explaining on a number of occasions, and as required, the procedure adopted, and the relevant principles to be applied.

4.86 There is suggestion that we misrepresented the claimant's evidence. In particular the claimant was concerned that the tribunal's summary of her oral evidence about her interactions at the bus stop on 30 May 2017 were inaccurate. Unfortunately, it was the claimant's recollection which was inaccurate. Also, her assertion that she was required, in relation to questions to give only 'yes' and 'no' answers is untrue.

4.87 The claimant's suggestion that we allowed fabricated evidence is unclear. She appears to be concerned about specific documents. However, there was no specific challenge to any document on which we had to rule.

4.88 The test is whether a fair-minded and properly informed observer would consider there was a real possibility of bias. We concluded that no fair-minded observer would consider that any of the matters relied on by the claimant could indicate any bias.

4.89 On day six, having confirmed we would not recuse ourselves, the respondent called evidence from Mr Gambie. We confirmed his evidence should be completed within 30 minutes. After approximately 15 minutes, the claimant requested a thirty-minute break. It appeared the claimant had become stressed, when Mr Gambie indicated that he had no knowledge of a particular matter on which he was being questioned. We granted the application for an adjournment. Thereafter, the claimant was able to continue cross-examining witnesses without requesting any significant further breaks.

4.90 On day six, the claimant cross-examined Mr Williams. The relevance of his evidence was limited. We initially gave the claimant 30 minutes to cross-examine him. We indicated that, as for all witnesses, if the claimant's questions predominantly sought to focus on relevant issues, and it were not possible to conclude the cross-examination in time, we

would extend the time allowed. The claimant had difficulty focusing on relevant questions, and where appropriate we sought to guide her. The claimant had requested two hours to cross-examine Mr Williams, but this did not appear to be proportionate to the tribunal. Ultimately, with various extensions, we allowed the claimant a total of ninety minutes to cross-examine him. It became clear that the claimant's questions were increasingly irrelevant and ultimately, having extended time for cross-examination on several occasions, we used our powers to bring the cross-examination of Mr Williams to a conclusion.

4.91 By the end of day six, the claimant had completed cross-examination of five witnesses and largely completed the cross-examination of the sixth witness. The remaining two witnesses had little relevance to the claims, and therefore we indicated that the cross-examination should be completed by mid-morning.

4.92 On day seven, the claimant asked the tribunal to print a number of emails. We agreed to her request.

4.93 The claimant completed her cross-examination of Ms Kontos. The claimant was also able to complete her cross-examination of Mr Deegan and Ms Brown.

4.94 The respondent explained that a number of witnesses could not be called and put into evidence statements from Ms Ruth Alake, Ms Rebecca Coates, Mr James McNicholas, and Ms Shirley Williamson. We received a doctor's certificate for Ms Williamson confirming she should refrain from work until 21 September 2018, as a result of a fractured metatarsal. We received a payslip and contract of employment which indicated that Ms Coates was an employee.

4.95 The evidence completed shortly before midday. By way of adjustment for the claimant, and to enable her to prepare her submissions, we adjourned until the following morning. Mr Fortune indicated he would attend the tribunal no later than 09:30 in the morning with hard copies of his submissions, and that he would forward copies of his submissions by email as soon as they were completed. The claimant indicated that she did not want to start till midday, as she wished to prepare her submissions and to consider the respondent's written submissions. It was unclear to the tribunal why the claimant would need such an extensive time to read the respondent's submissions, as it was anticipated she would receive them early in the morning by email. Further, they would be explained when the respondent gave oral submissions. The claimant had been given the remainder of the day to prepare her own submissions, and that should be her focus. We indicated the parties should attend at 10:00 and we would consider the matter further if necessary.

4.96 The claimant also requested that she should be permitted to record the proceedings during her submissions. It was unclear to the tribunal how that would assist the claimant, or why it would be any form of reasonable

adjustment arising out of her disability. The tribunal indicated it would consider the request.

4.97 On day eight we gave the claimant the printed emails she and requested on day 7.

4.98 Prior to the hearing, the claimant sent by email a "position statement" which the claimant agreed where her written submissions. The respondent presented written submissions of the hearing.

4.99 We considered the claimant's application for a recording of her own submissions. It was unclear how this would assist her to present her claim. We confirmed that her submissions would be recorded. If she wished to apply for a copy, she would have to demonstrate why it was an adjustment which assisted her to prepare. If we were to grant access, she would be required to enter into a written undertaking limiting the ways in which the recording could be used.

4.100 The respondent gave oral submissions for an hour. The claimant also gave oral submissions for an hour. We offered the claimant some guidance partway through her submissions. The claimant's narrative brought in many new facts and assertions. Ultimately, the claimant found the process stressful. She agreed after an hour that she did not wish to continue with oral submissions. We agreed that it would be appropriate for the claimant to put in further written submissions; those submissions would be supplied by 09:00 on Friday morning.

4.101 The claimant did file further written submissions following morning, day nine.

The Facts

5.1 The evidence presented in this case is wide ranging and covers the entirety of the claimant's employment. This tribunal will concentrate on the relevant facts. We will consider the background position, the claimant's contractual relationship, the general history leading to her being assigned to the CY project, and the specific incident which led to her dismissal.

5.2 Where necessary, we will find additional relevant facts when considering our conclusions in relation to the specific allegations.

The background

5.3 The respondent is a charitable housing association in receipt of public funds. It provides care, support and housing in London for people who may be homeless, have a learning disability, or a mental health need.

5.4 The claimant was employed as a recovery support worker from 1 February 2010 to 21 August 2017, when she was dismissed for gross misconduct.

5.5 The claimant worked in a number of projects, and throughout her employment she was involved in directly supporting clients. She initially worked at the Cherry Tree Project, until February 2011. She worked shifts which involved night work. She was on maternity leave from February 2011. When she returned, she worked at 57 Cambridge Gardens. This was a low support project that ran from 9:00 to 21:00. It did not require members of staff to sleepover. When she returned she was not required to work on a rota.

5.6 The claimant developed mental health issues. She first experienced a psychotic episode on 5 September 2011 and was diagnosed with schizoaffective disorder. She was detained under section 2 of the Mental Health Act and was treated with various medication. Since then she has had three admissions in three different mental health hospitals. In addition, the claimant has been diagnosed as having bipolar disorder. It is her case that following treatment, and self-medication, she was able to continue in her employment and function fully. In essence, it is her case that her symptoms are fully controlled.

5.7 On 6 February 2013, the claimant was assaulted leading to a shattered eye socket, which required and subsequent surgery. This injury is not relied on as an allegation of disability.

5.8 The respondent has a number of projects which cater for vulnerable adults with varying needs.

5.9 At the time of the claimant's dismissal, she worked at the project known as CY, a supported accommodation scheme for adults with learning disabilities and mental health needs. This was a high support project. It operated a rota system which included night work and sleepovers. Prior to that the claimant worked at Westway, a supported accommodation scheme for those with needs and mental health problems.

5.10 There are a number of service users who have been named during the course of the proceedings. Their specific identity is not relevant, and it is appropriate that they should be referred to by their initials. We will anonymise them as necessary.

<u>The claimant's contractual relationship</u>

5.11 The claimant's initial contract of employment records that she was employed as a recovery support worker. This contract was given to her at the start of her employment. She refused to sign it. We accept that the terms accurately reflected the contractual agreement.

5.12 The contract of employment provided for 25 days' annual leave without any increase. Her salary was £21,375 per annum, with a London allowance of £1,755 per annum for a 37.5 hour working week. The respondent would contribute 6% of basic salary into a personal pension scheme. It had an arrangement with NPI. The contract specifically states

that payment would be made when the relevant forms were signed and completed.

5.13 The normal hours of work were recorded as 37.5 hours, with core hours from 10 to 4 and a lunch break. The contract goes on to say "these rotas normally include 'sleep-ins,' weekends and early & late starts." The contract provides that staff were "expected to work flexibly according to the exigencies of the service."

5.14 On 21 February 2017, Ms Sally Brown, of HR, sent an email to the claimant attaching a copy of the original contract and confirming the claimant had been appointed as a recovery support worker. She confirmed that now the claimant was working at CY, her salary could be increased to £22,000 per annum for a 40-hour working week, in line with other support workers. The claimant was required to sign a new contract. It would be backdated to 1 January 2017. The claimant failed to agree to the variation of her contract and she failed to sign the new contract. The same email also confirmed that if the claimant did not wish to work the usual rota for CY, she should send a flexible working request. A copy of the flexible working policy was attached.

<u>The assignment to the CY project</u>

5.15 The claimant's assignment from Westway to CY occurred largely because of a difficulty which arose between the claimant and her managers. We will give further details of this in our conclusions. In essence, there was a dispute which arose about the claimant's response to an email sent by her manager, Ms Williamson. The manager's email concerned a client's finances that were not being properly managed. The client was the claimant's responsibility. The manager considered the claimant's response to be inappropriate. This then led to grievances, and ultimately the claimant left the Westway project and started at the CY project in early 2017.

<u>The incident of 30 May 2017</u>

5.16 It is common ground that an incident took place on 30 May 2017 which resulted in disciplinary action against the claimant that led to her dismissal.

5.17 In her witness statement, the claimant described the incident as follows:[1]

> **68. On the 30.05.2017, the incident that led to my dismissal took place. I was attacked by AG's friend SP, who the Respondent refers as a member of the public, SP held her bag with her both hands and hit my left eye where I had a reconstruction through surgical procedure at Barnet and Chase Farm Hospital in 2013. My only reaction was that I held SP's bag handle to prevent her from hitting my left eye again with her bag, however she started kicking me with her legs which caused me to sustain bruises on my left leg.**

[1] We have anonymised the relevant service users.

> **69. I know the attack was premeditated because I overheard AG making derogatory comments about me and saying they needed to teach me a lesson.**
> **70. On the day of the incident, I was supporting, with an outreach worker, a client of CY project. After the completion of HM's shopping we went to bus stop to catch a bus to escort HM to Pall Mall clinic for his depot injection, on reaching to bus stop AG and her friend SP were already there. We were sitting as follows: Outreach worker, HM myself, AG and her friend SP, AG and SP were already sitting in the bus stop before us. Again, I overheard AG making comments about me to SP. SP looked at me in a funny way but did not alter a word that was my first time of seeing SP. AG said, "go on" she got up from her sit and SP move to AG's original position and unleashed the above described attack on me.**
> **71. I refer the Tribunal to witness statement and police report dated 30.05.2018 for full account of the incident [1655-1658]. I requested the Outreach worker (David) to help me contact the police in which he failed to do stating that he did not witness when SP attacked me, I then requested that he call CY project to report the incident while I call the police myself. I also ensured that I acted in a way that HM (the client I was supporting) would not get involved or be affected given his risk assessment. I also advised the Outreach worker to take him back to CY project for provision of backup staff to ensure HM attended his medical appointment as planned. I knew it was safe to take him back on 1:1 because the scene of the incident was 2 minutes away from CY project where HM reside. My manager also called me when I was with the police to say he is aware that I have been attacked. The police assessed the incident and arrested SP and took my witness statement before I returned to CY project.**
> **72. Upon my return, I informed my manager Joseph Angwella and John Deegan Service manager what had happened, all the measures I had put in place to safeguard HM, I showed them the bruises I had sustained. Joseph Angwella requested that I emailed him brief summary of what had led to the incident, in which I did before closing work for the day. However, I was shocked that no one from the organisation contacted me to find out how I was coping after the incident. Rather I was on a bereavement leave when I received a letter from Jeremy Williams on 14.06.2017 to report to the head office on the 16.06.2017. I attended the appointment on 16. 06.2017 as I was requested to do. Once there, Jeremy William issued me a letter of suspension [1659-1660].**

5.18 The incident led to an investigation. The claimant's account, as set out above, was not fully accepted.

5.19 The claimant was suspended. It was proposed Mr Jeremy Williams, an area manager, should undertake the investigation. The claimant objected to him. We find he had no further active involvement in the process.

5.20 Mr Mohammed Tejani, a financial accountant for the respondent, was asked to investigate. On 14 July 2017 he wrote to the claimant inviting her to a disciplinary investigation meeting; she attended on 19 July 2017. A statement had been prepared for her following discussions after the incident. The claimant disputed making the statement and refused to sign it. She stated she would not answer Mr Tejani's questions until she had further details of the allegations. Despite further discussion, the claimant refused to answer questions.

5.21 At all material times, the claimant understood that it was the incident at the bus stop on 30 May 2017 that was under scrutiny.

5.22 Mr Tejani was unaware the claimant was disabled, and she did not raise it. On the available evidence, he recommended disciplinary proceedings.

5.23 He attended the disciplinary hearing on 8 August 2017. At that hearing she referred to disability. She alleged that the investigation report was neither free nor fair she read out her written defence. The hearing adjourned at 2:30 PM.

5.24 Mr Tejani attended a reconvened disciplinary hearing on 21 August 2017.

5.25 The disciplinary hearing was undertaken by Ms Eve Kontos, head of support services. Ms Kontos had been involved in a mediation arising from the grievance procedure in May 2017. Other than that mediation, which was unsuccessful, Ms Kontos had not been involved with the claimant.

5.26 The claimant was invited to the disciplinary hearing by letter of 20 July 2017. She was sent a copy of the investigation report, disciplinary procedure, and other documents including witness statements. The claimant's request to reschedule to 4 August 2017 was agreed. The claimant's request of 28 July 20017 to bring a friend to the disciplinary hearing was refused. The claimant did not refer to her disability as a reason for needing support. Ms Kontos believed that there was sensitive and confidential information relevant to a service user who was a vulnerable adult, and believed it would be appropriate to have either a work colleague or union representative. The claimant failed to attend the hearing at 10 AM on 4 August, but arrived at 1 PM. The hearing had gone ahead in her absence, but a re-hearing started at 1:30 PM. The meeting was adjourned and reconvened on 8 August 2017. That hearing overran and was adjourned. The claimant attended the reconvened hearing on 21 August 2017, after around 20 minutes, the claimant refused to cooperate further and left. The claimant had a right, given by letter of 20 July 2017, to invite her own witnesses to the disciplinary hearing. She did not invite any witnesses to attend.

5.27 Ms Kontos considered the written documentation, the verbal responses of the claimant, and the representations of Mr Tejani.

5.28 The claimant had been supporting a client of the CY project, MH. He was a vulnerable adult. He had potential violent tendencies and may constitute a suicide risk. He would normally be supported by two adults in the community. The claimant was working with an outreach worker, Mr Bryceland. Her plan was to take HM to a café for some tea. Thereafter, they were to visit Sainsbury's where he could get shopping, then she would take him, by bus, to a clinic, as he needed injections.

5.29 On her way to Sainsbury's, the claimant come across a former client of hers, AG who was a vulnerable adult. AG had previously complained about the claimant. AG was with a friend, SP. Little is known about the friend, SP, but it is believed that she also had vulnerabilities. AG and SP

made negative and derogatory comments about the claimant. The claimant then went with HM into the supermarket. She was there for approximately 30 minutes. When she emerged, it was her intention to go to the bus stop and take HM to his appointment.

5.30 The claimant observed that AG and SP were at the bus stop. The claimant chose to sit next to SP.

5.31 There is then a dispute as to what happened. It is accepted that there was a degree of violence between the claimant and SP. The claimant says that she was a victim and was assaulted by SP who struck the claimant with a handbag. It is the claimant's case that the claimant merely held the handbag, so that she would not be assaulted further, and let go the handbag immediately SP started to kick her. That account is not supported either by the statement of AG, or more importantly, the statement of Mr Bryceland.

5.32 Mr Bryceland took control of HM and returned to the CY project. The claimant asked for the police to be called. SP was arrested. Ultimately, SP was prosecuted. She failed to attend the magistrates' hearing and was found guilty in her absence.

5.33 No statement was obtained from SP. She was neither a client, nor an employee. She was subject to a police investigation. Mr Tejani did not interview AG. He wished to interview Mr Bryceland, but he was not available. He did obtain a questionnaire from Mr Bryceland. He also had a record of the initial responses of Mr Bryceland, as set out in the manager's report.

5.34 Mr Bryceland described the claimant as screaming, an allegation she has denied throughout. He suggested that the incident could have been avoided. The report of what AG said indicated that she had got onto the bus and that the claimant had held her friend's handbag and was having a tug-of-war.

5.35 It follows that the witnesses' accounts vary significantly from the claimant's. At no time has the claimant accepted that she screamed or shouted. At no time has she accepted that she entered into an altercation whereby she was involved in some tug-of-war over a handbag. It is her case that she held, briefly, and lightly, the handbag in order to prevent herself being hit further.

5.36 Ms Kontos considered the relevant evidence. It is clear that she did not accept the claimant's account. Where there was conflict, she accepted Mr Bryceland's account. She found that the claimant's action had been inappropriate. She was concerned the claimant had acted inappropriately, shown poor judgement, and perhaps most seriously, had failed to have any insight into her own behaviour. The claimant had been escorting an adult who was vulnerable who had serious needs. Exposing that adult to violent conflict could have caused severe behavioural difficulties with the client, which could have led to him, and others, being endangered. She

was concerned the claimant had approached AG and SP at the bus stop and shown poor judgement in doing so. An incident had occurred which had escalated. She did not accept the claimant's explanation that she was merely a victim, and was concerned that the claimant had behaved inappropriately wrestling over the bag with the member of the public and screaming. All of this had demonstrated poor judgement and inappropriate behaviour. This had exposed the client to risk and potentially brought the respondent into disrepute. The most important of her concerns was the apparent lack of insight. She concluded that the respondent could have no further trust and confidence in the claimant and decided to dismiss.

5.37 The claimant at no stage suggested that her behaviour was explained by any mental health condition. It has been the claimant's position, throughout, that her ability, professionalism, and judgement, have not been affected by any disability, as it is fully controlled by medication.

5.38 The claimant was an experienced support worker. Ms Kontos did not consider any training necessary or appropriate. She did not believe any training would prevent the incident from occurring given the claimant's lack of insight. The claimant was dismissed. She set out reasons in her outcome letter of 21 August 2017.

5.39 The appeal hearing was undertaken by Mr James McNicholas. It was not a full rehearing of all matters, but it took the form of a review. He reviewed all the relevant documentation. He held a hearing on 21 September 2017. He considered the claimant's appeal letter of 25 August 2017. He was aware of the claimant's disability and concluded it did not affect his decision. He upheld the decision for essentially the same reasons as Ms Kontos had decided to dismiss. His outcome letter was sent on 11 December 2017.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

> **Section 13 - Direct discrimination**
>
> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **"employment 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." (para 10)**

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept that there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 Harassment is defined in section 26 of the Equality Act 2010.

> **Section 26 - Harassment**
>
> **(1) A person (A) harasses another (B) if--**
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(3) A also harasses B if--**
>
> **(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,**
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b), and**
> **(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--**
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are--**
>
> **age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.**

6.5 In Richmond **Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.6 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the prohibited grounds.

6.7 In **Dhaliwal** the EAT noted harassment does have its boundaries:

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

6.8 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

6.9 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.

6.10 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

6.11 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

6.12 Victimisation is defined in section 27 of the Equality Act 2010.

> **Section 27 - Victimisation**
>
> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**

> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**
>
> **(4) This section applies only where the person subjected to a detriment is an individual.**
>
> **(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.**

6.13 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.14 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases may still be helpful. It is not in our view necessary to consider the second question, as posed in Derbyshire below, which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason for the treatment.

6.15 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. However as noted above there is no requirement now to specifically consider the treatment of others.

> **37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental… Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment".**
>
> **40. The second question focuses upon how the employer treats other people…**
>
> **41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan*'s case [2001] IRLR 830, 833, paragraph 29, this**
>
> > **does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the**

> **alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.**

6.16 Detriment can take many forms. It could simply be general hostility. It may be dismissal or some other detriment. Omissions to act may constitute unfavourable treatment. It is, however, not enough for the employee to say he or she has suffered a disadvantage. We note an unjustified sense of grievance is not a detriment.

6.17 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law.

Reasons for unfavourable treatment.

6.18 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. Of course, the questions of reason and detriment are often linked. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.

6.19 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire police v Khan 2001 IRLR 830 HL** is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.

6.20 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act.

6.21 Lord Nicholls found in **Najarajan v London Regional Transport 1999 ICR 877**, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others 2005 ICR 931** that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.

Subconscious motivation

6.22 The House of Lords in **Nagarajan** rejected the notion that there must be a conscious motivation in order to establish victimisation claims. Victimisation may be by reason of an earlier protected act if the discriminator consciously used that act to determine or influences the treatment of the complainant. Equally the influence may be unconscious. The key question is why the complainant received the treatment.

6.23 Section 23 refers to comparators in the case of direct discrimination.

> **Section 23 Equality Act 2010 - Comparison by reference to circumstances**
>
> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**

6.24 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **Section 136 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
> **(5) This section does not apply to proceedings for an offence under this Act.**
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal;**
> **(b) …**

6.25 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

> **Appendix**
> **(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**
>
> **(2) If the claimant does not prove such facts he or she will fail.**

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

6.26 The law relating to reasonable adjustments is set out at section 20 of the Equality Act 2010.

Section 20 - Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) …

6.27 In considering the reverse burden of proof, as it relates to duty to make reasonable adjustments, we have specific regard to **Project Management Institute v Latif 2007 IRLR 579** we note the following:

… the Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be evidence of some apparently reasonable adjustments which could be made.

Indirect discrimination

6.28 Indirect discrimination is defined by section 19 Equality Act 2010.

(1) A person (A) discriminates against another (B) if A applies a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

> **(c) it puts, or would put, B at that disadvantage, and**
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**
>
> **(3) The relevant protected characteristics are – age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation.**

The 'justification' test

6.29 The classic test was set out in **Bilka-Kaufhas GmbH v Weber Von Hartz** (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality principle. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see **Rainey v Greater Glasgow Health Board (HL)** [1987] ICR 129 per Lord Keith of Kinkel at pp 142-143.

6.30 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax** [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.

6.31 It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: **Hardys**.

6.32 Section 15 - Discrimination arising from disability provides:

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

6.33 Unlawful deduction from wages is prohibited by section 13 Employment Rights Act 1996.

> **(1) an employer shall not make a deduction from wages of a worker employed by him unless -**
> **(a)The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract or,**
> **(b)the worker has previously signified in writing his agreement or consent to the making of the deduction**

(2) in this section "relevant provision", in relation to a workers contract, means any provision of the contract comprised -

(a) in one or more written terms of the contract of which the employer has given the work of a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

Breach of contract

6.34 If the employee is in repudiatory breach of contract, the employer may affirm the contract, or the employer may accept the breach and treat the contract as terminated. In the latter case, the employee will be summarily dismissed. If the employee's breach is repudiatory and it is accepted by the respondent the employee will have no right to payment for his or her notice period.

6.35 In order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract **Laws v London Chronicle (Indicated Newspapers) Ltd 1959 1WLR 698, CA**.

6.36 The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal to decide. In **Briscoe v Lubrizol Ltd 2002 IRLR 607** the Court of Appeal approved the test set out in **Neary and another v Dean of Westminster 1999 IRLR 288, ECJ** where the special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." Each case must be considered on its facts.

Conclusions

7.1 In considering all the allegations of discrimination, we have looked at the individual allegations in detail. However, we have borne in mind, at all times, that we must have regard to the totality of the evidence. In considering all the allegations we have had regard to all of the evidence before us and its cumulative effect.

7.2 The specific allegations are set out in appendix 1. We have, for ease of reference, set out each allegation.

Allegation 1: by requiring the claimant to use a staff sleepover room, used by others, which does not have toilet or bathroom facilities, and which has an unbearable smell of food. [It is the claimant's case that she did not work any rota,

but had she done so she would have used the room. She says the requirement came from Mr Angwella by email in April 2017, then by Sally Brown by email, then by Mr Deegan orally after 29 July 2017]. (It is put as a claim of harassment, or victimisation. The reference to disability occurs in the context of the harassment claim.)

7.3 The CY projects required staff to work on a rota. In one shift, the staff member was required to sleepover. Accommodation was provided. There was a toilet and bathroom off an office space. Beyond the office space was a room with a kitchen area where food and drinks could be prepared. That room had a sofa bed. This arrangement existed before the claimant transferred to the CY project. It was used by all staff who were required to sleepover and it continues to be used.

7.4 The respondent's explanation for using the room is that it was necessary to have some facilities, these were the facilities which were provided, the relevant sofa bed was chosen by the staff, any alterations to the arrangements would be discussed with all relevant staff. Had the claimant started to work the rota system, as required by the respondent, she would have been required to use the room. We accept that the requirement to use the room arose because of the requirements of the rota.

7.5 It was not caused in any sense by any protected act, or by any grievance of the claimant. It follows the victimisation claim must fail. It was not harassment.[2] In no sense whatsoever was it the purpose to harass the claimant. It cannot be said it had the effect of harassment. It may be the claimant objected to the potential smell of food, or the possibility of being disturbed, although this seems to be anticipatory, as she did not at any time undertake the night shift. However, there was no medical or other evidence which would suggest that she was particularly sensitive, and the respondent's reason for requiring members of staff to sleep in that room was in no sense whatsoever because of disability. Harassment revolves around violation of dignity or creating an atmosphere which is intimidating or hostile. It may be the claimant would have preferred not to be in that room. However, the requirement in no sense was a violation of dignity or any form harassment. If there were any arguments that the claimant is particularly sensitive because of her disability, there is no evidence to suggest that sensitivity was because of a particular sensitivity to smell. There may be more general question as to whether she should have been required to work night shifts. However, that is a matter of reasonable adjustments and the allegation advanced is not that she was harassed by requiring her to sleepover at all, it revolves around the suitability of the room.

Allegation 2: by providing only one computer for staff entries. It is said this increased the claimant's stress level as a disabled employee. [This occurred after December 2017, when the claimant moved to the CY project.] It is not clear

[2] In order to prevent unnecessary repetition, we will use the words harass or harassment to include the concept of violation of dignity, and the creation of an intimidating, hostile, degrading, humiliating or offensive environment.

if this is put as any act of discrimination. (It is put as a claim of harassment or victimisation.)

7.6 Administration was part of the claimant's general duties. Part of that administration required the use of a computer. The CY project had one computer which was used by a number of staff. There may be up to 6 or 7 staff in a day. The primary function of staff was to support the clients. The amount of administration necessary would have varied from day to day. The primary focus, however, was not on administration by entry on computer.

7.7 Prior to the claimant attending at the CY project, all staff had used one computer. We cannot rule out the possibility that there were occasionally difficulties in that two members of staff may wish to use it at the same time. However, there is no credible evidence that this led to any contemporaneous complaint or grievance. We find that any conflict was not serious.

7.8 The provision of one computer, or the failure to provide more than one computer, in no sense whatsoever had anything to do with any protected act, or potential protected act, raised by the claimant. In no sense whatsoever was the purpose to harass the claimant. We cannot say that it had the effect of harassing the claimant. There is insufficient evidence that she found the arrangement a violation of her dignity or any form of hostility or intimidation. Viewed objectively, the mere fact that the resources were limited could not amount to harassment in this case. In any event, the provision of the computer, and the requirement to use it in order to complete administration, was not related to disability or any other protected characteristic. It was not harassment.

Allegation 3: unlawful deduction of annual leave from 2010. The specific allegation is unclear. (The nature of this claim is unclear, it is not clear that it is put as any form of discrimination. It will be considered as an act of harassment, direct discrimination, or victimisation.)

7.9 Before it is possible to say whether something amounts to harassment, victimisation or discrimination of any form, it is necessary to find that the the alleged action said to be some form of detriment occurred at all. In essence, we have to find that the events relied on occurred. The claimant's contract entitled her to 25 days' holiday, plus bank holidays. That did not vary. There is a total absence of evidence from the claimant demonstrating what is meant by an unlawful deduction of annual leave. The claimant fails to establish that there was any deduction of leave at all. It follows that as there is no factual basis for this allegation, there is nothing for the respondent to explain. It cannot be an act of harassment or victimisation.

Allegation 4: by allocating to the claimant 25 days' holiday and not 35. The date is from April 2012. (Race discrimination.)

7.10 The claimant alleges she was entitled to 35 days' holiday, but was only allocated 25 days. The contract is clear. She was entitled to 25 days plus bank holidays. She received that allocation of holiday. There is no factual basis for this allegation and it must fail.

Allegation 5: by neglecting the claimant's request (undated) to undergo induction or recognised training to enable her to support the tenants who rely on her appropriate support to lead a normal life. The nature and date of training is unspecified in the claim form. The claimant refers to requesting, in April 2012, a refresher course, lone working training, and PSCC training. She then refers to training following the move to CY in 2016, when the request was to Ms S Brown for CY induction and other training in January /February 2016. She alleges she spoke to Mr Angwella. (This is put as a claim of race discrimination.)

7.11 At various points in her statement, the claimant made allegations about training and the lack of training. We are specifically concerned with allegations which relate to 2012, and training on the CY project.

7.12 We have considered the claimant's statement carefully. There are several points where she refers to training related to lone working. However, at no stage does the claimant set out, in her evidence, anything which can be construed as her making a request, in or around April 2012, for any refresher course, lone work training, and PSOCC training. The claimant failed to set out the detail in her claim forms. She failed to set it out in her witness statement. There is no evidence on which we could conclude that any specific request was made; there is no evidence on which we could determine that any request was refused. There is nothing for the respondent to explain.

7.13 As regards the allegation that she made a request to Ms Brown for CY induction training in or around January/February 2016, the claimant fails to set out in her statement, or anywhere else, the nature of that request. It also follows that the claimant has failed to establish that there was any request, or that there was either express refusal, or failure to act. As there is no basis for finding that there was a failure to act on the part of Ms Brown, or refusal on the part of Ms Brown, there is no action for the respondent to explain. It follows that this claim of race discrimination must fail because the claimant has failed to set out or identify any evidence in support of these unparticularised allegations.

Allegation 6: by Dawn Atkinsall the former deputy manager of 57 Cambridge Gardens referring to the claimant as "You lot came over here to work and you do not know what we do here, this Britain"). [No date is recorded in the claim form. The claimant says it occurred on or around 23 April 2012.] (Victimisation, harassment, and direct discrimination.)

7.14 It is clear from the allegation that the claimant is alleging that Ms Dawn Atkinsall linked the reference to "you lot" to some further reference to working "here" and there being a reference to "Britain." In her statement, at paragraph 29, the claimant does refer to her using the term "you lot." However, the claimant gives no evidence in support of the alleged use of

the term in the context indicated by allegation six. No date is identified. No context is identified.

7.15 It is common ground that Ms Dawn Atkinsall did use the phrase "you lot." The evidence from Mr Jeremy Williams was clear that this was a phrase commonly used by Ms Dawn Atkinsall and ultimately, she was discouraged from using it. However, it was used in relation to groups in general, including management.

7.16 The use of the term "you lot," without more would not be enough to turn the burden. It would be necessary to look at the context. Had the claimant presented evidence establishing the term was used in relation to working "here" or working in "Britain," it may have been necessary to look to the respondent for an explanation. However, when an allegation is made which is entirely unsupported by evidence, the mere fact of the allegation in the claim form is not, in our view, sufficient to turn the burden. It is necessary for there to be some evidence presented which sets out the words used and the context. The only evidence presented by the claimant entirely contradicts her allegation and makes it plain that the use of the term was not connected either to the claimant working here, as opposed to another country, or her working in Britain.

7.17 In any event, we accept the explanation that it was a common term used by Ms Dawn Atkinsall to refer to groups including management and in no sense whatsoever was because of the claimant's race.

Allegation 7: that on a further occasion by Dawn Atkinsall grabbing a chair and saying "I have observed that you sit on this particular chair and that made me feel intimidated. The dates are unclear. (It is put as a claim of harassment, victimisation, or direct disn.) [No date is given in the claim form, paragraph 25 of the statement would suggest the incident occurred on or about 1 October 2013.]

7.18 The claimant's complaint concerns events which happened in October 2013. It is necessary to set out the context. Mr Jeremy Williams had received a complaint from a third party, Mr Ryan Bird, which related to the claimant's place of work, number 57. He complained it was hard to get hold of staff after 15:00. Staff should have been there till at least 17:30.

7.19 Mr Williams decided to meet with Ms Dawn Atkinsall at number 57 the next morning. He did not warn the claimant.

7.20 The claimant was late; she arrived at approximately 10:00. She stated there had been a problem with the trains. The claimant was asked to attend a meeting to explain. It was during that meeting that there was an incident over the use of a chair.

7.21 Whatever happened with the chair, Mr Williams evidence was the claimant became very distressed quickly and started to scream at Ms Atkinsall and cry uncontrollably. She then sat in the office and refused to leave saying things like "This is the sort of abuse I have to put up with." Ultimately, she did leave.

7.22 It is, therefore, apparent that the general circumstances involved an informal investigation concerning why it was difficult to contact staff. Mr Williams attended the claimant's workplace in the expectation that she would be there in accordance with her normal obligations. The claimant arrived late at work, and she was asked for an explanation.

7.23 As regards the chair, the respondent's explanation is that Ms Dawn Atkinsall was using the chair as a table, and it was in front of her. The claimant suggested to us that the chair was 6 or 7 feet away and not being used as a table. There is a direct conflict of evidence. We have, on the balance of probability, preferred the evidence of Mr Williams. The chair was being used as a table. When the claimant went to take it, she was requested not to. There is insufficient reliable evidence to say exactly what words were used. The claimant's allegation is that the chair was unoccupied and she was told not to sit in it because it may be seen as intimidating. We are satisfied that that was not the reason why the claimant was asked not to use the chair. It was being used by Ms Dawn Atkinsall. This is, essentially, an entirely innocuous request. We have no doubt that the claimant reacted negatively because she felt stressed. She felt stressed because it was clear that the respondent's managers were seeking to ascertain whether the project was being properly staffed. That could lead to criticism of the claimant and it was in relation to that stress that the claimant reacted negatively. In no sense whatsoever could it be said that the action in relation to the chair was any form of harassment, victimisation or discrimination. It was not the purpose to harass the claimant, it could not objectively be said to have that effect. It did not occur because of any protected act or potential protected act. It had nothing to do with the claimant race.

Allegation 8: on 28 January 2015 suspending the claimant with immediate effect. (This appears to be a complaint of victimisation). Thereafter subjecting the claimant to an unresolved disciplinary process. [It appears from paragraph 44 of the claimant's statement that this is the suspension complained about.] (Victimisation, and harassment.)

7.24 The claimant complains about the suspension on 28 January 2015. It is necessary to consider the circumstances. The claimant had written to an MP regarding a client. There was concern that this was misrepresenting the position of the respondent and it was considered inappropriate. In order to facilitate the investigation, the claimant was suspended. It is clear the suspension came about because of the claimant's action, which was potentially inappropriate. It follows that it was not because of any protected act. There is no possibility that the purpose was harassment, and given the claimant had written the letter it could not be reasonably said to have had the effect of harassing her. There were clear and appropriate grounds for suspension.

7.25 The claimant was suspended on 28 January 2015. This precipitated a formal complaint from the claimant. She was invited to attend a formal investigation meeting on 4 February 2015 and then on 19 March 2015.

The matter was complicated by a complaint by a service user, AG. It is clear that the respondent was taking steps to resolve the position. This led to a discussion where the parties contemplated the claimant's leaving.

7.26 The claimant was referred to occupational health. Her manager, Mr Mead, wrote on 19 February referring to the occupational health report. It is clear that the claimant's potential difficulties in relationships with members of staff and commissioners were discussed. No meeting led to any formal disciplinary proceedings. The claimant was invited to a meeting on 28 April 2015 and was told her period of suspension had ended and she was required to return to work. That letter of 30 April 2015 confirmed the suspension had ended and she should return on 5 March 2015. He confirmed that the disciplinary allegations were currently in process, but there was no question of gross misconduct. It is unclear whether there was a final resolution.

7.27 The evidence we received was unsatisfactory. This is an old complaint. We cannot find that there is any possibility that it is part of some form of continuing conduct. At worst, there was a failure to formally resolve the disciplinary process. It is quite clear it was not pursued. It is possible that there was some form of oral discussion. On the evidence we have before us, there is no factual basis on which we could conclude that any suspension, disciplinary process, or failure to complete a disciplinary process, was an act of victimisation. It was not an act of harassment. It did not arise out of any protected act. It was not the purpose to harass. It cannot be said to have that effect.

Allegation 9: by Dawn Atkinsall and Jeremy Williams telling a client (AG) on 22 January 2015 to raise a complaint against the claimant. (Victimisation and harassment.)

7.28 There is no credible evidence that either Dawn Atkinsall or Jeremy Williams told the client, or sought to influence the client, to make a complaint against the claimant. As there is no evidence the act occurred, no explanation has called for in the claim must fail.

Allegation 10: by Mr J Williams in February 2015 mandating the claimant to do heavy cleaning tasks as an act of retaliation and punishment for raising a complaint . (Victimisation, and harassment).

7.29 Cleaning was part of the claimant's duty. The project was due to be inspected by a funder. Mr Williams wanted to make a good impression. In fact, although this is put is an allegation from 2015, it related to events in October 2013. The claimant was asked to clean a coffee stain from the front door. All that was envisaged was sponging it down with some soapy water. It was reasonable to request her to do so. There is no evidence on which we could conclude that it was because of any protected act. There is no evidence on which we could conclude that it was the purpose to harass. As it was part of her duty and a reasonable request, it could not have had the effect of harassment.

Allegation 11: by paying the claimant £21,375 since December 2016. (This is a claim of race discrimination).

7.30 The claimant was paid £21,375. That was the amount provided for in her contract and it related to a 37.5 hour working week. The claimant was offered a new contract in 2017 at £22,000 for a 40-hour working week, consistent with her co-workers. The claimant was sent a new contract. The only reason why she was not paid the new sum was because she failed to sign the contract. It follows her original contract continued without amendment. The claimant fails to establish that she was treated differently to any co-worker. In fact, the respondent attempted to treat the claimant the same as other co-workers, one of whom was a Nigerian national, there is no fact from which we could conclude that this had anything to do with the claimant's race. We accept the respondent's explanation that the claimant was paid in accordance with her contract, and was offered a new contract which would have given her parity with her co-workers. The claim of discrimination cannot succeed.

Allegation 12: on 20 September 2016 threatening the claimant with disciplinary action and accusing her solely of responding to the email she sent to the staff team; the detail is unclear. [This occurred on 14 September 2016.] (Harassment, and victimisation.)

7.31 It is necessary to consider the background to this matter. The claimant was responsible for assisting clients to manage their affairs. Part of that process involved ensuring they were paying rent. One client for whom the claimant had responsibility had fallen into arrears. This led to an email from a manager, Ms Shirlee Williamson. This email was abrupt and stated "I am very disappointed to see so much outstanding service charge payment! Why on earth would Simon be in arrears when he has so much money?" There is no doubt that this was a direct criticism of the claimant. There is also no doubt that the claimant took it as such and she wrote an email on 15 September 2016, albeit said to be signed by all staff. The claimant's email stated, "We find the tone of your email and your approach on issues of service charge arrears wholly inappropriate and unacceptable."

7.32 The claimant's response was equally abrupt. Both emails could reasonably be described as rude. Holding the claimant to account, and the fact of criticism, had validity and foundation. The tone of Ms Williamson's email was inappropriate, the tone of the claimant's reply was inappropriate.

7.33 This led to, or contributed to, a breakdown in relations. On 19 September 2016, Ms Williamson, and Miss Akomeah, requested a meeting with the claimant. The claimant was asked whether she had written the email. The claimant indicated that she had not acted alone. The meeting deteriorated. The claimant began to shout and scream. She started to shake and point her finger. The managers had lost control of the meeting. The claimant's behaviour was unjustified and inappropriate. We accept the evidence of Miss Akomeah. The claimant made reference to going

home. In that context it was suggested that there may be disciplinary action if she did.

7.34 When we stand back and look at what happened, it is clear that there was a difficulty with the client. The claimant was responsible for that. Ms Williamson sent an inappropriate email. The claimant responded in kind. At the meeting there was escalating conflict. This led to a suggestion the claimant may be disciplined. There is no evidence on which we could find that any of this occurred because of any protected or potential protected act. We have considered whether this could be harassment. It may be argued the original email was inappropriate. However, it is not every inappropriate or unkind act which will be harassment. The escalation is unfortunate, but the claimant was at least partly responsible, and possibly wholly responsible for that escalation. It may be fair to say that the general atmosphere had become hostile or intimidating or even humiliating. However, again the claimant was at least equally responsible for that situation.

7.35 As regards the action of Ms Williamson in saying that disciplinary procedures may result, that was a reasonable response and in itself was not any form of harassment. It was not a violation of dignity. It was not humiliating or offensive in any sense. Finally, none of this related to any protected characteristic. We therefore also find that it was not an act of harassment.

Allegation 13

7.36 Allegation 13 was a repetition of allegation 11.

Allegation 14: refusing a request for flexible working made 11 May 2017. (Indirect discrimination, victimisation, and harassment.)

7.37 Following the claimant's request for flexible working in April 2017, the request was refused. We have considered the detail of this in the context of indirect discrimination (see below). We have found the reason for the refusal revolved around the business needs of the organisation. There is no fact from which we could conclude it was because of any actual or potential protected act. It was not related to the claimant's disability.

7.38 As regards disability and the relevance of this, we consider that in more detail below when dealing with the allegation of failure to make reasonable adjustments. The claimant's disability was not, in any sense, part of the reason. In any event, the purpose was not to harass. The requirement of the claimant to undertake a shift rota, when that was the normal requirement of the role, and when there was no specific medical reason why she could not do so, could not objectively be seen as harassment.

Allegation 15: on 23 May 2017 by not allowing the claimant into a Cedar house project. (Victimisation)

7.39 On 23 May 2017, the claimant escorted a client, KP, to the Cedar House project. This was an arranged visit. Ms Ruth Alake was in charge. She expected the claimant's visit, but did not know the time she would arrive. At the Cedar House project there were a number of clients who could pose a threat. When the claimant sought entry, Ms Alake observed on CCTV that the claimant was dressed in a manner which may expose her to danger of assault from a client. She wished to make the area safe and asked that neither the claimant nor KP be let in. Unfortunately, KP entered and the claimant was left outside. Ms Alake sought to make the area safe, approached the claimant, let her in, and explained.

7.40 There is no factual basis on which we could find that the action of not letting the claimant in initially had anything at all to do with any protected act, or potential protected act. The respondent's explanation is clear, cogent, and well supported. It was the manner in which the claimant was dressed which caused concern. Her entry was delayed so that steps can be taken to ensure the claimant's safety.

Allegation 16a: by not promoting the claimant following her application of 4 February 2017. (Race discrimination.)

7.41 On 4 February 2017, the claimant applied for the role of general manager at the CY project. On 27 February 2017, the claimant was invited to interview. She initially confirmed she could attend. The claimant was initially sent the wrong documentation and then that was corrected. The claimant then applied to change the date for the interview. That request was agreed to. When the claimant made a further request to change the date, it was refused and the interview for the post went ahead. It follows that the claimant failed to attend an interview. It was the claimant's failure to proceed with the interview which prevented her obtaining the position.

7.42 The claimant told us that she wished to rearrange the interview and failed to attend because she elected to meet a friend. The friend had flown in from Nigeria and was bringing perishable food which the claimant wished to collect.

7.43 There is no fact from which we could conclude that the failure to promote the claimant was because of race. The respondent has established its explanation. The claimant simply failed to proceed. The respondent had rearranged the interview; there was no proper reason to postpone it further. We also heard evidence that it was common for individuals to apply for jobs and then not proceed with the application. Therefore, the claimant's action was not unusual.

Allegation 16b: never promoting the claimant. (Race discrimination.)

7.44 There is a general allegation that the respondent failed to promote the claimant. No specific occasion was relied on. The claimant has failed to establish any evidence on which we could conclude that there was any failure to promote the claimant which calls for any form of explanation. The allegation is unparticularised, and there is no relevant evidence.

Allegation 17: by denying the claimant an opportunity to attend an interview when it had refused to adjust a scheduled interview. The claimant does not specify the purpose of the interview or the date of the interview. It is not possible from the pleadings to identify the basis of this claim. [It is unclear what is envisaged, it appears from the claimant's statement that this may be an event in 2017. It appears that this may be dealt with at paragraph 58 of the claimant's statement, in which case it refers to an application for the position of deputy manager made on or around 4 February 2017. The claimant should clarify the position.] (Harassment, and direct race and disability discrimination.)

7.45 This allegation concerns denying the claimant an opportunity to attend interview for the general manager's position at the CY project. It is clear that this allegation is the same as allegation 16a. The claimant was invited to interview. The interview was rearranged once. When the claimant sought to rearrange again, the respondent refused. We have set out the circumstances above. The explanation is an answer to any claim of direct discrimination because of any protected characteristic. The action of the respondent was, in no sense whatsoever, harassment. There was no purpose to harass. It could not objectively be seen as the effect. Having rescheduled the meeting once, it could not be harassment to refuse to reschedule an interview so the claimant could meet a friend.

Allegation 18: by the employer declining to deal with ongoing formal grievances raised (the claimant does not set out which grievances she complains about, or the dates of refusal, or the course of action). [Subject to the respondent's confirmation, we will consider this allegation as it relates to the grievance of 7 March 2017.]

7.46 During the course of employment, the claimant presented multiple grievances. She continues to allege that a number of those grievances had not been dealt with. These grievances are spread over a wide range of matters and cover a substantial part of her employment. It is apparent that some were dealt with more formally than others. Allegation 18 concerns the grievance of 7 March 2017. This contained a collection of matters, including previous allegations. That grievance was investigated by Mr Deegan and thereafter was heard. During the course of oral evidence, the claimant accepted that Mr Deegan had investigated appropriately. She complimented his approach. It is apparent that the grievance was heard and an outcome given. At no time did the claimant clarify what she meant by declining to deal with the ongoing formal grievance. It was dealt with carefully and thoroughly. Whatever form of discrimination it is said to be, this allegation must fail. The respondent did not decline to deal with her grievance.

Allegation 19: by failing to support the claimant following an assault on 30 May 2017. (Victimisation, harassment, and direct discrimination.)

7.47 The alleged assault occurred at a bus stop on 30 May 2017. This was the incident which eventually led to the claimant's dismissal, and we will consider it further below. It is apparent the claimant alleges that she was a

victim. It is unclear what the claimant envisages by saying that she was not supported. The matter was investigated. She was asked for an account. The claimant declined to give an account in the investigation hearing and was uncooperative during the disciplinary hearings. The assault itself was minor. There is no factual basis for saying that the respondent failed to support the claimant. There is no factual basis for saying that it related to any actual or potential protected act. In no sense whatsoever was it harassment. It is likely that the claimant objected to the disciplinary proceedings. However, they were appropriate, legitimate, and necessary. It was not the purpose to harass. It could not objectively be said to be the effect. In no sense whatsoever was any of this because of the claimant's race. This allegation fails.

Indirect discrimination

7.48 Mr Joseph Angwella ran the CY project. He was responsible for 17 support workers who worked on a six-week rota including the following shift pattern 07:30 to 16:00; 14:00 to 22:00 (involving occasional sleep over); 22:00 to 08:00 (waking night staff). Part of the rota involved sleeping over.

7.49 The claimant had had issues with managers which resulted in the claimant's transfer to the CY project, as we have described. Mr Angwella met with the claimant on 19 December 2016 and established her current working pattern. Initially, she was allowed to continue with a modified working pattern. The claimant did not wish to report to work before 09:00 (as opposed to 07:30) she wished to finish by 21:00, as opposed to 22:30. She could not work Wednesdays, weekends, or do sleep-ins. Mr Angharad made it clear this was a temporary arrangement.

7.50 On her transfer, she received induction training. Mr Angwella knew about the claimant's general mental health condition, as she had brought it to the attention of a group that Mr Angharad was part of, during a training session on "hearing voices." The claimant was viewed as a highly skilled and competent worker. Mr Angwella had not suspected she had any mental health issues. Mr Angwella ascertained that there was no mention in her personnel documents of any mental health condition.

7.51 In February 2017, the claimant applied for the post of deputy manager at CY. This would have required her to work the rota. It was following this that her hours were further discussed. It was clear that there had been no formal flexible working request. As a result of those discussions, the claimant made a formal request for flexible working on 21 April 2017.

7.52 On 18 April 2017, the claimant's email requested that she be transferred back to Westway and stated that any change to her working pattern because she raised a grievance would be entirely unacceptable.

7.53 The request on 21 April 2017 (R1/600) contains limited detail. She alleged it would impact positively on the service provision. She said she could be paired with individuals who do sleepovers. She further requested a

transfer back to Westway. Her reason was as follows: "I am a single mother and have a six years old son and four other children who are older. My six [year] old son is a child in need. The head teacher reported that Monday and Tuesday he appears tired in the classroom." The request for flexible working in no sense whatsoever suggested that any disability would cause her difficulty or that she was unable to make domestic arrangements which would allow her to undertake the shift work.

7.54 Mr John Deegan, Mr Joseph Angwella, and Mr Jeremy Williams considered the application and refused it. The claimant appealed their decision. On 29 June 2017 Helen Scullard gave the outcome of her appeal.

7.55 Despite the refusal, and in part because of absence and suspension, the claimant did not ever work the rota pattern at CY. She was not required to sleepover.

7.56 It is clear that there was a provision criterion or practice (PCP) which was the requirement to work the rota, this would include sleeping over when on the relevant shift.

7.57 The disadvantage alleged by the claimant is less clear. The fact that the claimant is a single parent who has responsibility for a number of children including one six-year old is not enough to establish disadvantage. There are many areas of employment where an individual is required to work a shift pattern. Frequently, there is enhanced payment. Such jobs may include factory work, security work, and the caring professions. There can be no doubt that working shift patterns has an impact on family life. Many employees, both men and women, find it difficult and intrusive. In that sense, shift work can be unwelcome. However, an unwelcome shift pattern is not necessarily a particular disadvantage. Many individuals find working shift patterns unwelcome, but they can arrange their lives to accommodate the hours.

7.58 The claimant deals with the disadvantage as it affects her at paragraph 65 of statement as follows:

> **65. On the 25.05.2017, I received an outcome letter refusing my application. Also, the letter stated that I must revert back to normal Rota pattern by the 29.07.2017, which means starting work from 7.30am to finish 4.pm for early shift, for late shift I have to start 2.pm to finish 10.30pm and then do sleep-ins. It was strange to me how my employer who knew that I was a disable worker, a single mum with six-year-old child, would expect me to I finish work at 10.30pm to get home at 12.am before picking up my son from the minder. This means myself and my son might settle for bed around 2.am, the next morning for me to get to work by 7.30am I must wake up at 5.am to get myself and my son ready, therefore will only be able to sleep only for 3 hours. It is worth noting that my contract of employment had fixed working hours. Moreover, having flexible hour is one of the recommended adjustments for disabled people. I, of course appealed against that decision.**

7.59 It follows that the claimant's concern revolves around the overall effect on her family life. In her statement she refers to disability, but that formed no part of her application. She did not rely on it.

7.60 It appears that the disadvantage cited revolves around a preference not to work shifts. There is some suggestion that it would lead to additional expense, albeit there is no evidence to suggest that was an expense she could not afford. To the extent the claimant relies on additional expense, she gives no adequate evidence.

7.61 We find that the claimant has not established that the PCP caused her a particular disadvantage. The fact that she would prefer not to work shifts is not sufficient. We accept that there are more single parents who are women. Inevitably, childcare arrangements must be made. It is likely that many women would not be able to make arrangements to accommodate a shift pattern. That could be a disadvantage, as it would affect the ability to undertake the work at all. However, it is not a disadvantage shared by the claimant. As to the preference not to work shifts, that preference may be equally shared by men and women.

7.62 It may be possible to argue that the concept of "particular disadvantage" should be given an extended meaning, which encompasses an individual's preference. On that assumption, we consider whether the respondent's requirement was a proportionate means of achieving a legitimate aim.

7.63 The aim was to provide appropriate cover in accordance with contractual arrangements for vulnerable adults. It was necessary to provide 24-hour cover. Undoubtedly, that was an aim which was legitimate. The means of achieving this was to have a rota system which was operated by a limited number of people. The only way of achieving 24 hours cover is to have some form of shift pattern. A rotating shift pattern is a common arrangement. The rota was clearly a means. Is it proportionate? Without a rota system, there is potential for overburdening some individuals, with the potential negative impact on their private lives and relationships. The more exceptions given to those wanting to avoid night work, the greater the burden will be on the remaining members of staff. It may be possible for an individual's preferences to be taken into account. The larger the organisation, the greater the possibility of having permanent shifts, or other arrangements that impact marginally on the main body of staff.

7.64 This was a relatively small organisation with relatively few people to work the shift pattern. Granting dispensation to one person would have a significant impact on the remainder of the staff. We find it was proportionate to have a starting point of requirement of working the rota. The claimant's request was based on a preference. It was clear that she could work the rota. She had made that much clear, by applying for the general manager's position, and implicitly accepting it in her application. Her application was not based on any inability to work the rota. Her application was not based on any need as a disabled person. We find that the requirement was proportionate. We therefore find there was no indirect discrimination in this case.

Disability

7.65 We have limited evidence concerning the claimant's disability. The respondent has accepted the three impairments relied on. The claimant has not produced her medical notes. She has not produced any specific medical evidence in support. The respondent had limited information about disability. When the claimant reported her disability, the respondent did obtain a number of occupational health reports. We have considered the final report obtained dated 15 November 2016. This report raises a number of questions about the exact diagnosis. The report confirms the claimant's condition was controlled, and was having no specific material adverse effect; she required no specific adjustments.

7.66 The respondent had specifically asked whether the claimant had a history of mental illness and had requested a diagnosis. The occupational health report does not identify any specific diagnosis it records the following: "Various possible diagnoses were muted [sic] including post-natal depression, possible bipolar disorder or possibly a first psychotic episode." It reports no specific difficulties and states the claimant reports no further episodes. It concludes as follows:

> **At the end of our discussion, I explained to Rosemary the questions that you have asked me.**
> **1. Rosemary does have a history of mental health problems, although there is no evidence that this is active or will be particularly relevant in her current situation in my view.**
> **2. Please see my narrative above regarding the possible diagnosis.**
> **3. I have no concerns about her working based on the evidence today as a Support Worker. If there were now or in the future episodes where you felt voices were raised and Rosemary is more emotional than you might expect in a particular circumstance, then I would be quite happy for you to follow your normal processes in that regard if necessary without recourse unless any other issues arise to occupational health.**

7.67 It follows there was nothing in the report which suggested that the claimant was suffering any particular difficulty, or needed any specific adjustment. At that time, it was not raised whether the claimant would be able to undertake shift work, but there is no suggestion that this would present any difficulties.

7.68 In summary, the report is consistent with the view that the claimant's condition was well-controlled and required no adjustments.

7.69 The respondent obtained no further occupational health report concerning the claimant. The respondent did, around June 2017, request the claimant give permission for a further occupational health report. The claimant refused.

Reasonable adjustments

7.70 The nature of the allegation that there was a failure to make reasonable adjustments is unclear. It appears the PCP is the requirement to work the

rolling rota with night-time work. The disadvantage revolves around the impact on her ability to sleep causing unnecessary anxiety and tiredness, and an exacerbation of her condition. It is said the adjustment is the granting of her flexible work application, which would remove the need to work nights.

7.71 The duty arises when the provision criterion or practice places the disabled person is a disadvantage in relation to a relevant matter when compared to others without that disability. There is insufficient evidence to say this claimant was placed at any disadvantage because of her disability. Her argument relies on an assumption that she would be unable to sleep. There is no medical evidence in support of that. Further, it is suggested the night work, and consequential stress caused by inability to sleep, would exacerbate her condition, particularly affecting her ability to think and concentrate. There is no medical evidence in support of that. We note the claimant is on medication. There are occasions when medication could make it difficult to work nights or any form of shifts, but it cannot be assumed that all medication will have that effect. There is no medical evidence supporting the claimant's contention. It follows there is no medical evidence in support of the claimant's assertion that working a shift pattern would disadvantage her as compared to those who do not have her disability.

7.72 The fact that there is no medical evidence in support may not be fatal. The employer and the tribunal should take due notice of the claimant's assessment of her own condition. For example, an individual who is unable to stand should not need medical evidence to prove that there is difficulty accessing high shelves. Equally, an employer is not bound to accept that any preference shown by an employee demonstrates a substantial disadvantage. There are times when it will be necessary to have medical evidence to determine when a disabled person is at a substantial disadvantage compared with others. Even if the employee genuinely believes the preference arises from disadvantage caused by the disability, that may not be sufficient.

7.73 If we were wrong about that, we would have to consider whether the duty had been breached. What is clear is the available medical evidence did nothing to suggest the claimant was unable to work the rota. It is possible that shiftwork would have been more difficult for the claimant because of her disability. That possibility was recognised, and the respondent sought to approach it in two ways. First, consideration was given to her returning to her original work at Westway. Those discussions were under progress and had not been resolved, largely because of the other difficulties arising out of the claimant's grievances and the disciplinary arising out of the incident on 30 May 2017. Second, the respondent did recognise the potential need to obtain further medical evidence and the claimant was asked for her consent on or around 8 June 2017. She refused her consent.

7.74 Where a possibility arises that reasonable adjustments are needed, there may be a process of investigation. In this case, the respondent preserved

the position. The claimant was not required to start the rota work whilst the respondent reviewed the position. Part of that review was to seek further medical evidence. The claimant refused to cooperate, and so the evidence was not obtained.

7.75 Had there been medical evidence in support of the claimant's position, we would have needed to go on to consider whether the position adopted was reasonable.

7.76 It is difficult to see how a refusal would be unreasonable in the context of this employment. The employer had limited resources, obligations to funders, and contractual obligations to other members of staff. Moreover, the respondent was suggesting another solution, and we do not accept that the reasonableness of a specific adjustment can be wholly divorced from the reasonableness of accepting an alternative. It is also important to consider the timing. Where it is reasonable to consider the exact medical need, the duty may not be breached whilst reasonable time is taken to explore the possibilities.

7.77 In this case there was insufficient evidence to establish that the duty had arisen. The duty had not arisen because there was no disadvantage in comparison with those without the claimant's disability. In any event, it was not reasonable to have to make the adjustment in the absence of clear medical evidence, such as may have been established by an occupational health report. There was no breach the duty to make reasonable adjustments.

Breach of contract

7.78 The claimant has given no meaningful evidence in support of an allegation that there was unlawful deduction of annual leave. The respondent gave the claimant leave in accordance with the contract.

Wages

7.79 The claimant has given no meaningful evidence in support of an allegation that she should be paid for voluntary work. This claim has, effectively, not been pursued and must be dismissed.

The dismissal

7.80 The final matter we need to consider is the dismissal. We have set out the basic circumstances in our finding of fact.

7.81 The first thing to consider is whether the respondent has established a reason related to conduct. The reason revolves around the claimant's conduct on 30 May 2017. The claimant was supporting a vulnerable client. Whilst in the street, the claimant had been goaded by a former client and her friend. Approximately 30 minutes later, when she left Sainsbury's supermarket, she saw the former client and a friend at a bus stop. She was accompanying a client to a medical appointment and

needed to catch a bus. The claimant chose to sit next to the former client and her freind. There was then an incident.

7.82 The claimant's subsequent account that she was an innocent victim who reacted moderately was not believed. It is clear that it was believed the claimant had lost focus on her responsibility for the client. The key facts relied on were believed, and the reason is made out.

7.83 The next question is whether there were grounds for the belief. It was never disputed there had been an incident. The claimant alleged she had been assaulted. Therefore, there had been an incident between the claimant and a member of the public. There was no doubt the claimant was supporting a vulnerable client, and her duties and responsibilities were clear. The claimant's own evidence, to the extent that she gave it, confirmed that she had been goaded by the former client and her friend before she went into Sainsbury's and then had chosen to approach the bus stop, even though she knew that they were there. The claimant's own evidence confirmed that she was not the person who had taken responsibility for the client, HM, after the incident, but instead focussed on telephoning the police.

7.84 There was only one general area of dispute, and that was how far the claimant had caused the conflict, or had reacted inappropriately. There were a limited number of witnesses. There was the former client who had needs, and whose evidence may not be entirely reliable. Her account, to the extent it was taken, suggested that she had boarded the bus and when she turned around the claimant was involved in a tug-of-war with her friend. The client, HM, was not an appropriate witness. There was no indication there was any CCTV. The member of public was subject to a potential prosecution and it was believed the police would not cooperate with any request for information.

7.85 There were two people who were in the best position to give evidence. The first was the claimant. The second was the outreach worker with whom she was working, Mr Bryceland. The claimant gave an initial account to her manager, Mr Angwella, and that was recorded. This led to a statement being prepared for her. When she attended the investigation meeting, she refused to sign the statement; she refused to answer questions. Thereafter, at the disciplinary she continued to refuse to cooperate. It follows that the claimant gave an incomplete account initially and thereafter was unwilling to expand upon, or clarify, her explanation.

7.86 Mr Tejani had wished to interview Mr Bryceland, but there were difficulties and ultimately, he sent a questionnaire. The response to the questionnaire was not supportive of the claimant's account. He believed that the incident could have been avoided. Most importantly he described the claimant as screaming. This contradicted the claimant's assertion that she remained calm at all times and that she had briefly taken hold of the handbag to prevent herself from being hit.

7.87 It follows that there were grounds for the belief. The next question is whether a sufficient investigation had been undertaken. The investigation must be sufficient to establish the relevant grounds for the belief. Where there is conflict, it is appropriate to seek relevant evidence. However, there is no absolute rule which says all individuals must be interviewed either by the investigation officer or the person dealing with the disciplinary. An investigation is reasonable if it is one that is open to a reasonable employer. What is reasonable in any particular circumstances must depend on all the facts, including the nature of this dispute. When an individual employee is obstructive, that may also be taken into account when considering whether the investigation was reasonable.

7.88 With all disciplinary matters, when the investigation is undertaken and when the disciplinary occurs, it is necessary for the accused to have sufficient knowledge of the circumstances relied on to be able to prepare a defence. The claimant accepted in her evidence that at all time she knew that it was her conduct of the bus stop on 30 May 2017 that was in issue. She knew that she was being asked to account for, and justify, her actions. It is clear, in that context, that the claimant's refusal to cooperate, which started initially at the investigation meeting and continued throughout the disciplinary process, was significant and was obstructive. There is no reason to believe that the claimant's approach was anything other than a rational and conscious decision. In that context, the respondent was not alerted to any specific lines of enquiry that the claimant would suggest relevant.

7.89 The potential relevant witnesses were identified. It was reasonable for the respondent to take the view that Mr Bryceland was by far the most important witness. He was not directly interviewed by the investigating officer. However, he had been spoken to at the time of the incident and a written statement was obtained from him. He was able to confirm that the claimant had approached the bus stop when the former client and a friend were there. That was, in any event, not disputed. The only point of dispute was how far the claimant reacted inappropriately to the contact with a member of the public. In that context, he confirmed the claimant had become involved to a significant extent and had screamed at the member of the public. It is arguable that further steps should have been taken to interview him to clarify the matter. However, the claimant's reaction was only one part of the account, and possibly not the most important part of the reason for the decision to dismiss. In these circumstances, given the claimant's lack of cooperation, and therefore her lack of contradiction of Mr Bryceland's account, the clear surrounding circumstances, and the clear written statement from Mr Bryceland, the investigation undertaken was one which was reasonable, and it was open to a reasonable employer.

7.90 The final question is whether the respondent was reasonable in treating that reason as sufficient to dismiss. The main concern was not the nature of the claimant's involvement with the assault. That was an important matter, but it was symptomatic of a more general lack of judgement. The claimant's main duty was to look after a vulnerable adult who may become

violent, behave unpredictably, and even potentially suicidally. When the claimant knew that she had been goaded by a former resident and a friend, she should have been on guard. When she observed them at the bus stop, it was poor judgement to sit next to them and it is not surprising that there was thereafter some form of argument or altercation. The claimant could have walked away. She could have gone to another bus stop. She could have avoided this situation completely. When the situation had arisen, she lost focus on the client and instead became focused on having the member the public arrested, even though the assault was transitory and of a minor nature. Mr Bryceland was left to take control of the situation and to ensure the safety of the client. All that may not have justified dismissal, but the claimant, during the investigation and the disciplinary, showed no insight into the inappropriate nature of her own conduct. Ultimately, it was that lack of insight which underpinned the reason for dismissal.

7.91 Ms Kontos did consider whether the claimant could be given training. However, she did not believe that the training would remedy the serious lack of insight. The claimant was an experienced worker. No specific training the could be identified. Ms Kontos could not be satisfied that the claimant would not act in a similar way in the future. Repetition of the claimant's behaviour could have had serious consequences. It was a matter of luck that the claimant's actions had no serious consequences for the client. Ms Kontos dismissed. That dismissal was within the band of reasonable responses.

7.92 The appeal undertaken was clear and appropriate. It reviewed the matter. The claimant had an opportunity to put forward further arguments. No new arguments were identified. The appeal was upheld for essentially the same reasons as the dismissal.

7.93 We can identify no procedural error or substantive error which could lead to a finding of unfair dismissal. We therefore dismiss the unfair dismissal claim.

7.94 It is also said that the dismissal was a section 15 act of disability discrimination (discrimination in consequence of something arising from disability). It is alleged that Ms Kontos assumed that the claimant behaved in a particular way because she assumed the claimant acted aggressively and participated in the altercation. It is said that assumption is based on the perception of people with the claimant's disability. That allegation is unsustainable. There was clear evidence as to the claimant's conduct, involvement, and reaction. Ms Kontos made no assumptions about the claimant's conduct. The claimant, therefore, was not dismissed for a matter arising in consequence of disability. We should add, that it is the claimant's case before us, and has always been the claimant's case throughout, that her conduct did not arise in consequence of her disability. Had the claimant accepted that her conduct was inappropriate, had she made the suggestion that she behaved inappropriately because, in some manner, her judgement was impaired, even temporarily, by her disability it may have been possible to argue that the dismissal arose in consequence

of something arising from her disability. However, that was not her case, and has never been her case. Had it been her case, it may have been that dismissal would have been a proportionate means of achieving a legitimate aim in any event, but such a conclusion may have turned on a careful analysis of evidence as to whether the disability would lead to a repetition of the behaviour.

7.95 It follows that the claim is not made out.

7.96 It follows all the claims have been dismissed. It is the respondent's case that a number of these allegations are out of time. The claimant has asserted that there is a course of continuing conduct in any event and so no allegation is out of time. It is sometimes very difficult to consider whether there is an ongoing course of conduct without considering each of the allegations. Where, as in this case, and while having regard to the totality of the evidence, no single allegation is found to amount to discrimination, it is a pointless task to go on and consider whether there is a course of conduct which links them. There is simply no discrimination, and no associated course of conduct. As we have received the relevant evidence, and considered each of the allegations substantively, it is now a pointless exercise to consider whether time would be extended in relation to all or any of them. We therefore reach no decision on whether it would be just and equitable to extend time in relation to all or any of the allegations. Should we be wrong in relation to our analysis of any matter, the time point would remain open for consideration.

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Employment Judge Hodgson

Dated:.. 13 November 2018

Sent to the parties on:

14 November 2018

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For the Tribunal Office