Case Numbers: 3200544/2017
3200545/2017

JJE

EMPLOYMENT TRIBUNALS

Claimant: **Ms K Hamad-Okunnu**

Respondent: **The London Borough of Waltham Forest**

Heard at: **East London Hearing Centre**

On: **14 -16 February 2018**
20-23 February 2018
26-27 February 2018
28 February & 05 March 2018 (tribunal only)

Before: **Employment Judge Prichard**
Mr D Kendall
Mrs B K Saund

Representation

Claimant: In person
Respondent: Mr S Harding counsel – instr. By Mr M Springer, Solicitor, Legal Services LBWF

JUDGMENT

It is the unanimous judgment of the tribunal that the claimant's complaints of disability discrimination - direct discrimination, harassment, and victimisation - fail and are all dismissed.

REASONS

1. The claimant Ms K Hamad-Okunnu is now 49. She was employed by the respondent, London Borough of Waltham Forest, for over 5 years from 17 August 2011 until 27 February 2017 when she (and her team) were all dismissed by reason of redundancy. The Parking Appeals Service in which she was employed was disbanded. The work was transferred to NSL whose operation is now run in Dingwall, outside Inverness.

2. The claimant makes no dismissal complaint of any sort in these proceedings. No unfair dismissal, no discriminatory dismissal. Her complaints are of alleged disability discrimination taking place over a period just over a year, mid February 2015 to 10 February 2016 but then resuming again from 31 January 2017 until just before the termination of her employment on 27 February 2017.

3. The case was originally case managed on 13 October 2017 in preparation for the final hearing. There was a preliminary hearing before Employment Judge O'Brien.

4. It has been resolved at this hearing that it is best to go by his summation of the issues in the case. We revert to that nearer to the end of the judgment to make sure that we have decided everything it is our duty to decide. Judge O'Brien specifically identified the types of disability discrimination as direct, harassment, and victimisation

5. Note there is no claim for a failure to make reasonable adjustments. Nor is there a claim under Section 15 of the Equality Act 2010 for discrimination because of something arising from a disability.

6. The parking appeals service had been run by the respondent council until the whole service was contracted out. Some of the senior managers who have appeared before us are still employed by the council as contract managers or supervisors, overseeing the contracted out work.

7. The claimant had worked for the parking appeals service as an agency worker before the above employment started. She was then covering vacancies which had arisen in the team. She was advised by Cheryl Power to apply for a permanent role when one came up. She did apply and she was successful.

8. In this case the tribunal heard evidence from the following witnesses, the claimant herself, Mr Richard Gull GMB representative, who represented her in her grievance appeal.

9. From the respondent's side we heard from Emma Fall, the principal witness, a team leader in parking services. We also heard from Lorraine Maynard who managed the team overall. She was the successor to Sue Kirkland who had been the original manager when the claimant was first employed.

10. We heard from Neil Howard who was employed in a separate directorate, the general CCTV section, who was tasked with hearing the claimant's grievance (or FAW – Fairness At Work procedure). He is the CCTV and control room manager, currently reporting to the Neighbourhoods directorate.

11. We heard from Jane Custance, Director of Strategic Planning, who heard the claimant's appeal against the grievance outcome, and we heard from Cheryl Power who is LBWF's Principal Finance Officer, who was located with, and worked beside, the parking appeals officers.

12. The parking appeals team consisted of 8 individuals all of whom have featured in this account as all of them are invoked by the claimant as comparators, as well as her reliance on a hypothetical comparator. They are 1. The claimant, 2.Julia Roberts, 3. Francesca Sharpe, 4. Li-ja Zu, 5. Regina Ntim, 6. Daniel Jones, 7. Zoe Fitzgerald, 8. Rula Leila 9. Gori Falorami 10. Alec House (who had different duties but for some purposes is used as a comparator and a colleague for the claimant's disability discrimination claim).

13. The work of Parking Appeals Officers is of various types. They consider representations made by members of the public who have incurred penalty charge notices (PCN's). Under the procedure, the motorists can make representations against the enforcement of this fine. The fine is £65.00 and remains so if the fine is paid within 14 days. If it is not paid within that time, it doubles to £130.00. If a car is removed ("removals") and taken to the pound, there is a release fee of £200.00 in addition to storage charges per day. In practice some vehicle owners / keepers do not reclaim their vehicles. These are then scrapped or otherwise disposed off by the council at council expense.

14. The entire parking system and the referrals are based on a computer software system known as Si-Dem. The referrals to the parking appeals service are inputted by NSL the company who now runs the entire appeals service and enforcement. They scan all appeals in so emails cannot be directly loaded onto the system. They are printed, scanned and input in that way, as are handwritten representations too.

15. Throughout the hearing we were taken repeatedly to the Si-Dem screens to understand the system from which the claimant's principle complaint relates – work allocation. Team leaders allocate or refer cases to parking appeal officers. There is first the queue management screen which breaks cases down into case type, e.g. contractor cases (NSL), civil enforcement officer (CEO) cases, and double jeopardy cases. The largest queue is incoming correspondence. There is incoming correspondence at charge certificate stage, incoming correspondence debt registration stage, and then incoming correspondence pre-notice to owner, and also incoming correspondence bailiff stage.

16. It was a revelation for the tribunal to see how many people progress deep into the enforcement stages of the process. It is far from exceptional. There is also a mixture of moving traffic and on-street offences. The moving traffic offences include such as entering box junctions and bus lanes.

17. Quite apart from the work queues, mentioned are the far more time consuming duties involved with the parking tribunal. Parking appeals officers are responsible for preparing packs to present the authority's position when owners/drivers appeal to the parking appeal tribunal. These referrals were known as PATAS referrals (Parking and Traffic Appeals Service) but later became known as ETA packs (Environment & Traffic Adjudication).

18. The claimant's principal complaint centres around work allocation and specifically around work allocation from Emma Fall, team leader during the periods complained about, February 2015 to February 2016 and subsequently a year later from 31 January 2017 until the end of her employment.

19. Her case theory on direct discrimination is that Ms Fall as her team leader allocated an excessive and disproportionate amount of lengthy time consuming cases to her deliberately in order to exploit her known disability, chronic fatigue syndrome (CFS) to make her fail, and to do her harm. She states the amount she received was considerably greater than her comparators received, or than a hypothetical comparator would have received.

20. Originally she particularly singled out Julia Roberts and Daniel Jones as comparators with lighter case loads. It has now become clear that her case is not restricted to them by any means. All other members of the team were cited by her at one time or another.

21. The second main part of the claimant's complaint refers to the telephone rota. Some time before the period covered by the complaint, the team manager introduced a telephone rota to ensure fairer allocation of calls between the team members. There was a tendency for some team members not to pull their weight on the telephone and to ignore ringing telephones to the cost of those who were more conscientious and were not prepared to let it ring.

22. There were two lines, the most busy line ends 2656 and that number is apparently the number given on the signature address block of the parking appeals officers in any emails which they send to owners. There is a secondary number which ends 2661 which those who know, e.g. NSL, will dial. Those who come through the switchboard rather than using the direct dial may also be transferred to 2661.

23. The 2656 line is the primary line and considerably more busy than the 2661 line. Although 2 people are rota'd to be on the telephones for any given working day, Monday to Friday, apparently the allocation of one of those people to 2656 is left for the two appeal officers to sort out between themselves or for the team leader to make a decision. After extensive questioning from the tribunal, we established this was an *ad hoc* arrangement.

24. We looked at an email dated 23 December 2013 regarding the telephone rotas and answering the phones. It was from Emma Fall to everyone within the parking services including the enforcement section and Cheryl Power. It emphasises that it is the duty of anyone and everyone in the department, between 9.00am and 5.15pm, Monday to Thursday and 9.00am to 5.00pm on Friday, Must answer the telephone within 3 rings. If they could not take the call they should take the caller's details and advise them that someone would call them back. This applied to all staff including management. It included instruction to take lunch breaks at separate times. Also to ensure that 2661 and 2656 were diverted to PAOs' extensions. Also if they had to leave the office, to let other staff know. Also, to pre-arrange to swap a rota'd phone day with another staff member if planning to take the day off. And any staff who were not on PATAS/ETA duty had to assist with taking calls. As Ms Fall stated, when the claimant left for the day, say at 4.00pm, other members of staff would have had to continue picking up the telephones.

25. A considerable number of appeals officers work from home. This work lends itself to home working and a degree of flexibility is encouraged. There has to be a minimum number of people in the office between core hours, if only to answer the phones. The lines are stated to be open from 9.00am till 5.00pm, and appeals officers must be

available. The phone lines are not part of a modern advanced telephony system. If somebody is already speaking on 2656 and there is another incoming call on the same number, it will give an engaged tone. There is no system, as is common in many workplaces, for an incoming call to hunt for a vacant extension.

26. Those who work from home do not have the additional task of printing off and enveloping the letters they send out. That task must be carried out by appeals officers who are in the office. This is one of the reasons why there are differential targets.

27. The only targets / performance metrics we have heard about are that those in the office should generate 5 letters per hour in response to representations, each averaging twelve minutes. Those working from home have a higher target of 6 letters per hour because of fewer distractions, averaging 10 minutes. It is a theme to which we shall return time and again. Apart from this metric, the claimant seems to have set herself exacting performance standards that were neither measured nor expected of her.

28. As part of the general background of this case, the respondent said consistently throughout her employment and through this tribunal case that there is no criticism of the claimant's work - the output or the quality. We have been shown a vast amount of undigested data, management output statistics which were not visible to the claimant at the time she was employed.

29. We have also seen several Excel spreadsheets which the claimant compiled in an attempt to demonstrate "patterns" of disproportionately heavy allocation of lengthy cases to her. Those Excel spreadsheets have all been compiled manually from system generated records on Si-Dem of the precise timings of referrals. They clearly represent days and weeks of the claimant's time. The claimant states to the tribunal that she did all this work in her own time and that even if she was compiling these in the office, it would not have been in her booked work time.

30. We have also been shown many screen dumps which have helped us in the important task of understanding how Si-Dem works and the mechanics of work allocation.

31. An important source of information has been the flexi-timesheets for the entire team and its managers Lorraine Maynard and Emma Fall. Those extra flexi sheets were produced just before the first weekend of this hearing allowing the claimant Saturday, Sunday and Monday (17 - 19 February), to study them in order to develop her case for unfavourable comparisons. In the event she has not used the material on those sheets at all.

32. The sheets were produced in response to a request from the claimant that they be produced saying that the disclosure was uneven without them. She stated she did not know what she was looking for. Therefore, this would clearly rank as a "fishing exercise". However, exceptionally, the respondent made no objection, and the tribunal allowed it.

33. It is true, as the claimant says, that the respondent had disclosed some leave sheets - Daniel Jones and Julia Roberts - as they had been actually mentioned by name in Judge O'Brien's summary of the issues. By contrast, it was now fair and right to provide the

reverse side of the claimant's own sheets because many of them did state on the front "see reverse".

34. The claimant's disability for the purpose of these proceedings is Chronic Fatigue Syndrome CFS.

35. At the stage of the Judge O'Brien hearing it was agreed by the respondent that the claimant was a disabled person by reason of this condition. The focus of the claimant's complaint has been this particular condition, which is exactly what it says it is.

36. She has been under a specialist consultant in St Charles Hospital, Ladbroke Grove. We have seen a report of 22 October 2014. The claimant had been treated that year for iron deficiency anaemia. She had received a CosmoFer iron infusion which is a one-day hospital based procedure – it is a drip by canular. She had had a period off sick from 6 August 2014 to 27 August 2017. Her return to work, like all her returns to work, was phased. For sickness purposes she was then under the management of Lorraine Maynard. The claimant's diagnosis at this date was uterine fibroids, iron deficiency (now treated), recurrent sinusitis and "possible" chronic fatigue syndrome.

37. Subsequently she was referred to a specialist Dr Jane Maine, a consultant in Hepatology and Infectious Diseases at St Charles Hospital. She later provided a report on the 23 July 2015. After that the claimant's diagnosis was confirmed as chronic fatigue syndrome as the leading diagnosis. She was referred by Dr Maine for CBT subsequently, on 16 October 2015 there was a report from a psychiatrist specialist registrar, Dr Nattrass who wrote a report for Dr Maine. The tribunal was not specifically referred to this but it strikes the tribunal as significant that the report it does mentions the allegations that have formed the claimant's tribunal complaint here.

38. It is a theme of the claimant's illness that she does not help herself. She has been seen to overdo it at periods where she is not chronically tired is also against medical advice. She feels frustrated by the condition which she described to Dr Nattrass as a "weight around her neck". She had previously been more active and visited the gym regularly. She made up for low energy by drinking "Boost, Red Bull, extra coffee, and Solpadine Max" (the latter is a mixture of paracetamol, codeine and caffeine.

39. The tribunal marvelled at the hours the claimant was working at the same time as she must have been compiling her Excel spreadsheets. She was "collating evidence", as she put it, which was subsequently used in her grievance and for this tribunal hearing too.

40. The claimant's condition of CFS seems to have started in the aftermath of the iron deficiency episode sometime in September 2013. Dr Nattrass significantly reported:

"She would be very critical about her own performance and catastrophise if she may any mistakes at work. She was hopeful about trying the CBT approach to address her negative cognitions and to help with her CFS symptoms "

The doctor also advised that the claimant should cease using Solpadeine (which was the strongest of the stimulants she was using).

41. In a subsequent report the next year in September 2016, the claimant's CBT therapist at St Mary's Hospital Paddington, confirmed the diagnosis of CFS aka ME (Myalgic Encephalitis). Over this period the claimant was referred by the respondent to their occupational health consultant, Medigold. There is a full report, dated 5 April 2016. The report concludes that the claimant:

> "is capable of undertaking the full duties of the role".

It also confirms:

> "Ms Hamad Okunnu has chronic fatigue syndrome. She does not require any medication. The symptoms are managed with life style changes and diet. It does affect her daily working and non working life in that she has to pace herself with periodic rest breaks so that she does not get overtiredness on top of her chronic fatigue…..In my opinion Ms Hamad Okunnu is likely to be covered by the Equality Act as her condition is likely to last more than 12 months".
>
> "All recommendations contained in this report are recommendations only and it is the responsibility and decision of the employer to decide what are reasonable and unreasonable adjustments".

42. It is important to remember in the light of this that there is no claim for failure to make reasonable adjustments.

43. The report suggests that allowances might have to be made for the claimant having periodic rest breaks so that she did not get over-tired. The evidence before this tribunal has been quite to the contrary. The claimant did not ask for rest breaks. She did not ask to be given more time. She never asked for targets to be adjusted. Her work rate was impressively high, and she was regularly within the top two or three performers in the team. There was no criticism of the quality of her work. Far from ever complaining that she had an excessive workload. The tribunal was referred to 5 emails where the claimant had been requesting more work into her work queue.

44. At this stage we need to describe in more detail the mechanics of work allocation. We have been told about team leaders, any of whom could allocate work to the claimant. There were Emma Fall, Chantel Wormer, Chi Ta, and also Lorraine Maynard (who was the next manager up in hierarchy).

45. Ms Maynard had been the claimant's team leader in the past before she was promoted, and they seemed to enjoy a good relationship. She had given the claimant favourable feedback and had entrusted her with special projects such as updating the statutory penalty charge notices. The claimant had also had a good relationship with the previous manager before Ms Maynard - Sue Kirkland, who had left.

46. The way this works is that the team leaders will look at the overall work queue. It is a graph, the vertical axis is how many days old the piece of work is. That means how long it was since it was scanned onto the system by NSL. The horizontal axis represents the different work types. On this chart numbers appeared. The specimen we were given, p 1728 of the bundle, shows that there were 9 pieces of incoming correspondence at the charge certificate stage and they were all 12 days old. That represented the largest amount of the oldest work. It would therefore be allocated first. The allocator clicks on the

line and then comes another screen called 'Work Queue Assignment'. In the right hand frame, the PCN numbers for those 9 cases appear together with the issue date. In the left hand box, appear the available appeal officers to whom this work can be allocated and the size of each one's existing work queue.

47. Examples the tribunal were shown were more recent examples and related to the team in Dingwall, but it is the system that is important. We were assured it is the same as it was. Individuals' names can be ticked, or a 'Select all' option is available. In the right hand box, of the 9 referrals, individual ones can be ticked. The 'Select all' option was the one mainly mentioned by Ms Fall, who described her use of these screens. It seems that if the Allocate cases button is then pressed then, these will be distributed amongst all the ticked parking appeal officers, in what order we do not precisely understand. It seems that if somebody's work queue is particularly low, they will get most, if not all of this work. The work referred on a given day is not usually carried out on the same day unless the parking appeal officer's work queue has run very low. Many stay with the PAO for some days, particularly if they are referred onward to that officer's 'More Info' section.

48. The reason why it is necessary to go into this much detail is that this has been the respondent's principle defence to the claimant's allegation of selective partial allocation of work to herself rather than to others. Cross-referring this to the claimant's own Excel spreadsheets on referrals on a given day, we frequently see batches of certain types of case allocated to the claimant in a matter of seconds. This means that the team leader has not taken time to open each file to make an assessment of how difficult or lengthy the referral is, before allocating it.

49. This is an important and fundamental finding that we are asked to make on this point.

50. It is a curious feature of this case that the claimant singles out Emma Fall as being the discriminator. She appears to have no issue with Lorraine Maynard or Chi Ta who were the other principle allocators of work to her throughout the period, as we shall later relate.

51. By agreement Emma Fall was suspended from allocating work to the claimant during the currency of the claimant's grievance investigation and hearing. It resumed later after the outcome letter and report had been sent to the claimant in January 2017. When asked, the claimant could not give any particular reason why she should have personally had a difficult relationship with Emma Fall or why Emma Fall might have wanted to harm her, although that is what her case is. She alleges a deliberate attempt to hurt her by allocating her too much hard work, in the alleged knowledge that the claimant had CFS. This knowledge is denied by Ms Fall.

52. The tribunal is troubled about this and at one stage we asked ourselves if there might not have been some medical reason for this. Part of the symptomatology is that the claimant's persistent fatigue can lead to sleep difficulties with unrefreshing sleep, and a tendency to be unhappy and snappy towards others. We are at a loss to understand it. Indeed the respondent too attempted to guess at what the claimant's difficulties might have been, with Emma Fall and with the others in the team.

53. In her statement, Ms Fall states she was specifically asked this same apparently important question during the investigation of the claimant's grievance. She ventured the suggestion that there could have been a falling out over an apparent *contretemps* between a manager, who was then the claimants partner / friend, Steve Leftwich, and one of her colleagues, Francesca Sharpe or Fran. Apparently, Mr Leftwich had tackled Fran about having bad breath. Ms Fall felt concerned about the way in which he had done this and raised her concern to the Head of Parking, Mr Leftwich's immediate manager, Karen Naylor. It was a sensitive matter as we explain below because there was a medical reason for the bad breath.

54. Mr Leftwich was not in the claimant's management line. He was in charge of an enforcement section which dealt with appeals. Ms Fall said that ever since that time, the claimant ceased to speak to her. It seems odd because the tone of the emails between the claimant and Ms Fall is extraordinarily chatty and friendly, especially the ones where the claimant asks for more work.

55. This is not a strong part of the claimant's case. The claimant, in her case theory, cannot even begin to explain why Ms Fall should wish to harm her, let alone on the grounds of her disability (which we later find she did not know about).

56. We need to deal with another controversial topic. The claimant has a tendency to believe that others know a lot more about her than they in fact do. This has been a consistent theme at this hearing. In a significant email dated 9 January 2014, Ms Fall wrote to Lorraine Maynard about issues with the claimant. She stated:

> "Hi Lorraine….I had a chat with Kay this morning as I felt that Kay was upset with me. I asked there if there was something I had done to upset her and she said no in a very abrupt manner…..she said she did not have any problem with me and if I wanted to bring someone else in, then she would tell them the same… I told Kay that I would like the opportunity to resolve any issue she but she stated again very abruptly that she did not have any issue. The meeting ended there…..I felt you need to be made aware of this because it could cause some issues in relation to work…..if I am honest, it is not easy to work with someone who is harbouring an issue which could potentially explode".

57. This followed very shortly after the Francesca Sharp/Steve Leftwich exchange which was on 5 December 2013. At that point Francesca was reporting to Emma Fall explaining that she did have halitosis and it was as a result of a chronic kidney condition. She considered she would probably have to get herself re-referred to the consultant after this conversation with Steve Leftwich. That explains why Emma Fall felt she needed to refer it to Karen Naylor, who oversaw the entire Parking team including Enforcement.

58. The most important issue we have to decide here is over Emma Fall's knowledge that the claimant in fact had chronic fatigue syndrome. Lorraine Maynard did know that the claimant had Chronic Fatigue Syndrome. She had reviewed employee files when she took over from Sue Kirkland and knew such matters. That is what she confirmed to the tribunal. Ms Fall stated that she did not know the claimant had Chronic Fatigue Syndrome until February 2016 at which time she had been suspended from allocating any work to the claimant. It is a fundamental point in this case. It affects the disability discrimination in all aspects.

59. The claimant's grievance/FAW process started fitfully. The first mention of it around the end of July 2015 was when she went to tell Lorraine Maynard she had issues, although she did not want to make a complaint. As often with the claimant, her communication was cryptic to the point of bewildering. Ms Maynard stated that the claimant should email her with whatever concerns she had and she would look into these concerns for her and let her know what she found.

60. The claimant emailed her shortly afterwards, but she stated that she could not email everything that she had and would bring information over to Ms Maynard. It was not immediately done. She implied that it was more than a nominal amount, which turned out to be true. On 30 July she provided 2 full lever arch files consisting of 700 pages of evidence. 2 weeks later on 15 August, she left a 53-page document.

61. At the back of the lever arch files was a summary of the claimant's complaints. It was a 9-page summary inserted from pages 692 to page 701 of the files. It is worth quoting from that to show the problem the claimant herself had with her own complaints. It subsequently troubled Mr Howard and has troubled the tribunal throughout this hearing. The summary starts:

> "I would like to say that it is very hard to convey what my concerns are in writing. The concerns that I have raised can be perceived as very small and can also be interpreted as unnecessary or viewed as an unwillingness to perform certain tasks. I am aware that in my role here, there are a number of tasks that form part of my day to day routines and others that will not, all of which I will do when it is or it is not requested".

62. The claimant has sought to say that this 700-page summary in fact raises a complaint for disability discrimination. The tribunal finds this hard to accept in the final analysis. The closest the summary comes to that is as follows. Talking of the allocation of an undue amount of heavy cases to her, the claimant states:

> "I believe that the purpose of this is to put pressure on me and increase the possibility of making mistakes. I understand that my job is pressurised and I am not seeking work where I do not have to apply myself as this will not help me in the long run. I would like to think that I apply myself in all areas of my work, but I do not believe that this should involve overloading me with multiple time-consuming cases. I also believe that the more of these types of cases you receive, the greater impact it will have on achieving my targets. I have tried to combat this by booking annual leave where I have felt exhausted or have fallen behind or occasionally coming into the office to work where the target is not 6 an hour. On 24 June 2014 I was only able to complete 1.5 hours work. I explained that I was unable to work but did not want to give reasons why as this would obviously affect my sick days. 6 letters an hour is an achievable target but to have to work twice the amount of time to achieve the target over a long period of time, I found tiring. I cannot afford to not achieve my targets after my one to one of 7 November 2011".

The problem with the above is it only mentions hard work, sick days and exhaustion, which is natural. It does not mention any special vulnerability because of any condition, which is the essence of disability discrimination. The tribunal therefore cannot accept this was a disability discrimination complaint. This affects the s 27 victimisation complaint on which our conclusions are developed in the summary at the end.

63. Ms Maynard complained during the hearing that putting a summary like this at the back of the 2 bundles was not a helpful thing to do. She never reached it. Only after an email

exchange with the claimant was it drawn to her attention, that there was a summary at the back of volume 2.

64. The tribunal has sympathy with Lorraine Maynard who did not really understand what she was to make of these 700 pages of evidence produced by the claimant, much of which consisted of Excel spreadsheets compiled by the claimant purporting to show unfair distribution of work amongst the PAO's. It was intensely detailed and there was no easily-assimilated analysis. It is raw data. That is the main reason this hearing has taken 11 days of tribunal time

65. Another complaint has been made by the claimant that Lorraine Maynard apparently left these grievance files out in the open in her office, not locked, where they could be seen. She says Ms Maynard left them in an open plan office. This was identified in the O'Brien preliminary hearing as an act of alleged harassment on the grounds of disability. Dealing with that briefly, we accept Ms Maynard's evidence that they were left, in the same carrier bag as they were delivered in, between her desk and Steve Leftwich's desk. She felt the chances of anybody seeing them there were negligible as she did not know anyone who would root around amongst her or Steve Leftwich's files. She said that if anyone had looked at these files, cursorily, it would have been extremely hard for them to see what the files were about. The tribunal agrees with that view. The files were in a carrier bag and therefore separate from other work related files. It is hard to understand this complaint.

66. The claimant also considers that she was unfairly deprived of having an informal stage in her Fairness at Work process and states that Lorraine Maynard simply denied her that step - a step which is mandated by the written FAW Fairness at Work Policy & Procedure. Lorraine Maynard was in fact acting on the advice of Sunita Sharma the HR advisor appointed to this case. It was anyway very hard to see with the size and scope of the complaint and the underlying allegation, how an informal process was going to satisfy the claimant. Somebody had to examine these two files of evidence to try to make some sense of them. However (see below pa. 69 & 70) the claimant herself had expressly requested that this was <u>not</u> to be treated informally. Therefore her tribunal complaint makes no sense at all.

67. The first step was on 7 December 2015 when the claimant filled out a formal application under the FAW Procedure, saying that the person she complained about / had been treated unfairly by, was Emma Fall her team leader. She stated as follows:

> "I have detailed a number of incidents over a lengthy period of time and I am therefore unable to list dates of incidents. I have submitted a supporting document comprising of 701 pages. I believe that my work conditions have been made difficult by placing me under what I believe to be a number of pressurised conditions causing my work conditions to be stressful and ultimately resulting in personal stress. I would like my submission to form the basis of my complaint".

What the claimant meant by 'submission' was not clear. Did she simply mean her submission of 700 pages? It seems so.

68. Just how obscure, cryptic, and vague the whole complaint was, is hard to appreciate without quoting the words the claimant used to summarise her complaint:

> "I have raised a few issues with the person concerned or have made informal requests that I would like to be considered, but have made the decision to escalate these issues with the Parking Support Manager, as the situation worsened. I have also raised concerns relating to the document prior to this".

What the claimant meant by 'document' is anybody's guess.

69. For the remedy sought the claimant states:

> "I would like concerns I've raised to be dealt with in line with Fairness at Work Policies and do not wish to make this informal".

That was not a remedy in any sense, merely asking for the procedure to be implemented. It elevates process over outcome, and makes no sense whatsoever. Further, it was clear at that stage that the claimant did not want an informal process because she expressly said as much, despite the complaint above (pa 66). We have seen no evidence, literally no evidence, to suggest that Lorraine Maynard forced the claimant to take this straight up to a formal process. All the evidence is the other way. The claimant wished it to go down the formal route.

70. Subsequently, on the same day, Ms Maynard emailed the claimant to say:

> "Hi Kay, I'm still confused as to what you want me to look at. I have put notes where I can"

She explained that she had tried to map these 700 pages with the use of post-it notes. At this point, the claimant stated

> "Thank you again for looking at the folders, I have attached the relevant FAW form, I please respectfully request that under the circumstances, the folders are not left by your desk and would like to request that I collect them from you please…… I detail my concerns in pages 692 -701 of the folder"

Ms Maynard replied

> "Sorry, I did not see pages 692-701 but have read them now. We have a meeting on Thursday"

Ms Maynard proposed meeting the claimant on Thursday 10 December to talk about her issues. Then significantly the claimant replied:

> "Hello Lorraine, thank you very much. I'm very happy for you to speak to me about the folders however, I hope that this will not stop me from pursuing the matter formally (with all due respect)".

71. Ms Maynard was allocated to the case and the first meeting, the investigation meeting, took place on 10 February 2016. That meeting was attended by the claimant, Sunita Sharma, Terrie Sutton the claimant's Unison representative and Chi Ta the claimant's other team leader who took the minutes. Suffice to say, a lot of time was spent at this tribunal hearing, trying to understand the claimant's complaints about the inaccuracy of Chi Ta's minutes.

72. An important decision was made at this meeting that Mr Ta would refer all new work for the claimant until her grievance had been dealt with. Emma Fall was to cease to allocate all work. That arrangement was, in the event, to last for 12 months from 31 January 2017 shortly before the claimant and her colleagues were made redundant.

73. The issue of the two telephone numbers 2656/2661 was discussed and it was minuted that the claimant said:

> "KH believes whenever she was on duty with a particular colleague, she would always be given the busier line. Furthermore, the officer often came in at a later time in the morning and took long lunches which meant KH had to take more calls. KH suggested that team leader Emma Fall had consciously rota'd the two officers together knowing they did not get on with each other. KH did not feel comfortable in approaching her colleague directly to discuss the matter in view of their relationship".

The officer / colleague in question was RN (Regina Ntim).

74. The claimant was working under a misapprehension when she embarked upon this and also the tribunal proceedings that she would have to anonymise everything and not name the people about whom she complained. The case is difficult enough to analyse without this anonymisation. There is no such principle in practice or law, in the workplace or in the courts, and there never was. It was unnecessary and hopelessly confusing.

75. The tribunal looked into the evidence of the phone line allocation including comparing the flexi timesheets for the claimant and Ms Fall and to analyse whether the claimant's general contention that because she arrived at work earlier, Emma Fall would automatically allocated 2656 to her. On some of the days complained about, Emma Fall arrived later than the claimant and, thus, it could not have been as the claimant has alleged. We worked this out from the extra documentation that was provided mid-hearing- the flexi sheets of the entire team, including Emma Fall and Lorraine Maynard.

76. Lorraine Maynard and Emma Fall had agreed that this could be extended to their timesheets as well. They volunteered it. It was not required or even requested.

77. It is a thoroughly confusing picture the claimant paints. Later, at this tribunal hearing, the claimant made it clear that she had issues with another colleague, Ms Julia Roberts. Ms Roberts had to take over care of her grandchild suddenly and therefore, it impacted on her attendance at work. The claimant's GMB union, (she had since changed from Unison just before the FAW grievance appeal hearing and was apparently disenchanted with Unison) said that if reasonable adjustments were made for Ms Roberts situation, reasonable adjustments should also have been made for the claimant because she had chronic fatigue syndrome and therefore, he considered that management was wrong ever to rota the 2 women together.

78. This complaint was not mentioned at all in the first investigation hearing on 10 February. The topics then were limited to telephone rotas, cheque cases, and work allocation.

79. Of the telephone calls, surprisingly, it was minuted that:

> "… as new rota has resolved issues, all parties agreed to not include this matter within the FAW hearing".

Quite how that happened is not certain. Contrary to that statement, the topic did go forward and had to be dealt with by Neil Howard as part of the grievance.

80. On the cheque cases which the claimant maintained could take longer to deal with, she stated:

> "It was acknowledged that since October 2015 when the cheque referral process was changed, the number of cheque cases referred to KH has decreased significantly. KH suggests that this confirms her view that prior to this change, she was being given more cheque cases than usual and it was difficult and was being done deliberately to make her work more difficult".

That has remained the claimant's case through the FAW process and this hearing.

81. The final topic was that EF was referring more lengthy/complex cases to KH at the beginning of 2015. The claimant stated this was demonstrated by her Excel spreadsheets, which the tribunal have seen.

82. The claimant stated:

> "KH stated that she feels when she approaches EF about work matters, EF's response is curt and that whilst EF does not give the impression that she is offended at the time, her actions thereafter suggest otherwise".

83. Lorraine Maynard said she would look into the cheques and the lengthy complex referrals and report back, but she never did. That was because she was off sick for a month from 12 February to 11 March 2016.

84. Ms Maynard stated emphatically that the sick leave she took was not in any way work-related. That contention became important as we shall explain later. Ms Maynard did not wish to share with the tribunal or anyone else the reason why she was actually off sick. Karen Naylor, the Head of Parking Services, appointed Neil Howard to take over the whole FAW grievance investigation.

85. Mr Howard is the CCTV and Control Room Service Manager. This is general street CCTV. Thus he did not have a parking background. Nor had he conducted an FAW investigation before. There was some continuity because Sunita Sharma remained the HR adviser. It proved to be difficult for him to organise things quickly because of the difficulty of convening the people he needed to convene. He was also busy in his own department, transitioning to being a traded service to the council.

86. He decided that it was going to be necessary to conduct interviews with Chi Ta, Emma Fall, Julia Roberts and the claimant. There was an initial meeting on 11 April 2016. Mr Howard and another minute taker, the claimant, Terrie Sutton and Sunita Sharma. The topics covered were: 1) the allocation of the two telephone extensions 2) the unfair amount of cheque cases and 3) a new complaint about a case which the claimant had omitted to close. This had occurred because there had been a practice of putting

indefinite holds on cases – a practice which management was trying to stop. If you put an indefinite hold on a case, then the case can default to the next routine step which could mean enforcement.

87. It is true that Ms Fall had taken it upon herself to remove cases from the claimant's work queue. The problem, which the claimant did not explain at the time, was that, apparently, the claimant had attached notes to these pieces of work. The removal of cases from her work queue meant the loss of the notes. Ms Fall, at this tribunal hearing, was unable to understand what the claimant's problem was. Nor had it ever been raised with her. The tribunal cannot understand it either despite considerable effort. It was yet another unsatisfactory and inconclusive piece of evidence.

88. Those 3 topics were the only topics discussed with Mr Howard. Even at that stage, the claimant had remained uncommitted on her preferred remedy. The minutes state:

> 'KH to think of how she wants resolution of case before answering'.

The claimant was clearly more interested in the process than in the outcome. At this interview, it appeared the scope of the investigation was much less than what it later turned out to be.

89. The next meeting was shortly after, with the claimant. It was an investigation meeting.

90. We recall Lorraine Maynard said that when Mr Howard inherited the grievance there were 10 headings. Ms Maynard stated that the original bundles had 8 file dividers 1-8 and the claimant stated that she had emailed 10 headings to Sunita Sharma.

91. The controversy over 10 February minutes, for what it is worth, is that the claimant states at that hearing, that her representative Terrie Sutton had alluded to the fact that the Equality Act 2010 needed to be observed, such an allusion is not minuted in the minutes taken by Mr Ta. The reason why this took so much of the tribunal's time, is that we had to analyse her correspondence with the tribunal in the run up to this hearing. It appears that every detail of tat late correspondence was not finely examined. (One of the problems was that the claimant's emails became so frequent and broad ranging and the tribunal staff and judiciary lacked time and resources to work through all this). Her request for disclosure of all the correspondence surrounding the production of these minutes and an original copy of the minutes. It is interesting that in the following meeting, 11 April with Neil Howard at which Terrie Sutton attended as well. The claimant's own note of the minutes in her calligraphic pen, does not mention the Equality Act but it alludes to unlawful discrimination.

92. The importance of it to the claimant is that part of her complaint is a victimisation complaint. She is contending that the grievance/FAW application submitted on 7 December 2015 is a protected act under s 27(2)(c)&(d) of the Equality Act 2010.

93. We have quoted from that comprehensively. It was in writing only. We cannot see any reference to unlawful discrimination. A reference to stress is a long way from being sufficiently clear statement of a breach of the Equality Act 2010.

94. The next meeting was on 20 April. It was a long interview with the claimant. It lasted from 9.30am to 1.00pm. It was a "continuation" meeting on 11 April to deal with the 3 complaints. On the 20 April Terrie Sutton is minuted as saying "the Equalities Act needs to be adhered to". The claimant then observed that EF:

> "…knows about the condition but may not have seen the medical report".

Terrie Sutton then said:

> "Lorraine and Emma are friends so it is likely they have spoken about this".

95. The tribunal has discussed this previously. We made a finding that the claimant's condition did not in any way affect the respondent's business. Therefore Lorraine Maynard felt no need to discuss this condition with the claimant's team leader. As a professional manager, she treated such information as to be shared with others strictly on a need to know basis. There was no need for Ms Fall to know. We find Emma Fall did not know the claimant ha chronic fatigue syndrome.

96. On 20 April the complaints were expanded to include and PATAS/ETA work.

97. A curious extra topic was the deletion of emails from the parking inbox. There are capacity issues with the inbox. Emma Fall had received a call from ICT asking her to reduce its size. Rather than deleting the oldest, she had deleted a whole block from 2015. Mr Howard then put in a special request to ICT to have them reinstated. There was no problem with complying with that request. It was done.

98. Removals were discussed and what the claimant considered the undue number of removals allocated to her was discussed. There was a particularly large number on 8 July 2015, just that one day. The claimant received 14, 3 other colleagues received 4 between them. Because of the lapse of time, it is very hard to tell why this might have occurred. If the claimant's work queue had seemed to be particularly low, she might have had a disproportionate amount of a certain type of referral. It remains a consistent theme that she never complained to Emma Fall, and this was not investigated at the time, and then, and now, it has to be analysed long after the event on incomplete data..

99. In an effort to try to get to the bottom of the claimant's grievance, Sunita Sharma asked the claimant about the ethnic and gender make up of the team. That was because the claimant had mentioned the Equality Act through Terrie Sutton. It gives an indication of how cryptic the claimant's formulation of her own case had been consistent.

100. The respondent once again, was left guessing at the drift of the claimant's grievance. Because the claimant is of black Nigerian heritage, Ms Sharma thought she would try to see if there was a racial dimension to the claimant's grievance. She asked carefully non-committal questions about the make up of the team. The exchange was:

SS: "what is the relationship and make up of the team?"

KH: "a mix of gender and nationalities"

SS: Was there a clash with Emma?"

KH: "No, there was no clash with Emma; I just noticed being treated a little differently"

NH: "were other team members being overloaded with work or do you know of any other complaints raised?"

101. Sunita Sharma asked the claimant if she had anything in common with other colleagues who have complained. The claimant stated that they were both Nigerian however, there is a male Nigerian in the office that Emma is very friendly with. The claimant said:

> "two female Nigerians have also been overloaded".

She was apparently referring to Julia Roberts and Adebola Owusu (who had incidentally also raised a complaint).

102. The claimant stated also at this hearing that had nothing at all to do with her complaint to the tribunal or fairness at work. In fact she accused Sunita Sharma of somehow imputing a racial element to her complaint. A careful reading of the minutes of this shows that Sunita Sharma asked completely open questions. The first person to mention race was the claimant.

103. Generally speaking, the meeting on 20 April seemed to lack focus. We regret to say that this tribunal hearing has also been unfocussed.

104. After that, Mr Howard interviewed the claimant 3 more times. He had interviewed Chi Ta on 19 April as well as Julia Roberts but he did not interview Emma Fall until near the end of the year - 28 November 2016.

105. Throughout this hearing, the tribunal and the respondent's counsel have been at pains to say that the conclusion of the Fairness at Work hearing, is not binding upon this tribunal. This tribunal has to make a decision on the merits of the complaint. This is not (despite appearances), a tertiary appeal from the decision of Neil Howard, who ultimately did not uphold the fairness at work complaint.

106. The claimant's Fairness at Work complaint was not a discrimination complaint it was to do with <u>fairness</u>, as the policy suggests. To uphold the claimant's tribunal claim not only would the tribunal have to disagree with Mr Howard's conclusions but we would also have to find that it was an act of disability discrimination, either direct discrimination, harassment or victimisation. It always was an ambitious claim to make to this tribunal.

107. It is important to describe the product of Mr Howard's hard work, the final investigation report published and sent to the claimant on 13 January 2017. The report is well structured. It is worth reading the headings 1) Phone Duties, a. Line Diversion, b. No Cover, c. 2 Hour Break; 2) Derogatory Remarks; 3) Cheques; 4) Work Delegation; 5) Occupational Health; 6) PATAS; 7) Referrals; 8) Deleted Emails; 9) Removals; 10) Appraisal 1-2-1 before interview.

108. It is worth noting that numbers 8 and 10 were not pursued. In the case of the emails that is because they were reinstated easily and quickly. We are not sure what the appraisal / 1-2-1 before the interview was, but it is not being pursued, then or now. It related to some interview on 7 November 2011 after the claimant had been employed for 4 months

109. Before we deal with the conclusions, we need to explain the "Derogatory Remarks". One comment by Emma Fall was made a matter of complaint by the claimant. She stated that on 13 March 2013, Emma Fall made a comment within the confines of the team environment, to the claimant as follows "your breath stinks like bullshit" [sic]. As the tribunal remarked during our hearing, it was an extraordinary comment to make anyway and apparently, idiomatically rather bizarre because the word bullshit has a different meaning from just shit.

110. It became even more bizarre when the claimant explained at this hearing, that there was an office conversation about a film "How to Lose a Guy in 10 days", starring Kate Hudson (daughter of Goldie Hawn) and Matthew McConaughey. Part of film had included playing a card game called "Bullshit". Mr Howard conducted a serious investigation into this. The claimant had stated, as part of her complaint, that the comment had been witnessed by Julia Roberts, Michelle Thompson (Health & Safety), Regina Ntim, Zoe Fitzgerald and Alec House who had allegedly been aghast. Mr Howard interviewed Emma Fall who said she could remember saying no such thing and he also asked Julia Roberts if she remembered anything. Julia was completely unaware of the incident for it does not seem that any such incident created the sort of stir that the claimant alleged. At this tribunal hearing many more such comments were cited as complaints.

111. Mr Howard's overall conclusions were as follows:

1) Telephone Duties - not upheld. The claimant never at the time raised a complaint. He said that something like this should never have been allowed to escalate to a grievance. He blamed the claimant for suffering in silence.

2) Derogatory Comment - this was not upheld in the absence of any corroboration by others.

3) Cheques - this was not upheld on the basis that he considered, as the tribunal does too, that it would have taken Emma Fall too long to cherry pick these for the claimant to deliberately over-allocate tricky work to her.

4) Work Delegation - the claimant had been concerned that work was being allocated by Emma Fall even though she was supervised by Chi Ta. This was not upheld on the basis that the allocation process was outside Emma Fall's remit. It was in fact the job of Alec House.

5) Occupational Health problems - this was a complaint that the claimant's illness had not been followed up by management who had referred her to occupational health and that OH recommendations had not been implemented. Of this, Mr Howard partially upheld the complaint saying that it reflected mismanagement by the parking service generally but not

necessarily to blame on Emma Fall. (It must be remembered, Ms Fall was the only person named as the subject of her original grievance on 7 December 2015).

6) PATAS - again this complaint was partially upheld. He agreed as everyone does that the process of allocating PATAS/ETA cases was originally open to abuse. Cherry picking was possible. It was stopped (for the most part). Mr Howard could find no evidence that Emma Fall particularly had been responsible for a partial or unfair allocation of PATAS cases.

7) Referrals - which are at the centre of these tribunal proceedings as well. Mr Howard partially upheld this complaint on the basis that it could be seen as general mismanagement within the whole service, but not Emma Fall in particular.

8) Removals of Vehicles to the Pound - Mr Howard made an express finding that the claimant (as we saw in this tribunal), was often requesting extra work and he stated:

> "I feel that KH was repeatedly requesting more work on top of her normal workload and this I feel added to the stress levels she was encountering and placed upon herself.".

112. His overall conclusions were:

"management within the parking services need to deal with and action issues with staff more quickly and not allow them to escalate any further".

113. Mr Howard also referred to:

> "an underlying event which caused the unsettling of the service".

When pressed upon this at the tribunal, he said this was the Steve Leftwich / Francesca Sharp exchange to Emma Fall had escalated to Karen Naylor and at the end of his report, he said more cryptically:

> "I also believe that there is another underlying issue relating to this case, which has driven this case to get where it is now. Again this underlying issue should have been dealt with by management".

In a totally unsatisfactory response to the tribunal when asked what this meant, he was at a complete loss, he wracked his brains and he could remember what he was thinking of. It cannot have been that important.

114. The tribunal consider that Mr Howard's findings were unduly generous to the claimant, given that the claimant had never raised these issues before putting them into a formal grievance. The only time Mr Howard held this against the claimant was in connection with the telephone duties. There are so many people the claimant could have spoken to about those particular duties too. Lorraine Maynard was an obvious one. The claimant made no complaint against Lorraine Maynard, certainly not in that regard. Given that the FAW concerned Emma Fall almost exclusively, and that she did not complain about Lorraine Maynard or Chi Ta, it is hard to see why she did not raise her problem with either of them, and why she bottled it up.

115. We have seen nothing over the duration of this 8-day tribunal hearing which would begin to suggest that Mr Howard's bottom line conclusion on Emma Fall's conduct or culpability was in any way wrong.

116. One reason that the FAW process was so slow was that the claimant was off sick from 11 May 2016 until 8 August 2016 when she started back on a phased return to work. The diagnosis was variously 1) chronic fatigue syndrome, 2) asthma, 3) uterine fibroid, 4) iron deficiency secondary to anaemia. She was off sick \ again on 10 January 2017 and did not return until 2 February 2017. This time she had a diagnosis of CFS. Thus she was off sick at the time that the report into the FAW report was emailed to her. Because she was off sick, she was given a time extension to appeal it.

117. The claimant's appeal was on time and the claimant will have to forgive this tribunal for saying that her appeal was an extraordinarily rambling, virtually incomprehensible, document. It was extremely general, and not particular, considering it was 24 pages long.

118. The appeal hearing took place on 11 April 2017. The appeal was definitely a review rather than re-hearing all the evidence Mr Howard had heard, and any fresh evidence too. The claimant states she was wrong-footed as she continued to gather evidence in the interim between the FAW investigation and the appeal, whereas no such fresh evidence was ever going to be considered.

119. The appeal was heard by Ms Jane Custance who was a witness in this tribunal. At this stage, Mr Gull her GMB union rep was representing the claimant. Jane Custance is the Director of Strategic Planning and Development. She is thus wholly outside the parking department. She manages planning applications, building control, and land charges.

120. Ms Custance impressed the tribunal as having a good grasp of what she was asked to do here. The tribunal agree with her conclusions which were well expressed in her outcome letter dated 25 April 2017.

121. She summarised the complaint well. It was that Emma Fall had deliberately

> "set her up to fail".

Ms Custance remarked as follows:

> "I have to say this was a difficult case to evaluate. There is no doubt that you have gone to considerable time and effort to put together evidence that work was allocated to you differently to your colleagues".

She stated:

> "If Emma Fall had deliberately tried to overload you or allocate more complex work with the intention of making it impossible for you to complete this work, I would have expected this to be reflected in your

> appraisals or for her to have followed up with some performance management procedure. None of this happened and instead you have been described as an asset to the parking service.
>
> Unfortunately, I think it is more likely that because you are a diligent employee, you may have ended up with more work than a less able or willing colleague although this could be described as poor management, it does not amount to bullying".

That presumably meant that people who were performing less well or who were less willing, should be tackled, rather than heaping excess work onto uncomplaining and diligent colleagues.

122. In what we consider rather a strange passage, she makes no different findings about the Emma Fall derogatory comment but states:

> " I recommend that Emma be asked to formally apologise about this" .

We never asked Ms Custance exactly what she meant by that and why Emma Fall should have had to apologise.

123. Ms Custance had the same problem as Mr Howard had, and as this tribunal has had. It is worth quoting her paragraph:

> "I have no idea whether there is any way of going back now to further test your allegations".

She put her finger on major obstacles to the claimant's grievance succeeding. The tribunal has found that the claimant's Excel spreadsheets, described by Mr Howard to the tribunal as a "snapshot", were just that. They do not represent the whole picture, and might well have been partial.

124. For instance, as at the date of an allocation to the claimant, what did the claimant's work queue look like? We have no way of knowing that. We had to analyse this using only our brains. The claimant suggested during this hearing that Mr Howard should have commissioned a full scale analysis from the technical people employed in the council. Maybe the ICT could have been involved. It would have required enormous time and expense. The respondent could not and would not have done that. We cannot consider that it was unreasonable not to do that.

125. For the purpose of these proceedings, we consider that if these lever-arch files of evidence did not portray a complete picture such as we could detect a pattern of unfair work allocation, the claimant was not ever going to be likely to demonstrate it. We are not sure what the claimant considered the tribunal would do with all this data.

<u>Sundry complaints</u>

126. Before dealing with the list of issues, we need to extend the narrative to deal with some of the complaints of harassment which have not yet been referred to in the narrative and also one complaint about refusing the claimant's leave request.

127. The latter started as a complaint about "leave requests". The way the case has played out, there is only one complaint. On 19 May 2015 the claimant emailed Emma Fall saying "I would like to book a flexi day one day next week, if possible Thursday or Friday, Thank you KR".

The response from Emma Fall was:

> "Hi Kay, unfortunately the diary is showing as full on both days. Is there a specific reason for your request (hospital appointment etc?) alternatively? Wednesday is free at the moment, if you want it. Regards
>
> Em".

128. The claimant never stated any reason nor did she state why Wednesday would not be a suitable alternative. This is wholly unexceptional management of leave requests. Managers do not want too many members of the team being on leave at the same time. They can restrict it. Leave requests are refused in the interests of the service. If there is a pressing need for that leave request, some special reason, it can nonetheless be allowed going over the target allocation for numbers to be off simultaneously. In the absence of any reason at all, we cannot conceivably find this to be an exceptional piece of management in any way. This was brought by the claimant to this tribunal as a complaint of disability discrimination harassment. The tribunal cannot possibly uphold it.

129. Coming now to other acts of alleged harassment. The claimant complains that just before 25 February 2016, when it will be recalled that Lorraine Maynard was off sick, the claimant says that Zoe Fitzgerald and Alec House stated in the claimant's presence that:

"Lorraine is off sick due to an unjustified complaint".

130. This is an instance in our view of the claimant considering that people knew more about her business, and specifically her complaints about unfair allocation, than they in fact did know. We find on the balance of probabilities, nobody knew about it, not even Emma Fall until the 10 February or just after.

131. The claimant makes a complaint that Cheryl Power, Finance Officer, who works in amongst the team, although she is not part of it, had said words to the effect of "how dare you complain, I'd go to a tribunal" …. "get the bullies out". Cheryl Power was called by the respondent as a witness before this tribunal. She confirmed that bullying is a subject close to heart on which she holds strong views and therefore it was not out of character for her to have said something along those lines. If anything, the tribunal would find Ms Power's comments to have been favourable to the claimant. The claimant's tribunal complaint is therefore incomprehensible.

132. Ms Power could not remember any context for this. She denied that she pointedly stared at the claimant as the claimant alleges. We accept Ms Power's evidence to us that she had no idea that the claimant had a formal complaint. She would not have needed to know. She had nothing to do with it, even as a comparator.

133. We have already dealt with the files left out by Lorraine Maynard's desk. We could not uphold the complaint.

134. The claimant singles out for complaint a comment made by Emma Fall, when Mr Howard interviewed her on 28 November, namely that the claimant:

> "…. walked around with her head under a cloud".

There were words allegedly to the effect that the claimant did not approach people freely. Understandably, Ms Fall was being asked by Mr Howard, about the team dynamics - the atmosphere. He wanted to know how the claimant was generally regarded. The claimant seems to be under a misapprehension that managers are not allowed to state that she is difficult or that she had issues with people and that it would be unprofessional to do so. This echoes other misconceptions she has shown in these tribunal proceedings about the need to be strictly anonymous and impersonal.

135. This is a strange misconception on the claimant's part (like the anonymity which she afforded to colleagues). It was not only unnecessary but thoroughly confusing. Of course any investigation is going to be interested in the team dynamics and want to find out where this complaint could possibly have come from, what was the impetus, the genesis. At the end of a long hearing, this tribunal has no clue. At the end of a long FAW process, nor had the respondent.

136. The claimant complained next about Emma Fall asking Chi Ta whether he was going to a "… meeting tomorrow". We cannot accept that this was some sort of an allusion to the claimant's complaint and a meeting about it scheduled for the following day. As Mr Harding fairly submitted, in a team like this, "meetings" are happening constantly. It is unlikely that there would not be a meeting of some sort the following day. One colleague might ask another if they were going there. Again the claimant is reading an impossible amount into this routine comment and we cannot hold otherwise. We find it was an entirely innocuous enquiry. There is no evidence to suggest it was anything else. We would have heard it if there was any.

137. Next the claimant complains (or certainly complained before Judge O'Brien), about Regina Ntim and Alec House calling the claimant "a snake" on 8 November 2016. Quite where this came from, we have no idea. It did not seem to go anywhere either. It completely disappeared. It was not referred to in the claimant's witness statement for this hearing. It was not referred to in evidence.

138. We should also mention one more matter that we were referred to in evidence. Relations between Regina Ntim and the claimant were not good. We originally heard the claimant's complaints about Ms Ntim not pulling her weight on the phone rota. This was an extra, and extraordinary, piece of evidence which the claimant felt extremely strongly about. The claimant stated that some sort of a barrier seemed to have been erected between her desk and Ms Ntim's, so there was a time when they could not see each other. The claimant was convinced that this was deliberate. It seems to the tribunal to have been completely fortuitous and innocuous. At one time Regina Ntim had collected a whole pile of stacking trays and erected it higher than one would normally do, so that she

could no longer see the claimant's face across her desk. The claimant for her part brought in a bunch of dried Christmas flowers in a vase. She could not remember what kind of flowers they were when asked but she stated she put them on one side of her desk and people would keep on knocking them off, so she moved them to the other which coincidently blocked out her view of Ms Ntim. That is collateral. It is not a formal matter of complaint. It was not identified as a grievance. Nonetheless it took up much time at this hearing.

139. It was not even an issue and we are not sure why we were asked to consider why the claimant was allegedly denied time off for hospital appointments. We ended hearing an amount of evidence on this, and we are not sure why we allowed it. Ms Fall dealt with it. Her explanation on the hospital appointments was that different people had different travel time. This was also the evidence of Lorraine Maynard, who oversight of all sick leave on the team. She also had delegated authority to be flexible over and above a policy stating that employees should only have two hours paid time to accommodate hospital appointments.

The list of issues

140. Rather than working from a list of issues agreed between the parties, both parties have agreed that they will adhere to the list of issues formulated by Judge O'Brien at his hearing on 13 October 2007.

Direct disability discrimination s 13 Equality Act 2010

141. Now dealing with each one of the issues identified by Judge O'Brien. This is under Section 13 of the Equality Act 2010, a familiar section which need not be quoted but it is worth reminding ourselves that it needs a comparator to succeed, real or hypothetical comparator, and that s 23(1) provides:

> "… 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"

142. The dates of unfavourable treatment identified are mid February 2015 to 31 January 2017. The claimant raised continuing less favourable allocation after Emma Fall re-started allocating work to her after the grievance. Specifically that was on 31 January 2017 after the FAW report, which was sent out on 13 January. The claimant complained that she had been put back onto allocations while she still had a live appeal pending against the FAW, as she had been given an extension of the deadline to submit her appeal. That was a point Mr Richard Gull emphasised to the claimant. The explanation was that Emma Fall did not know that.

143. Secondly, they were very short of management staff because Chi Ta had since left. We have been shown another Excel spreadsheet of the claimant's which reveals that much of the work over that period was in fact allocated by Lorraine Maynard, and not Emma Fall. It then seemed that the complaint was not so much about the allocations but the very fact that Ms Fall was put back onto the allocations, potentially in some technical breach of the FAW policy.

144. On this we find as follows, firstly, it has not been demonstrated to the tribunal's satisfaction, that there was any ill-intentioned or partial allocation of work to the claimant by Ms Fall over the period. To the extent that the claimant may have been allocated more than others, if anything, it would reflect weak management in relying upon the diligent rather than managing the less diligent. However, this is all supposition. Our statistical analysis has not extended that far, and it has not been illustrated by the parties.

145. It all became academic, after the event, because NSL took over the running of the entire service and everyone was made redundant.

146. Thus, the recommendations that Mr Howard made in his FAW were never put in place. It was not necessary. There was not time. The claimants last day of work was 27 February 2017.

147. As regards the telephones, we cannot find that there was ill-intentioned rota'ing by Emma Fall on the evidence we have seen. We discussed it above.

148. Next, we cannot find that Emma Fall treated the claimant less favourably over the leave request as we have already discussed above.

149. All these findings on less favourable treatment are before you get to the second part of the test under Section 13:

> "….because of a protected characteristic, …".

The claimant's case theory is far-fetched and also a conceptual strain on the imagination. To say that Ms Fall wanted the claimant to fail and wanted to harm her, as the tribunal remarked during this hearing, is impossible to accept. The circumstantial evidence is very much against it. Any failure by the claimant in her work would have reflected badly on Ms Fall as her team leader. To say this was done to the claimant because she had chronic fatigue syndrome and not to the others because they did not, is utterly implausible - even at a subconscious level (which could count as discrimination).

150. The claimant often tried to resile from her own case theory on this, without apparently realising that, at the bottom, it is a crude thesis she is putting to the tribunal, Despite burying it beneath copious statistical data, there is really no nice way of saying what she was inviting the tribunal to find. We are not convinced that the claimant ever thought through what she needed to prove to this tribunal in order to win.

151. Thus the claimant fails every part of the statutory test of 1) less favourable treatment and 2) because of a protected characteristic, under s 13 Equality Act 2010. Therefore we do not need to consider the circumstances pertaining to such comparators as Julia Roberts under s 23. The claimant has not advanced even a *prima facie* case of disability discrimination, to move the burden of proof to the respondent under s 136 of the Equality Act 2010.

Harrassment s 26 Equality Act 2010

152. The 3 main heads of complaint are 1) the allocation of difficult debt types, 2) disproportionately allocating to the claimant two busier of the phone lines – 2656, and 3) disproportionately refusing the claimant's leave. Harassment under Section 26 of the Act involves conduct

> "… related to a relevant protected characteristic and which has the purpose and effect of a) violating the claimant's dignity or b) creating an intimidating, hostile, degrading, humiliating, or offensive environment".

AS Mr Harding rightly submitted:

> "This is certainly not a paradigm harassment case"

We explained to the claimant what "paradigm" meant.

153. Further we have to ask if it had that purpose or effect under s 26(1)(b), if it was reasonable for the conduct to have that effect, as dictated by the perception of the claimant, Under s 26 (4)(a)&(c). For the reasons already given, we cannot possibly make that finding. It was not objectively reasonable for the claimant to have had such a perception. We consider the claimant was very much bound up with her own perceptions of this which, as time progressed, diverged more and more from reality. This entire complaint to the tribunal is a testament to that. The documents which the claimant has provided, on which she spent weeks of her time, have not come near to raising a *prima facie* case for harassment on the work allocation. The leave request was different in nature. It was based on a quick email exchange in which the claimant failed to give any reason for needing leave on the day she requested it, in response to Ms Fall's understandable and unexceptional enquiry.

154. It is the same logic as above, where we have not found any less favourable treatment for the purpose of s 13 direct disability discrimination.

155. Coming to the specific individual allegations of harassment, there was Cheryl Power saying "get the bullies out… take them to tribunal" etc; narrated above, and "how dare you complain". The claimant's perception of this was not reasonable. It is possible that some such conversation happened, but it was not directed at the claimant. We accept Ms Power's evidence on that. It strikes the tribunal as an innocuous and unexceptional comment in itself, the claimant somehow imagined it was directed at her. It is an illustration of the claimant's belief that other people knew more about her or were more interested in her case than they in fact were. But also we consider that the comment was actually supportive of the claimant in her situation.

156. Then there was Zoe Fitzgerald Alec House saying: Lorraine was off sick due to "an unjustified complaint". We completely reject the factual basis for this comment. We find as a fact that it never was said.

157. Then there were the files left out by between Steve Leftwich and Lorraine Maynard's desks in a carrier bag. We have dealt with this above. We cannot think that

the claimant's perception of this was reasonable. Nor can we see how it could conceivably have "related" to her chronic fatigue syndrome.

158. Then there were the comments made by Emma Fall to Neil Howard about the claimant:

"having her head under a cloud" and "not approaching people freely".

These comments, reasonably viewed, are entirely innocuous, and honest (as we find) answers to investigatory enquiries which were only to be expected in a grievance of this nature. Whatever effect they had, it was not reasonable to regard them as having that effect. We find Emma Fall was sincere in making these comments, and, having heard much of the history, the comments seemed to the tribunal to be eminently fair

159. The claimant also had a strange misconception that management was somehow being unprofessional and was precluded from making such personal comments, given that the claimant's complaint itself was highly personal in nature (despite all the statistical data).

160. How such comments "related" to the claimant's CFS is impossible to see.

161. The question about Chi Ta going to the "meeting tomorrow" has been dealt with above, and by the same logic it was not reasonable of the claimant to regard it as harassment. How it related to her chronic fatigue syndrome in the direct way required for s 26 (1), is conceptually impossible to understand. The claim is also nonsensical.

162. The complaint about the "snake" is not pursued - Regina Ntim and Alec House. No adjudication is called for.

163. Then there was Alec House telling Zoe Fitzgerald on 8 November (the same day as the snake comment day) that he had the "inside scoop" as to why the claimant's meeting had been cancelled. Again, we cannot find the evidential basis for this. It is not established. We do not consider that Alec House ever made such a remark. Furthermore the claimant never really explained the significance of this to the tribunal or why Alec House might have had any inside knowledge. The complaint was in fact not mentioned by the claimant in her witness statement for this hearing. Nor, for completeness, was it mentioned in the detailed schedule of discrimination complaints. It has therefore not been pursued by the claimant to and through this hearing, and has to be dismissed as a complaint.

<u>Victimisation s 27 Equality Act 2010</u>

164. The tribunal cannot find that the 7 December 2015 FAW application/grievance did amount to a "protected act" within the definition in s 27(2). None of the protected characteristics were mentioned directly or even inferentially. The Equality Act 2010 was not mentioned. The respondent's FAW procedure concerned only fairness. Of course a complaint about "fairness" *per se* cannot come to this employment tribunal unless it is unfair dismissal or possibly a breach of the implied term of mutual trust and confidence for

a constructive dismissal. There is no dismissal complaint of any sort in these proceedings. This complaint as to be a disability discrimination complaint otherwise it will not be entertained. That is the way the claimant has put it.

165. In the history of this complaint, the first mention of the Equality Act was cryptic and fleeting. There was a comment quoted above, by the claimant's representative, at the second FAW meeting on 20 April 2016. This comment did not elevate the whole complaint into a "protected act", either retrospectively or at all. A bald statement that the Equality Act has to be complied with is nothing more than a generalisation and statement of the obvious. It does not fall within the definition in s 27(2). It is not sufficiently intelligible even to come within s 27(2)(c).

166. S 27 (2)(c) involves a "protected act" being "doing any other thing for the purpose of or in connection with this Act" and s 27 (d) "making an allegation (whether or not expressed) that a or another person has contravened this act". Thus 27(c) is the broadest and most accommodating sub-section which would probably suit the claimant's argument better, but is still insufficient in our view. Mentioning something is not "doing" something. There was no suggestion of any breach of the Act.

167. Nonetheless, even if we were wrong about the protected act, the complaints all fail in any event. Under this heading, the claimant makes 4 complaints – 1. Cheryl Power, 2. Lorraine off sick due to an "unjustified complaint" 3. snake comment (not pursued) 4. the allocation of large complex workloads to the claimant from 31 January 2017, (which of course was the only alleged unfavourable treatment of any sort arising <u>after</u> the alleged protected act). The tribunal has already made findings on the other 3 remaining allegations. These comments were innocuous comments into which the claimant has read too much. We have already made findings on the alleged disproportionate workload. Indeed, we found claimant did not pursue a complaint of actual unfair allocation after the 31 January, but just complained about the mere <u>fact</u> the Emma Fall was once more allocating work to her when her appeal was live. It was a criticism about adherence to procedure, with no relevance to the claimant's CFS or her grievance.

168. On that basis, we cannot find that this was an act of victimisation prompted by the fact that the claimant had tangentionally raised something in her fairness at work hearing. Emma Fall would not have been party to that. She would not have known that, at one stage, Terrie Sutton had made a fleeting cursory and cryptic reference to the Equalities Act, on 20 April 2016.

169. The victimisation claims all have to be dismissed.

<u>Jurisdictional time-limits s 123 Equality Act 2010</u>

170. Finally, (and this could have been our first and only decision), most of the complaints are out of time and could, and possibly should have been dismissed on that basis alone, regardless of the merits. We cannot think why it would have been just and equitable to have allowed these complaints to proceed. Perhaps that is particularly so in hindsight in view of *Hutchison v Westward Television Ltd* [1977] IRLR, 69, EAT.

This hearing

171. We have tried to adopt an accommodating approach, by listening to the merits of all complaints, which was not mandated in law. The respondent has been extremely helpful at this hearing. Rather than objecting to the claimant putting certain extra parts of her case, they simply dealt with it and responded. They voluntarily indulged the fishing expedition in the middle of the hearing (which the tribunal would not have ordered). It resulted in a large amount of documents which the claimant has not referred to at all.

172. This hearing has been an exceptional hearing and the tribunal (and the respondent) has made more allowances for the claimant than we can recall ever being made for any litigant. That is the view of all 3 of the panel, who have been sitting in the Employment Tribunal for many years.

173. The Judge apologises to the parties for the length of time taken to promulgate this judgment. The delay occurred at the typing and fair copying stage. The judgment, substantially in this form, was dictated and recorded by the panel on the last days listed in February and March 2018.

Employment Judge Prichard

13 June 2018