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EMPLOYMENT TRIBUNALS

Claimant: Ms J Smith

Respondents:

1. Maryland Care Home Limited (in voluntary liquidation)
2. Suraya Bacon
3. Kelvin Bacon
4. Savoy Care Home Limited

HELD AT: Liverpool (by in person hearing and CVP) **ON:** 18, 19, 20 & 21 July 2022 & 9 August and 2 September 2022 (in chambers)

BEFORE: Employment Judge Shotter

Members: Ms C Gallagher
Ms Ross-Sercombe

REPRESENTATION:

Claimant: In person
Respondents 1 & 4: Kelvin Bacon
Respondent 2: In person
Respondent 3: In person

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The first and fourth respondent failed to consult with the claimant and the complaint brought under regulation 15(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006/246 is well-founded and adjourned to a remedy hearing. The parties will be advised of the date in due course.
2. The claimant was not victimised and her claim of victimisation brought under section 26 of the Equality Act 2010 is dismissed against the respondents.

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3. The claimant's claim of disability discrimination brought in relation to allegation 2.2.1, and 2.2.2 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done), the complaints are out of time and in all the circumstances of the case it was not just and equitable to extend time. The Tribunal does not have the jurisdiction to consider the complains which are dismissed.
4. The claimant was not treated less favourably because of something arising in consequence of her disability and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed.
5. The second and/or third respondent did not harass the claimant and the claimant's claim of harassment brought under section 26 of the Equality Act 2010 fails and is dismissed.

REASONS

Preamble

The hearing

1. This has been an in-person hearing. The in chambers hearing on 9 August 2022 was held partly in person and partly by CVP due to a member self-isolating with Covid19. The short in chambers hearing held on the 2 September 2022 was by CVP.
2. The documents that the Tribunal was referred to are in a bundle of 321 pages together with additional documents produced by both parties marked C1 – C10 and R1 to R3, the contents of which I have referred to where relevant below.

Witnesses

3. The Tribunal was provided with a bundle of witness statements consisting of written statements prepared by the claimant signed and dated 15 June 2022. Giving evidence on her behalf, we heard from Paula Laybourne, the claimant's "close friend," whose statement was unsigned and undated, Soniel Smith, the claimant's son, whose statement was signed but not dated, Mubeen Willoughby, manager of Dapa coffee shop, whose statement was signed but not dated, Summer Smith, the claimant's daughter, whose statement was signed but not dated and Colette Riley, an employee of the fourth respondent, whose statement was unsigned and undated.
4. On behalf of the respondent the Tribunal had before it written statements produced by Carol Allcut, pharmacist, signed and dated 23 January 2022, Dawn Ashcroft, carer and employee of the fourth respondent, signed and dated 24 January 2022, Carol Major, carer and employee of the fourth respondent, 2 statements signed and dated 10 January 2022 and 15 June 2022, India Bacon, daughter of the second and third respondent, signed and dated 15 January 2022, Darcy Bacon, daughter of the second and third respondent signed and dated 15 January 2022, Gilliam Louse Morris, carer employed by the fourth respondent, 3 statements signed and dated 23 January 2022, 15 June 2022 and 18 July 2022, Chloe Anne Fisk, senior carer employed by the fourth respondent, 2 statements signed and dated 23 January 2022 and 15 June 2022, Kate Chover Leyland, carer employed by the fourth

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respondent, signed and dated 23 January 2022, Nely Chover Leyland, carer employed by fourth respondent, signed and dated 23 January 2022, D Aspinall, previous employee of first respondent, signed and undated, Jonathan Jason Westaway, production manager at Ayrton Saunders Limited, signed and dated 15 June 2022 together with 2 attachments, Joseph Kelly, supply chain manager at Ayrton Saunders Limited, signed and dated 15 June 2022, Pamela McGivern, carer employed by the fourth respondent, signed and dated 18 July 2022, and Hilary Yearsley, senior carer, signed and dated 18 July 2022.

5. No witness statements were filed by the second and third respondent who misunderstood the case management orders and did not appreciate they were required to produce witness statements. With the agreement of the parties the position was resolved by the second and third respondent adopting pleadings (see below)..

6. On behalf of the claimant the Tribunal heard oral evidence under oath from the claimant, Paula Laybourne, Samuel Anthony Robert Smith, Mubeen Willoughby, Summer Marie Hope Smith, and Colette Riley.

7. On behalf of the respondents the Tribunal heard oral evidence under oath from the second and third respondent, Gilliam Morris, Chloe Fisk, India Bacon, Darcy Bacon, Jonathan Westaway and Joseph Kelly.

8. The claimant was not found to be a credible witness whose evidence could be relied upon, and on balance the Tribunal preferred the evidence given by the second and third respondent. The conflicts in the evidence and how the Tribunal resolved them have been explored below.

9. The Tribunal did not hear oral evidence from Carol Allcut, whose statement had no relevant evidence, the respondent agreed that this was the case and no weight was given to it.

10. Dawn Ashcroft, who did not give oral evidence, confirmed in her written statement she was suffering from depression and taking sertraline having suffered from mental health issues for around 18 years which she disclosed to the second respondent and found her to be supportive and caring which included changing her shift pattern. The claimant did not dispute that Dawn Ashcroft suffered with depression, her issue was that sertraline had been referenced in the statement, which according to the claimant, must point to the second and/or third respondent having breached confidentiality by informing Dawn Ashcroft that the claimant also had depression and prescribed the same medication. The claimant had no basis for reaching such an assumption, and the Tribunal on balance accepted Dawn Ashcroft had not disclosed her medication to prove it was the same as that prescribed to the claimant, preferring the second and third respondent's evidence that the claimant's personal circumstances had not been disclosed which it found credible given there was no reference to the claimant whatsoever in the statement and setline is a commonly prescribed drug for depression. The claimant did not put forward a strong argument as to why the information provided by Carol Allcut could not be relied upon, and the Tribunal took the view there was no reason to disbelieve the second and third respondent's evidence that it supported Dawn Ashcroft in the knowledge she had mental health issues.

11. Carol Major in her first witness statement referred to various medical conditions that affected her employment including severe anxiety and mental health problems before and when she was absent on ill-health grounds from July 2020 to January 2021. Carol Major described taking sertraline, and when she returned to work found the second and third

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respondent approachable and caring with a flexible attitude towards time off and hours being changed. The statement does not refer to the claimant or her medication for depression, and the Tribunal took the view there was no reason to disbelieve Carol Major's evidence which the claimant did not dispute and weight was given to this evidence.

12. Carol Major in her second witness statement described how she attended a meeting with the second respondent in August 2021 to discuss the closure of the first respondent and transfer of employment to the fourth respondent following which she was given written notice of the change. No details were given about the written notice. Carol Major's evidence supports that given by other witnesses, and was given weight.

13. Kate Chover Leyland's evidence was not relevant to the issues in this case, and her statement was given no weight.

14. Nely Chover Leyland's evidence was not relevant to the issues in this case, and her statement was given no weight.

15. Ms D A Aspinall in a hand written statement explained how she had informed the second respondent at an interview in 2019 of her physical and mental health problems including depression, anxiety, chronic pain and fatigue and she was reassured and supported by the second respondent during her employment following the successful application. Ms Aspinall described how she was on long term sick with a flare up and wanted to return to work the second respondent being so kind and supportive. The claimant did not raise any issues with this evidence, and there is no reason to believe Ms Aspinall is not telling the truth about her experience and the statement was given some weight.

16. Pamela McGivern in her witness statement referred to a meeting she had been to with the second and third respondent, Hilary Yearsley and Colette Riley during which the second respondent explained the claimant was "making a serious claim" and as they were friends with the claimant did not want them to "feel uncomfortable about coming into work." Pamela McGivern records how she stated she did not want to become involved, which was accepted by the second and third respondent. She confirmed nothing was said about the allegations or details of the claim. It is uncontroversial that the claimant was not at the meeting. Pamela McGivern's statement was corroborated by other witnesses (see below) and given weight.

17. Hilary Yearsley in her statement describes how she a meeting with the second and third respondent, Pamela McGivern and Colette Riley in March 2021 at which she was made aware the claimant had made serious allegations likely to go to court. No details of the case were mentioned. Reference is made to the third respondent stating they may be asked for witness statements or evidence by the claimant or the respondents and she wanted to ensure that there was no animosity at work and no one was made to feel uncomfortable. Hilary Yearsley denied being told she should keep her distance from the claimant, and it was her decision due to the Covid guidelines not to meet the claimant in Formby village but go for a walk with the claimant instead. It is undisputed Hilary Yearsley asked the claimant to meet her outside the village for a walk, and the claimant failed to put forward any cogent argument why the Tribunal should disregard Hilary Yearsley's written evidence, which was given weight.

18. Apart from the second and third respondent Colette Riley was the only person whose evidence could be tested on cross-examination as to what transpired in the March 2021 meeting. Collette Riley does not deal with the meeting in her witness statement. The

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claimant, who was not at the meeting, alleges the third respondent “disclosed details of my claim and my personal information, including my medical conditions, to employees.” The claimant confirmed she was referring to the March 2021 staff meeting. Collette Riley gave oral evidence that the meeting took place beginning of March 2021 at which reference was made to the claimant having made serious allegations. Collette Riley informed the second and third respondent she intended remain in contact with the claimant having explained to the second and third respondent she was not going to get involved due to the fact she was an employee and a friend of the claimant. Colette Riley described the third respondent as being angry and deeply upset and confirmed in a response to a question from the Tribunal that no other subject was raised at that meeting. The claimant’s own witness, Colette Riley, undermines and contradicts the claimant’s evidence that personal information including her medical conditions were discussed, and the Tribunal concluded the claimant was exaggerating her evidence to support the other allegations she has made in this claim by attempting to show the second and third respondent in a bad light.

19. This case is a mass of contradictory evidence, which the Tribunal has resolved on the balance of probabilities as recorded in the findings of facts below. In short, it found the claimant was not a credible witness who gave inaccurate exaggerated evidence.

20. With reference to the allegations brought against the second respondent going back to August 2020 the Tribunal found the claimant was an inaccurate historian and the events described by her did not take place. It found Samuel Smith and Summer Smith’s evidence as to what took place on the 8 March 2021 not credible, and it is notable in cross examination the claimant described how she had not driven “wildly” down the street because she could stop at the junction, which undermined the evidence given by her son and daughter that the claimant did not leave the house after seeing the third respondent.

21. Paula McElwee (nee Leyburn) tried her utmost to support and strengthen the claimant’s case, repeating what she had been told by the claimant. Paula McElwee witnessed none of the events first-hand and believed what she was being told by the claimant, for example, reference was made by Paula McElwee to the third respondent “stalking,” videoing and photographing the claimant in March 2021 onwards when she was with the claimant. Paula McElwee also added allegations that were not part of the claim and could not have been an issue at the time, for example, the second respondent’s alleged failure to offer the claimant with a phased return when the claimant never indicated she was well enough to return to work, the clear message to the respondents was that she was not. In oral evidence the alleged “stalking” witnessed by Paula McElwee was the third respondent walking through the centre of Formby village whilst she and the claimant were “at Costa **probably or** sitting on a bench” [the Tribunal’s emphasis] and the third respondent passed walking by and stared as he did so. Paula McElwee confirmed in oral evidence in response to a question from the Tribunal that she did not see the third respondent videoing or photographing the claimant, and the Tribunal concluded her evidence was partisan and could not be relied upon.

22. Mubeen Willoughby in his handwritten witness statement alleged on 15 September 2021 the third respondent showed him a photograph of the claimant which had been taken without the claimant’s knowledge and asked him if he was aware the claimant was a “professional scammer and a racist.” Mubeen Willoughby works in a coffee shop that employs Summer Smith, the claimant’s daughter, and in the witness statement described the claimant as his friend. When giving evidence before this Tribunal Mubeen Willoughby was asked by the Tribunal how he was sure the 15 September 2021 was the correct date, and responded that he was in the middle of opening the coffee shop which opened on the

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15 September, employees were getting trained up 2-weeks beforehand and he knew the claimant would not have allowed the photograph to be taken because she was not in a pose. In short, Mubeen Willoughby assured the Tribunal he was certain the 15 September 2021 was the date.

23. On cross-examination it was put to Mubeen Willoughby that Jonathan Westaway and Joseph Kelly, both employees of Ayrton Saunders Limited a company where the third respondent worked, produced supporting documentary evidence to support the third respondent's assertion that he was working on the days when he had allegedly behaved in a discriminatory manner. The third respondent produced a printout of the journey taken by the claimant recorded by Jaguar on 15 September 2021, the day in question. Jonathan Westaway and Joseph Kelly confirmed the claimant was working in Liverpool that day and cannot have been in the coffee shop.

24. In response Mubeen Willoughby initially criticised the documentary evidence bringing into question its validity when he had no basis. Mubeen Willoughby then changed his evidence stating he was confused about the dates and gave a garbled account of when employees had carried out training despite in his witness statement and earlier oral evidence being adamant about the 15 September 2021 date. The claimant asked Mubeen Willoughby in re-examination why if the incident did not happen she had been informed of it when she returned from Spain. Mubeen Willoughby responded he had not informed the claimant but Summer Smith "a few days later." The Tribunal did not find Mubeen Willoughby a credible witness in respect of his evidence that the claimant would only allow a photograph taken if she was posing and the incident itself, concluding it did not take place as the third respondent's evidence that he was at work in Liverpool and not in Formby village visiting a coffee shop on the 15 September 2021 was more convincing, supported by contemporaneous documentary evidence and the straightforward oral evidence given by Jonathan Westaway and Joseph Kelly, who were found to be credible and honest witnesses.

25. Turning to the second respondent the Tribunal also found she was not always a credible witness having contradicted the evidence of the third respondent regarding whether employees other than the claimant had been informed in writing about the TUPE transfer. Despite the TUPE transfer and the date of when it took place being an issue, the evidence from the second respondent was unsatisfactory and ill-prepared.

26. The second respondent had not prepared a witness statement and relied on the pleadings at pages 63-68, 113-121 and a document prepared by the third respondent at pages 282-284 of the bundle. It was agreed with the parties beforehand that rather than adjourn the hearing the second and third respondent could adopt these documents as they would have formed the basis of their witness statements in any event, and the claimant was content to cross-examine on that basis as she had prepared her questions using these documents. The second and third respondent upon being asked for an explanation as to why no witness statements were filed by them, explained they had not understood it was required for respondents and understood witness statements were only necessary from the people giving evidence on their behalf. It is unfortunate; however, the Tribunal reluctantly accepted this explanation despite the fact that the respondents were represented by solicitors during part of the history of this case, and the respondent's witnesses clearly had some professional input into the framework of their witness statements back in January 2022. The fact no witness statements were produced did not benefit the second and third respondent in any way as they were constrained by the information set out in the documents adopted as witness statements that could only be expanded on cross-examination if the claimant asked a relevant question.

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TUPE

27. With reference to the issue regarding the first and fourth respondent's failure to consult, leave to amend was granted to the claimant, the "response" has clearly been drafted by the third respondent without the assistance of legal advice and there is no reference to consultation or the TUPE transfer. The third respondent produced a document marked TUPE transfer merely stating two letters had been hand delivered by him to the claimant's home. In oral evidence the second respondent confirmed the TUPE transfer had taken place on the 4 January 2022 and not the 21 January 2021 as set out in the of issues, the meeting with staff had been at the end of August 2021 and she had typed up the letters sent to the claimant that were signed by the third respondent and delivered by him. The credibility issue for the Tribunal was the second respondent's evidence that as nobody else was on sick leave the letter was "just sent to the claimant." On the face of it, this evidence was contradicted by the third respondent who referred to letters "going out to staff" plural.

28. Colette Riley confirmed she had the "seniors meeting" regarding the transfer in August or September 2021 having been told by a resident's family member that the direct debit was to be altered from the first respondent to fourth respondent. Chloe Fisk and Gilliam Morris were also at the seniors meeting and confirmed in a written statement they had been sent written notification on some date in August and September 2021 but the payslips did not change until January 2022. The Tribunal accepted the evidence of Chloe Fisk and Gillian Morris that letters were sent after the August meeting concerning the transfer from the first to fourth respondent and they were unconcerned having been told there was nothing to worry about by the second and third respondent. Chloe Fisk recalled being handed the letter by hand by either the second or third respondent. Chloe Fisk in oral evidence on cross-examination recalled that she received a letter to the effect that the transfer was delayed, her evidence was vague and the Tribunal concluded no such letter had been sent to any member of staff, who were handed two letters concerning the possibility of an earlier transfer which were posted by the third respondent to the claimant's letterbox. The Tribunal concluded on the balance of probabilities the two TUPE letters were handed to staff and hand delivered at the claimant's because she was absent from work and when her car was not parked outside thus avoiding any confrontation.

29. Turning to the evidence of India Bacon and Darcy Bacon the Tribunal found they gave straight-forward credible evidence of the walking down the street on the opposite side of the claimant's house with the third respondent and the family dog when the claimant banged on the window, shouted and as they continued to walk down the street, drove the car very fast before stopping at a give way sign.

30. Jonathan Westaway and Joseph Kelly were found to be credible witnesses who gave straightforward evidence supported by contemporaneous documentation that the claimant worked in Liverpool every Wednesday including the 15 September 2021.

Claimant's disability and impact statement

31. In the claimant's Disability Impact Statement she sets out the effect of the breast cancer and anti-depressant medication taken by her since November 2018. The claimant was diagnosed with breast cancer in 2007 and August 2019. She records that by 5 September 2019 the sertraline prescription was increased. The claimant maintains she informed the second respondent about her mental health issues after she had spoken to a psychologist Andrew Morgen for a basic assessment of her mental health and referred to

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the Community Mental Health Team. The claimant was referred on the 3 October 2019, and on 5 November and 5 December 2019 attended a mental health assessment before attending counselling sessions in February 2020. The claimant alleged the third respondent had videoed her drinking coffee with a friend and the Tribunal found there was no evidence to this effect given at the liability hearing and the third respondent had not videoed the claimant at any stage of the dispute.

32. The respondent concedes the claimant is disabled with breast cancer of which it had knowledge, and depression of which it did not. Knowledge is an issue in this case.

List of issues

33. A incomplete draft list of issues had been prepared at an earlier case management hearing that were affected by an amendment to the pleadings. The Tribunal provided both parties with a draft list of issues it had prepared at the outset of the hearing for discussion and agreement. The issues were agreed as follows. The Tribunal has adopted the same numbering.

1. Time limits

- 1.1 Given the date the claim form was presented (11 March 2021) and the effect of early conciliation (31.12.20 to 11.2.2021) any complaint about something that happened before 1 October 2020 may not have been brought in time i.e. the alleged remark on 28 August 2020.
- 1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - 1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?
 - 1.2.2 If not, was there conduct extending over a period? Was the alleged incident on 28 August 2020 part of an act extending over a period which ended on or after 1 October 2020?
 - 1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?
 - 1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 1.2.4.1 Why were the complaints not made to the Tribunal in time?
 - 1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Discrimination arising from disability (Equality Act 2010 section 15)

- 2.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date? It is common ground

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the respondent knew about the cancer disability throughout the relevant period.

- 2.1.1 The claimant relies upon the disability of cancer and mental health issues. The respondent accepts the claimant was disabled for the purpose of section 6 of the EqA but denies knowledge of any mental health issues. Did the respondent know, or could reasonably have expected to know of the claimant's mental health disability?
- 2.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:
- 2.2.1 28 August 2020 Suraya Bacon ("R2") questioned why the claimant was still sending in sick notes, said the claimant should not be returning to work and was not longer suitable to be working for R1.
- 2.2.2 First week of October 2020 R2 told the claimant she was no longer suitable for the care home; the care home was not suitable for her and asked the claimant whether she had considered working on the Till for Tesco.
- 2.2.3 From 1 March 2021 R3 monitored the claimant.
- 2.2.4 2 March 2021 R3 drive his car next to the claimant's car and pointed his phone at her as if he was taking photographs or a video.
- 2.2.5 Letter 7 March 2021 R3 threatened to disclose the contents of his letter to the claimant's landlord alleging her claim was racially motivated against R2.
- 2.2.6 Between 1 to 8 March 2021 R3 disclosed details of the claimant's claim/grievance letter and personal information to a staff meeting.
- 2.2.7 8 March 2021 R3 at 3pm stood directly outside the claimant's home and laughed at her.
- 2.2.8 R3 alleged the claimant had been driving recklessly on the 8 March 2021.
- 2.2.9 10 March 2021 R3 followed the claimant who was driving her daughter to school and back to the centre of Formby.
- 2.2.10 31 August 2021 a member of the public described the claimant as the racist from Maryland following R3 making unfounded allegations of racism to members of the public.
- 2.2.11 15 September 2021 R3 showed Mr Willoughby owner of Dapra coffee shop where a photograph of the claimant stating "be careful. She is a scammer. She sues people for fun. Watch her as she is a racist." When Mr Willoughby stated the claimant was his friend R3 responded "pick better friends. This woman is suing me because my wife is Asian."

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- 2.3 Did the following things arise in consequence of the claimant's disability:
 - 2.3.1 e.g. the claimant's sickness absence between June 2019 ongoing to date?
- 2.4 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?
- 2.5 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?
- 2.6 If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
 - 2.6.1 None are pleaded and the respondent does not rely on this.

3. Harassment related to disability (Equality Act 2010 section 26)

- 3.1 Did the respondent do the following alleged things:
 - 3.1.1 22.1 to 22.11 above
- 3.2 If so, was that unwanted conduct?
- 3.3 Was it related to disability?
- 3.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 3.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Victimisation (Equality Act 2010 section 27)

- 4.1 Did the claimant do a protected act as follows: the protected act is the grievance letter dated 1 March 2021.
- 4.2 Did the respondent do the following things:
 - 4.2.1 From 1 March 2021 R3 monitored the claimant.
 - 4.2.2 2 March 2021 R3 drive his car next to the claimant's car and pointed his phone at her as if he was taking photographs or a video.
 - 4.2.3 Letter 7 March 2021 R3 threatened to disclose the contents of his letter to the claimant's landlord alleging her claim was racially motivated against R2.

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- 4.2.4 Between 1 to 8 March 2021 R3 disclosed details of the claimant's claim/grievance letter and personal information to a staff meeting.
- 4.2.5 8 March 2021 R3 at 3pm stood directly outside the claimant's home and laughed at her.
- 4.2.6 R3 alleged the claimant had been driving recklessly on the 8 March 2021.
- 4.2.7 10 March 2021 R3 followed the claimant who was driving her daughter to school and back to the centre of Formby.
- 4.2.8 31 August 2021 a member of the public described the claimant as the racist from Maryland following R3 making unfounded allegations of racism to members of the public.
- 4.2.9 15 September 2021 R3 showed Mr Willoughby owner of Dapra coffee shop where a photograph of the claimant stating "be careful. She is a scammer. She sues people for fun. Watch her as she is a racist." When Mr Willoughby stated the claimant was his friend R3 responded "pick better friends. This woman is suing me because my wife is Asian."
- 4.2.10 R3's use of private detectives to take photographs of the claimant.

4.3 By doing so, did it subject the claimant to detriment?

4.4 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

4.5 If so, has the respondent shown that there was no contravention of section 27?

5. Remedy for discrimination or victimisation

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the claimant be compensated?

5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

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- 5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 5.9 Did the respondent or the claimant unreasonably fail to comply with it by [*specify breach*]?
- 5.10 If so is it just and equitable to increase or decrease any award payable to the claimant?
- 5.11 By what proportion, up to 25%?
- 5.12 Should interest be awarded? How much?

6. TUPE transfer

- 6.1 The claimant's employment transferred under TUPE from R1 to R4 in or around 8 September 2022 (285) or 21 January 2022 (311)?
- 6.2 Did the respondent do the following:
 - 6.2.1 Consult with the C in a letter dated 5 August and 7 September 2021?
- 6.3 If not, how much should the claimant be awarded as damages for failure to consult?

The pleadings

34. In a claim form received on 11 March 2021 following early conciliation that took place on 31.12.20 to 11.2.2021 the claimant raised complaints under section 15, 26 and 27 of the Equality Act 2010. The individual claims are set out in the agreed list of issues referred to below which included the following:

- (i) On or around the 28 August 2020 Suraya Bacon ("R2") questioned why the claimant was still sending in sick notes, said the claimant should not be returning to work and was not longer suitable to be working for R1.
- (ii) First week of October 2020 R2 told the claimant she was no longer suitable for the care home; the care home was not suitable for her and asked the claimant whether she had considered working on the Till for Tesco.
- (iii)
- (iv) 2 March 2021 R3 drive his car next to the claimant's car and pointed his phone at her as if he was taking photographs or a video.

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35. At a case management hearing held on the 24 May 2021 a discussion took place concerning the complaints and the Case Management Summary refers to direct disability discrimination in addition to the section 15, 26 and 27 EqA complaints when this was not pleaded and no application to amend was made to include a section 13 of the EqA complaint. The list of issues discussed at the case management makes no reference to direct discrimination, the issues agreed with the parties before today's hearing did not include direct discrimination and no evidence was given by the claimant concerning this. The Tribunal concluded the reference to direct discrimination was an error and there is no such complaint before it.

36. The Tribunal has taken a great deal of time to understand the claimant's claims which have been included and amended in numerous documents, including at the final hearing when the claimant in her witness statement confirmed she was not relying on the October 2020 allegation, and changed her evidence from the pleaded case blaming her solicitors. The Tribunal has dealt with this further below as it raised a question mark over the claimant's credibility and the less than straight-forward way she gave her evidence.

37. The Tribunal has considered the documents to which it was taken in the bundle, the witness statements and oral submissions, which the Tribunal does not intend to repeat in full and has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts having resolved the conflicts in the evidence on the balance of probabilities.

Facts

38. The first respondent was a care home business based in the centre of Formby. The parties, who did not get on, were unable to even agree on whether the Formby was a village or town, but nothings on this. The care home was originally referred to as Maryland Care Home Limited ("Maryland"), but in or around 4 January 2022 the first respondent went into liquidation and the claimant's employment contract transferred to the fourth respondent trading as Maryland under TUPE. The second and third respondent are husband and wife, ran the first respondent and when it went into liquidation, the fourth respondent. The third respondent also worked for Ayrton Saunders Limited on a consultant basis weekly including every Wednesday, parking nearby in the company carpark based in Liverpool.

39. The claimant commenced her employment as a care worker on 18 February 2014 based initially in Maryland. The claimant completed a pre-employment questionnaire that stated she had breast cancer. There was no reference to mental health issues and anti-depressant medication which the claimant had been taking for a number of years. It is notable that on cross-examination the claimant could not recall taking anti-depressant medication when her medical records showed otherwise, although the length of time could not clearly be established from the records. The records reflect the claimant had a pre-existing mental health issue before she started her employment with the respondent, who were unaware of the fact until the second and third respondent received the grievance/letter before action dated 1 March 2021 written by solicitors instructed by the claimant, and so the Tribunal found.

40. The GP records reflect on 25 March 2019 the claimant was prescribed sertraline for anxiety and depression. It is notable there is a reference to the claimant having difficulties with re-housing and it is undisputed the claimant had a discussion with the third respondent on the 27 July 2016 about her housing difficulties. The third respondent knew the claimant had experienced difficulties with housing and she was a single parent with school age

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children in 2016. This is relevant to allegation numbered 2.2.5 and 4.2.3 in the agreed list of issues.

Absence

41. The claimant was absent for a substantial period of time with a wrist fracture from 28 November 2018 to the 7 May 2019 for which she received sick pay as opposed to statutory sick pay before returning to work with no difficulties. The claimant successfully brought an insurance claim against the first respondent due to her suffering the fractured wrist as a result of an accident at work, but nothing hangs on this.

42. On the 6 June 2019 the claimant was referred to counselling for anxiety. The claimant returned to work for a short period of time before she was absent from work either in July (according to the claimant) or August 2019 (according to the respondent) with breast cancer. A MED 3 was issued "not fit for work...malignant neoplasm of female breast." It is undisputed that all of the fit notes made reference to the cancer and there was no reference to mental health issues. In oral evidence the claimant stated there was a reference to "functional effects" which the claimant believed, was effectively a reference to her mental health issues which put the respondent on notice that she was disabled with anxiety and depression. The Tribunal accepted the second and third respondent's evidence that a reference to "functional effects" of cancer did not put them on notice that the claimant was disabled with a mental health impairment and they had no knowledge of her condition until the 1 March 2021 grievance/ letter before action.

43. Fit notes were issued on the 3 October 2019 and 6 December 2019 until 17 January 2020, the reason for the claimant's absence referenced the cancer and no mental health issues. The claimant was seen in the mental health clinic on 15 November 2019 as recorded in the GP records which the respondents had not seen.

44. It is undisputed MED3 Fit notes were not always sent to the second respondent by the claimant. The second respondent was responsible for personnel matters and unconcerned with the lack of fit notes as SSP had run out in October 2019. It was agreed between the parties that sick notes were not always handed in by the claimant, and there was no contemporaneous documentation suggesting the third respondent was chasing the claimant or requested copies.

45. According to the documentation within the bundle in 2019 there was contact between the second respondent and claimant when the claimant texted the second respondent for a SSP1 [benefits form] informing her "I see the specialist first week in December so will now more about return date." The second respondent responded "OK." That is the extent of the communications between the second respondent and the claimant via text messages during this period, and there is no contemporaneous documentary evidence that the claimant informed the second or third respondent she was suffering from mental health issues.

46. In oral evidence the claimant stated that there was a telephone conversation between her and the second respondent to which there is no reference in the claim form or the claimant's witness statement. The claimant relying on text messages in the bundle, stated on the 9 November 2019 she had a conversation with the second respondent about her mental health and described the second respondent's reaction to the psychiatrist referral to her friend as follows; "OMG Suraya messaged back" with part of the text redacted. The claimant's friend responded "OMG" and in a separate text "sorry" to which the claimant responded, "about the call she gone really snotty since I told her I am waiting on psychiatrist

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and psychologist she is being horrible [tearful emoji] no need for way she is being, worked there for years, ffs it's cancer not a sore throat." Apart from the first text message sent on 9 November 2019 15.19 all were undated, and the Tribunal was not shown the originals. The text messages do not run logically, for example, the claimant's friend asked what the second respondent had said, which was ignored by the claimant.

47. On the balance of probabilities the Tribunal found the text messages relied upon by the claimant did not establish the second respondent was aware of her mental health disability on 9 November 2019, and the Tribunal is not satisfied the second respondent was "being horrible" as a result. On cross-examination the claimant conceded the allegation was not in her claim form and not in her witness statement, but maintained when challenged why she knew it was in November 2019 stated, "we **must have** had conversation about it" [the Tribunal's emphasis]. The claimant's evidence was not credible, and she has deliberately produced the text messages in such an order that it looked like the second respondent was "being horrible" due to her mental health. The claimant's attempt to support her version of events is unsuccessful, and on giving the text messages their straightforward logical interpretation taken in context the Tribunal concluded on the balance of probabilities the text messages were intentionally placed in such an order to strengthen the claimant's case when the reality was completely different.

9 December 2019 work-related discussion between the claimant and second respondent.

48. It is notable the text messages exchanged between the claimant and second respondent a month later were affectionate and supportive in tenor. The Tribunal prefers the second respondent's evidence that this was the first conversation about the claimant's health, her mental health was not raised and the issue of "weak bone density" and continuing cancer treatment was discussed.

49. The conversation that took place between the claimant and the second respondent on 9 December 2019 resulted in the second respondent texting the claimant "I think you are very strong for being so honest, and to say it how it is. I hope things get better for you soon. Will be thinking of you [kiss emoji] Take care xxx." The claimant responded "aww thank you. That means so much. I think I am struggling so much as it's just not my personality to feel sorry for myself but this has wiped me off my feet, thank you so much xxx."

50. The claimant argued that her text message clearly showed she had referred to the mental health issue. The Tribunal did not interpret the text messages in the same way as the claimant, preferring the second respondent's evidence which was that she knew the claimant was upset over the cancer diagnosis and took the view the claimant was being strong, as recorded in the text message. The reference to the claimant being "wiped off" her feet does not put the second respondent of notice of a mental health issue.

51. The claimant continued to be absent due to cancer and no formal contact took place with her, the second and/or third respondent although both confirm they saw each other within the small geographical area referred to as "Formby village". Their communications were pleasant. There was no sign of the claimant returning to work in the foreseeable future, and the second and third respondent accepted this in the expectation the claimant would return when she was well enough. There are a number of medical records covering this period with references to anxiety states, osteoporosis and malignant neoplasm of female breast. The Med 3's covered this period to 15 June 2020 straddling the onset of the Covid Pandemic and lockdown which has a direct consequence on the pressures experienced by the third and fourth respondent in running the home. The medical records do not reflect the

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claimant was chasing her MED3's and the respondent was not asking for them in direct contradiction of the claimant's evidence. The claimant's sick note expired on the 18 June 2020, and there was no conversation either before or soon after that date warning the second respondent that the MED3 would be delayed by a number of months.

28 August 2020

Allegation: 28 August 2020 Suraya Bacon ("R2") questioned why the claimant was still sending in sick notes, said the claimant should not be returning to work and was not longer suitable to be working for R1.

52. In the Grounds of Complaint and the amended Grounds the claimant alleged she contacted the second respondent by telephone explaining she would be providing her sick note later than expected as a result of postal delays due to the covid pandemic. The claimant alleges the second respondent responded as follows; "you're not sending them in" and she "seemed shocked." The claimant alleges she confirmed she was still providing sick notes but would like to return to work, she was under the care of a psychologist and taking medication to treat a mental health condition. The claimant claims the second respondent allegedly said she should not be returning to work and she was no longer suitable for Maryland Care Home....Mrs Bacon did not elaborate upon this."

53. The Tribunal did not accept the claimant's version of events which changed from the pleaded case, as credible, preferring the evidence of the second respondent on the balance of probabilities that the discussion did not take place. In cross-examination the claimant confirmed she had not mentioned the incident to her doctor, and later on in her evidence stated she cannot recall whether she mentioned it or not, having questioned why she would not have mentioned it given the claimant's complaint before the Tribunal that she suffered personal injuries as a direct result of what the second respondent had allegedly said to her. The medical records make no reference to the 20 August 2020 or October 2020 allegations.

54. In any event, as recorded below, the alleged incident (which the Tribunal found did not take place) is made out of time and dismissed on the basis that the Tribunal does not have the jurisdiction to consider the complaint.

The first week of October 2020

Allegation: First week of October 2020 R2 told the claimant she was no longer suitable for the care home; the care home was not suitable for her and asked the claimant whether she had considered working on the till for Tesco.

55 In the Grounds of Complaint the claimant alleged "during the first week of October 2020 the claimant along School Lane...past the Care Home...noticed Mrs Bacon in the car park. Mrs Bacon asked the claimant how she was and the claimant explained she was struggling with her health condition and attending telephone counselling in the hope she would "sort things out" so she could return to work. It is alleged "Mrs Bacon abruptly told her she is no longer suitable for the care home and the care home is not suitable for her...then asked the claimant whether she had considered working on a till in Tesco." The allegation was very specific and the Tribunal does not accept the claimant's assertion that her solicitors made a mistake. It is clear from the Tribunal that the information could only have come from the claimant.

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56 Two preliminary hearings took place on 24 May 2021 and 25 April 2022 at which the complaints were discussed and in relation to the 25 April 2022 hearing there was an application to amend. The claimant in oral evidence maintained her solicitors had made a mistake and ACAS had also made a mistake in a letter setting out the date of October 2020 when the incident had taken place “on or about the 28 August 2020”. The claimant maintains she informed her solicitors numerous times that the pleadings were incorrect in this respect, and they ignored her.

57 It is notable the document marked “Grievance/Letter Before claim” dated 1 March 2021 from the claimant’s solicitors is identical to the contents of the complaint and amended Grounds of Complaint. The claimant’s evidence was that the solicitors had read out to her over the phone the 1 March 2021 letter which ran to over 4 pages of information, and she was provided with a copy maintaining at that point she had asked her solicitors to amend the allegation of 28 August 2020 and October 2020.

58 For the first time in her witness statement that claimant described her allegation differently, changing her story. The phone call became the claimant passing Maryland, and there is no reference to the second respondent asking the claimant how she was. In short, the claimant has merged the 28 August and October 2020 allegation with other changes, in the witness statement, which was the first indication to the respondents that the claimant’s case was different. There is no reference to the second respondent allegedly saying that the care home was not suitable for her.

59 The claimant’s witness statement is dated 15 June 2022, almost 2 years following the alleged incident and in oral evidence the claimant explained how her medication for her cancer treatment had impacted in her memory to the extent that she had difficulty remembering things, such as the fact she had been on anti-depressant medication in the past. The Tribunal on the balance of probabilities does not accept the claimant instructed her solicitors to amend the Particulars of Claim a number of times as she maintains, and her instructions were ignored by three different solicitors when an amendment was made to include claims of victimisation and harassment with reference to an allegation concerning Mr Willoughby that allegedly took place on the 15 September 2021. We do not find it credible that the claimant’s solicitors would seek leave to amend the claimant’s complaint to include an allegation of victimisation based on what they were being told by the claimant, and ignore instructions to amend within the pleading the critical incidents of 28 August 2020 and October 2020 that resulted in the claimant undergoing early conciliation, seeking legal advice and sending a letter before action. The claimant was aware from the 7 March 2021 letter sent to her solicitors (see below) that the respondents believed her allegations were fraudulent and this has been the case throughout the litigation and this trial, and yet the allegations remained the same until the claimant sent her witness statement to the respondents.

60 A fit note was issued on 16 October 2020 referenced malignant neoplasm of female breast backdated to 15 June 2020. It is clear from the medical records that the claimant was not fit to return to work, there was no foreseeable return to work and the claimant confirmed in oral evidence at no stage did she inform the respondent she was well enough to return on a phased basis, despite a reference to the respondent’s failings in this regard by the claimant and Paula McElwee who referred to the failure to allow the claimant a phased return. The Tribunal accepted as credible the second respondent’s evidence that there was no issue with the claimant not sending her MED3’s and it appears the last MED3 received was in or around March 2020 with no chase up communications from the respondents to the claimant, or any communication from the claimant about this. This further undermines the claimant’s case.

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61 On 15 September 2020 there was an accidental meeting in Costa coffee when the second respondent came across the claimant and the Tribunal accepts pleasantries were exchanged reflecting that the second respondent was not ignoring the claimant when she came across her as alleged. In relation to the meeting on 15 September 2020 the issue for the claimant was that the second respondent was breaching Covid Regulations by being in Costa Coffee with a friend. The Tribunal found the second respondent's version credible, preferring her evidence to that of the claimant's that the only meeting between the claimant and the second respondent was on the 15 September 2020 and not in or around 28 August 2020 or October 2020 as originally stated by the claimant. The second and third respondent had been abroad on holiday returning to the UK on the 28 August 2020 as a result of a delayed flight and so the Tribunal finds. There was no telephone call to the claimant as alleged by the claimant at paragraph 8 of the amended Grounds of Complaint and in the alternative, the claimant did not see the second respondent getting out of her car at Maryland following which the alleged conversation followed. There is a big difference between a telephone call and meeting; the claimant has yet again changed her evidence and this further undermines her case. The Tribunal found her to be an inaccurate historian whose evidence could not be relied upon. At the liability hearing the contradictory evidence was discussed with the claimant and an explanation for it sought by the Tribunal; other than blame her solicitors the claimant was unable to give an explanation and submitted the fact she changed her evidence in her statement points to her being an honest witness. The Tribunal did not accept this. The allegations set out in the claim are very specific and detailed, there was plenty of opportunity to amend both before and after the successful application to amend. On the claimant's account she had repeatedly asked her solicitors to amend. The Tribunal did not find this explanation credible.

62 The Tribunal found in or around the 28 August 2020 Suraya Bacon did not question why the claimant was still sending in sick notes, and did not say the claimant should not be returning to work and was not longer suitable to be working for the first respondent.

63 The allegation that in the first week of October 2020 the second respondent told the claimant she was no longer suitable for the care home has been withdrawn by the claimant who put forward an alternative version of events that this took place in or around 28 August 2019. The Tribunal found this was not said by the second respondent at any time, and the claimant was not told the care home was not suitable for her and not asked whether she had considered working on the till for Tesco.

Approximately 4 months later early ACAS conciliation

64 The claimant underwent ACAS early conciliation on the 31 December 2020 in respect of the second respondent only. The claimant maintains ACAS provided the second and third responded with the original dates and allegations set out in the Grounds of Complaint. The claimant's position was that the information held by ACAS went to her solicitors and that is why the dates were incorrect. The Tribunal does not find this version of events credible either, concluding the claimant was a less than credible witness. The Tribunal found the claimant was capable and well enough to have consulted with ACAS within the statutory time limit, and there was no good reason for her not to have done so, had the incident taken place in or around the 28 August 2020, which the Tribunal found it had not.

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Grievance/letter before action

65 The claimant's solicitors on the claimant's instructions sent to the first and second respondent a "grievance/letter before claim" dated 1 March 2021 ("1 March 2021 letter"). The following is relevant:

65.1 The 1 March 2021 letter sets out details of the complaint in a 5-page document. As indicated above, the letter included a complaint about the alleged incident on "on or around 28 August 2020" referring a telephone conversation between the claimant and second respondent, and the first week in October an accidental meeting in the car park between the claimant and second respondent. Both incidents are very detailed, and the information can only have come from the claimant. It is these two specific allegations which upset the second and third respondent because they knew they could not be true given the dates cited, due to holidays and the second respondent's absence due to Covid19. Under the heading "claims" the allegations are repeated and numbered 1 and 2 and described as both harassment and discrimination arising from disability. The value put on the allegations was a total of £20,000 for injury to feelings put on an open basis.

65.2 Without prejudice the claimant's solicitors threatened to issue Employment Tribunal proceedings "within the statutory limitation period", and to the claimant believing "trust and confidence has been fundamentally breached by Ms Bacon's actions leading her to consider resignation and claim damages for constructive dismissal. Additional damages were claimed for unfair dismissal totalling £22,790 including injury to feelings which the claimant would accept in settlement and "once claims are lodged this proposal is withdrawn." The claimant's reference to resignation and claiming constructive unfair dismissal gave rise to further issues on her credibility. In oral evidence on questions from the Tribunal the claimant explained how she had not been in work since June 2019, that she did not want to issue proceedings, had not thought about resigning and wanted to return to work contradicting the contemporaneous documentation. It is notable despite at no time from June 2019 to date the claimant never requested a return to work always maintaining she was too unwell and suffering from personal injuries (including PTSD) caused by the actions of the second respondent.

65.3 There is no reference in the body of the 1 March 2020 letter to the word "grievance" except in the heading, to the claimant seeking a grievance hearing, or to the claimant relying on any internal Grievance Procedures and/or ACAS Code of Practice. In the claimant's evidence on cross-examination she said by the time she contacted ACAS she knew she would not be returning to work, and did not have any intention as of December 2020 to ever return. The claimant gave conflicting evidence as to whether she ever intended to return to work, the 1 March 2021 letter makes it clear the claimant was putting pressure on the first and second respondent to settle for £22,790 as a condition of Employment Tribunal proceedings not being issued and her resignation.

66 The claimant did not raise a grievance within the terms of her employment contract in the 1 March 2020 letter in good faith and so the Tribunal found, refusing to go so far as use the terminology adopted by the respondents who alleged throughout these proceedings that

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the claimant acted fraudulently. It was a letter aimed at being paid damages from the respondents for allegations which the claimant knew to be untrue, evidenced by her withdrawing the October 2020 allegation in her witness statement just before this liability hearing.

67 Solicitors acting on behalf of the respondent conceded the 1 March 2020 letter was a protected in a letter dated 23 August 2021. The second and third respondent's position was and remains that the claimant acted fraudulently and the claimant was aware that this, referring in oral submissions to the respondent's case that she had made false allegations. .

The third respondent's 7 March 2021 letter in response to the letter before action

68 On receiving the 1 March 2021 letter the second and third respondent were aware that what the claimant was alleging could not be the case and felt upset that the claimant was claiming a substantial amount of money relying on false allegations as a condition of her bringing the threatened litigation to an end. They were upset and angry. The following is relevant:

- 68.1 The third respondent confirmed the last sick note sent by the claimant to the second respondent was March 2020 and that the second respondent had texted the claimant on the 9 December 2019 for an update on current health issues. There was contemporaneous evidence before the Tribunal to this effect which supported the second and third respondent's version of events.
- 68.2 Reference was made to the care home records which showed the second respondent was on leave from 20 August 2020, her flight delayed and she returned home on the 28 August 2020, returning to work after the bank holiday and celebrating their daughter's 18th birthday. The second respondent returned to work on the 1 September 2020 and so the Tribunal found. The second respondent denied she had spoken to the claimant on the telephone as alleged, she had not met her in the car park and nor had she chased up sick notes which were non-urgent as the last sick note received was March 2020. Taking into account the unreliable evidence given by the claimant the Tribunal preferred on balance the second and third respondent's version of events.
- 68.3 With reference to the October 2020 allegation the respondent was absent from work and self-isolating with Covid and therefore "this incident could not have happened." There was contemporaneous evidence before the Tribunal to this effect which supported the second and third respondent's version of events, and the claimant withdrew the allegation. As at the 7 March 2021 the second and third respondent held a genuine belief that the allegations were not true and for good reason, and they believed the claimant was fraudulent because she was relying on false allegations for financial gain, threatening Employment Tribunal proceedings if payment was not made.
- 68.4 The third respondent wrote "these two incidents did not occur" having conducted an investigation and made reference to the claimant "regular" socialising during Covid pandemic lockdown with three staff from the case home. He confirmed the claimant's claim "will be contested".

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68.5 The second respondent sitting outside Costa Coffee with a friend on 15 September 2020 was confirmed, and reference made to the conversation being brief, and herself and JS “were warm friendly and cheerful to each other.”

68.6 Under the heading “Additional Information” the third respondent referred to Maryland Care Home being situated in the centre of Formby, many staff travel through the centre, the third respondent drove through the centre and has seen the claimant with friends socialising outside Costa. Reference was made to the third respondent walking to the post office in the centre of Formby and a member of staff sitting with the claimant inside her car on the 2 March 2021, breaching Covid-19 rules and “she was unable to attend work until she received her negative test result. Colette Riley confirmed in oral evidence that this was the case, she did not take the client to hospital as arranged and only returned work after a negative Covid test result.

68.7 Reference was also made to the claimant socialising evidenced by a video and photographs taken from her public social media account.

Letter 7 March 2021 R3 threatened to disclose the contents of his letter to the claimant’s landlord alleging her claim was racially motivated against R2

68.8 The second and third respondent believed the claimant’s claim was “fraudulent” and he wrote “this claim can be classed as fraudulent” maintaining it was a “personal attack on SB and it seems highly probable that it is racially motivated as SB is of Indian origin...I will be seeking a personal claim against JS in the civil court...**I will be informing JS’s social landlord of the above actions should they be progressed**” [the Tribunal’s emphasis]. The third respondent made a counteroffer to the claimant for her to withdraw the claims, submit a letter of apology and provide a letter of resignation.

69 With reference to the threat to inform the claimant’s landlord, the third respondent made the threat to inform the claimant’s landlord if the proceedings were issued by either party and the reference to the claimant being “racially motivated” was the second and third respondent’s attempt to understand why she had attacked the second respondent only, and the counter-allegations were forcefully made in an attempt to get the claimant to withdraw her claims. Both parties were putting pressure on the other; the claimant wanted a pay off and the respondents to avoid paying her anything in the face of a threat of Tribunal proceedings. Both parties acted aggressively as litigious parties and not employee and employer looking for a positive outcome following a grievance process. It is clear to the Tribunal from the evidence of the parties at this hearing, that the employment relationship had irrevocably broken down by early March 2021 and the correspondence between the claimant’s solicitors and respondent underlines this fact. Had it been otherwise a grievance process would have been followed by both. The claimant did not seek a grievance hearing, after the initial investigation the respondents did not offer it, and the reason for this was that both understood they were now taking part in a litigation process and not a grievance procedure.

70 In the 7 March 2021 letter the third respondent was responding and defending in detail to the claimant’s claim of disability discrimination, giving a clear explanation on every point raised in the 1 March 2021 letter before action including bringing into question the “claimant’s

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honesty and integrity". The third respondent attempted to undermine the claimant's allegation that she was unable to leave the house, as part of her claim, with reference to the copies of photographs and a video of the claimant out enjoying herself in public. It is notable in oral evidence the claimant accept the second and third respondent had not accessed her locked social media account, and that the photographs and video had been passed to him by members of staff which was indeed the case and so found the Tribunal. The claimant has no basis on which to assert staff passed the photographs across because of her disability, and the Tribunal preferred the third respondent's version of events which was that staff were concerned with the claimant's behaviour and exposure to Covid, they were aware she was out and about enjoying herself and appeared to be well enough to return to work. The third respondent then chose to use the evidence as a shield in the litigation once the 1 March 2021 letter had been received because by the stage the parties were undoubtedly in litigation mode evidenced by the tenor of the correspondence from both sides.

71 The claimant underwent ACAS early conciliation in respect of the third respondent on 11 March 2021 having instructed solicitors to act on her behalf.

ET proceedings

72 The claimant's complaint against the second and third respondent was received by the Tribunal on the 11 March 2021.

From 1 March 2021 R3 monitored the claimant.

73 The claimant produced no satisfactory evidence that the third respondent monitored her, and the Tribunal found he did not. The Tribunal has dealt with this above in credibility of witnesses.

2 March 2021 R3 drive his car next to the claimant's car and pointed his phone at her as if he was taking photographs or a video.

74 The claimant changed her allegation from driving next to her car to walking past her car, yet a further example of the claimant changing her story. The respondent first raised the fact that he had seen the claimant and Collette Riley sitting together in the car on 2 March 2021 in the 7 March 2021 response to the claimant's solicitor 1 March 2021 letter.

75 The Tribunal has dealt with this above in credibility of witnesses. It is notable that the first reference to this incident was in the respondents' letter of 7 March 2021 and not in the letter before action. The third respondent, as was his habit, walked from Maryland Care Home to the post office and so the Tribunal found despite the claimant's best endeavours to undermine the evidence by references to the third responded exposing himself to Covid19 by going into the post office and then preventing Collette Riley from returning to work until she showed a negative test, suggesting this was an act of victimisation because Collette Riley was friends with the claimant and sitting in her car talking. In mid-2022 it is easy to forget the impact the Covid Pandemic had on care homes; staff stayed in the homes not seeing their family, older people were dying in the homes and people were worried for themselves, their families and earning an income. The third respondent's evidence that care workers were worried was credible, and once he saw Collette Riley sitting next to the claimant in the car, in the knowledge that the claimant was enjoying herself with parties of friends during lockdown, he took the view Collette Riley could not go into work and take a client to hospital, which she was due to do, because it was too great a risk to other employees and clients.

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76 The Tribunal finds it is more probable than not that the third respondent used his phone to inform the second respondent of the situation concerning Collette Riley at the time before returning. Collette Riley recalls the third respondent may have been on the phone, but she was unable to say for sure. It is undisputed Collette Riley was sent home immediately and only returned when she had a negative Covid test. The client was not taken to hospital. It is not credible the third respondent took a video and/ or photographs of the claimant and this was not seen by Collette Riley who relies on the claimant telling her that he was. The Tribunal finds on the balance of probabilities that the claimant on reading the 7 March 2021 letter opportunistically used the reference to the third respondent seeing the claimant and Collette Riley sitting in the claimant's car to further bolster up her claim that she was being photographed, videoed and monitored by the third respondent when she was not.

Between 1 to 8 March 2021 R3 disclosed details of the claimant's claim/grievance letter and personal information to a staff meeting.

77 The Tribunal has dealt with this above in credibility of witnesses. The claimant was not at the meeting. No personal information concerning the claimant was disclosed, as confirmed by witnesses who were at the meeting. The only matter that was disclosed was the claimant's intention to litigate and the need for witnesses by both parties. Details of the claimant's claim/grievance letter was not disclosed and so the Tribunal found.

8 March 2021 R3 at 3pm stood directly outside the claimant's home and laughed at her.

78 It is undisputed the third respondent walked down the claimant's street and passed on the opposite side of the road to the claimant's house on the 8 March 2021. The parties do not agree as to what took place and the Tribunal was invited by the claimant to look at a photograph she had taken of the third respondent standing in the street, which she submitted showed him to be laughing at her. The photograph was grainy and unclear and the identity of the person could not be made out. At the hearing the claimant produced a marginally better copy whereupon the third respondent, who had never denied he was there with his daughters, accepted it was a photograph of him but not that he was laughing. The Tribunal concluded, on a close analysis of the photograph, that the third respondent was not laughing but looking up towards the claimant who had been banging on the window before she had taken the photograph to be used as evidence in this litigation. It is unfortunate the claimant did not take a photograph of the respondent's two daughters and dog at the same time.

79 On the balance of probabilities the Tribunal found the third respondent and his two daughters were taking a walk down the street near to where he owned a rental property. It was used as a shortcut. They walked on the opposite pavement that passed across from the claimant's house. The claimant saw them, banged on the window, took a photograph and then followed them in the car. As she was banging on the window the third respondent looked across. He did not smile or laugh at her. The claimant then got into her car and followed the third respondent down the street at speed. The perception of the third respondent was that she was driving recklessly. The claimant denied she left the house, but on cross-examination questioned how she could have driven recklessly and yet successfully have stopped at the give way.

R3 alleged the claimant had been driving recklessly on the 8 March 2021.

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80 For the reasons stated above dealing with the credibility of witnesses, the Tribunal found that R3 had good reason to allege the claimant was driving recklessly down the street after he and his daughters had continued with their walk.

10 March 2021 R3 followed the claimant who was driving her daughter to school and back to the centre of Formby.

81 Jonathan Westaway produced evidence by way of original timesheets showing the third respondent was at work in Liverpool on the 10 March 2021, and gave oral evidence that the third respondent had arrived at 10.00am when he signed in, left at 5pm and usually parked at the company car park. The timesheet was filled in by Jonathan Westaway.

82 The third respondent produced a document "Jaguar InControl" dated 20 July 2022 providing the data for the journey to and from Liverpool taken between 6 March and 11 March 2021. The Tribunal looked at the original document on the third respondent's phone and was satisfied that it was genuine, and reflected much like a tachograph, the journey taken in a Jaguar I-Pace 10ksb driven by the third respondent on the 10 March 2021. The Tribunal also took account a journey plan and map in the bundle confirming the third respondent worked in Liverpool on the day in question and was not following the claimant.

83 Summer Smith in oral evidence confirmed she had not included this allegation in her witness statement, that she had left for school at 8.25am, had not called the police or taken photographs. The Tribunal found Summer Smith did not give persuasive evidence that the incident had taken place, she was trying her very best to help her Mother and her comment that it may not have been the third respondent driving the car to Liverpool did not assist her. It had no basis and was undermined by the evidence of Jonathan Westaway who confirmed the third respondent was at work.

84 In oral evidence the claimant changed her story and stated the 10 March 2021 date was wrong when the evidence relied on by the third respondent was explored with her on cross-examination and she was faced with the documentation from Jaguar and witness evidence from Jonathan Westaway. The Tribunal found the alleged incident did not take place on the 10 March 2021 or any other day and the claimant's evidence that it had was not credible.

31 August 2021 a member of the public described the claimant as the racist from Maryland following R3 making unfounded allegations of racism to members of the public.

85 The evidence concerning this allegation was very confusing partly caused by the fact that the claim form was amended on the 15 October 2021 at paragraph 21 which refers to the claimant talking and having a "pleasant conversation with a South Asian manager of Costa Coffee shop she left the shop and was approached by a member of the public who said 'what are you doing here chatting to them? You're the racist from Maryland.'" In oral evidence on cross-examination the claimant stated she was stopped in the newsagents by a "little old lady" who said, "why are you in her because you are the racist from Maryland?" The claimant changed her story from Costa Coffee to a newsagents and the alleged words used, contradicting her own evidence.

86 The third respondent denied the allegation in its entirety, and explained in oral evidence that he went to a coffee shop next to the newsagents to see if he could gather evidence about the claimant's allegation, and there was confusion whether he had visited a different coffee shop called Settle Waite (not Costa) and/or a newsagents. The upshot was

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that no satisfactory evidence existed to the effect a “little old lady” had accused the claimant of racism, and the third respondent was confused over the claimant’s change in her evidence dealing with this allegation.

87 On the balance of probabilities the Tribunal concluded this incident did not happen as described by the claimant, who would have known if the description contained in the amended Grounds of Complaint was correct or if the incident had taken place at or outside the newsagents. The contradictions found in the claimant’s written and oral evidence compared to her pleadings are fundamental and undermine her whole case.

15 September 2021 R3 showed Mr Willoughby owner of Dapra coffee shop where a photograph of the claimant stating “be careful. She is a scammer. She sues people for fun. Watch her as she is a racist.” When Mr Willoughby stated the claimant was his friend R3 responded “pick better friends. This woman is suing me because my wife is Asian.”

88 For the reasons set out above when dealing with the credibility of witnesses and conflicts in the evidence, the Tribunal concluded on the balance of probabilities the alleged incident did not take place. The third respondent was at work in Liverpool that day, and Mr Willoughby changed his evidence from the 15 September 2021, a date he had been originally sure about, to an unknown date when training was taking place.

R3’s use of private detectives to take photographs of the claimant.

89 The claimant gave no evidence to support this allegation, and her evidence that the third respondent had produced photographs from her social media account undermined any allegation that a private detective took photographs of her. The claimant has not produced the photographs, and the only evidence that a photograph of the claimant existed was given by Mubeen Willoughby who was found to be an unreliable and less than credible witness. This allegation has not basis and did not take place and so the Tribunal found.

TUPE transfer

Allegation: The claimant’s employment transferred under TUPE from R1 to R4 in or around 8 September 2022 (285) or 21 January 2022 (311)? Did the respondent consult with the C in a letter dated 5 August and 7 September 2021?

90 A TUPE transfer from the first to fourth respondent took place on the on the 21 January 2022.

91 In early August 2021 a “senior meeting” took place attended by Gillian Morris, Collette Riley and Chloe Fisk with the second and third respondent in attendance to discuss the proposed change of business from the first to third respondent, the name was going to change and they were informed there was nothing to worry about. After the meeting employees were handed letters, which were not in the bundle. The only letters in the bundle were those addressed to the claimant and dated 5 August and 7 September 2021 respectively.

92 The 5 August 2021 letter confirmed the second and third respondent proposed to make a change to the organisation’s legal entity and trade through the fourth respondent on 8 September 2022. The claimant was informed her employment would automatically be transferred and her terms and conditions of employment remain the same, the job and role secure with no changes to how the home would be run. The claimant’s views were sought

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and a meeting was suggested. Unsurprisingly the claimant, who had no intention of ever returning to work, did not respond and so the Tribunal found.

93 The letter was hand delivered by the third respondent when he was riding his push bike and had satisfied himself the claimant's car was not outside her house. The claimant denies receiving the letter. The Tribunal preferred the evidence given by the third respondent on the balance of probabilities. Other employees had received letters and there was nothing to gain by the respondents not informing the claimant bearing in mind she had friends who worked as carers for the first respondent and would have eventually been told about the changes.

94 The second and last letter is dated 7 September 2021 confirmed the "change to the organisation's legal entity has taken place and the care home will now be operating through Savoy Care Home...trading as Maryland Care Home as from 8 September 2021.

95 There is an issue as to when the change in legal entity took place. In a preliminary hearing held on the 25 April 2022 the second respondent confirmed the claimant's employment transferred under TUPE on or around 21 January 2022 and the parties agreed the third respondent was now the employer. In oral evidence the second respondent confirmed the Transfer on the 4 January 2022. The Tribunal were not shown any documents relating to the transfer.

96 It is clear that whether the TUPE transfer took place on the 4 or 21 January 2022 the claimant was consulted with in part only, as from 7 September 2021 she was under the impression her employer was the fourth respondent when it was the first respondent through to January 2022. It is fundamental that employees know who their employer is, as acknowledged by the second respondent who conceded when being questioned by the Tribunal that the first and fourth respondent had failed to consult properly, although some consultation had taken place.

Law

Disability discrimination arising from disability

97 Section 15(1) of the EqA provides-

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

(a) A treats B less favourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

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

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- 1.2 there must be something that arises in consequence of claimant's disability;
- 1.3 the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;
- 1.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

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

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

99.2 The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

99.3 The Tribunal examined closely the conscious and unconscious thought process of the respondent's witnesses who gave evidence before it, concluding the explanations they gave were untainted by disability discrimination.

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

99.5 The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment

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and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

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

100 Whether or not treatment is “unfavourable” is largely question of fact but this does not depend just on the disabled person’s view that he should have been treated better - Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65. There must be a measurement against “an objective sense of that which is adverse as compared to that which is beneficial” - T-System Ltd v Lewis UKEAT/0042/15 (22 May 2015, unreported).

101 In Sheikholeslami v University of Edinburgh [2018] IRLR 1090, the EAT held that the approach to this issue requires :An investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the “something” was a more than trivial part of the reason for unfavourable treatment, then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.

102 The actual disability does not need to be the cause of the unfavourable treatment under s.15 but it needs to be “a significant influence” or “an effective cause of the unfavourable treatment” - Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT. It will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact – Pnaiser cited above.

103 It is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably. The unfavourable treatment must be because of the something which arises out of the disability - Robinson v Department of Work and Pensions [2020] EWCA Civ. 859.

Objective justification

104 This is not an issue in the case.

Harassment

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

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

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characteristic — S.26(1)(a), and the conduct has the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B — S.26(1)(b).

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

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

109 In order to decide whether any conduct has either of the proscribed effects under s.26(1)(b) EA 2010, the ET must consider both (by reason of s. 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of s.4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). All the other circumstances must also be taken into account (s.4(b)) - Pemberton v Inwood [2018] EWCA Civ 564.

110 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 - Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is submitted that a claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention.

Related to a protected characteristic

111 This is a very broad test, but some guidance about how the ET should approach the issue was provided in UNITE the Union v Nailard [2018] EWCA Civ. 1203. The ET should make findings as to the mental processes of the alleged harassers.

112 Whilst the view of a claimant might be that the conduct related to the protected characteristic is relevant, it is not determinative - Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 EAT. The ET has to apply an objective test in determining whether the conduct was related to the protected characteristic in issue. The intention of the actors concerned might form part of the relevant circumstances, but it is not the only factor.

Victimisation

113 S.27 EqA provides that: '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.'

114 To succeed in a claim of victimisation the claimant must show she was subjected to the detriment *because* she did a protected act or *because* the employer believed he or she had done or might do a protected act. The acts that are protected by the victimisation provisions are set out in S.27(2). They are:

bringing proceedings under the EqA — S.27(2)(a)

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giving evidence or information in connection with proceedings under the EqA — S.27(2)(b)

doing any other thing for the purposes of or in connection with the EqA — S.27(2)(c)

making an allegation (whether or not express) that A or another person has contravened the EqA — S.27(2)(d). The claimant relies on the grievance/letter before action letter dated 1 March 2021 as the protected act.

115 Section 39(4) provides that an employer (A) must not victimise an employee of A's (B):

as to B's terms of employment — S.39(4)(a)

in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training, or for any other benefit, facility or service — S.39(4)(b)

by dismissing B — S.39(4)(c), or

by subjecting B to any other detriment — S.39(4)(d). the claimant relies on S.39(4)(d).

Burden of proof

116 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

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

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Conclusion – applying the law to the facts

Burden of Proof

118 The claimant has not proved, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the respondents subjected her to the discrimination alleged save for allegation 2.2.5 and 4.2.3, and the burden has not shifted. If the Tribunal is wrong on its application of the burden of proof, and the burden shifted to the respondent to prove on the balance of probabilities that the claimant's disability was no part of the reason: Igen cited above, it would have gone on to find the explanation given on behalf of the respondents was untainted by disability discrimination. With reference to allegation 2.2.5 and 4.2.3 the third respondent satisfied the Tribunal he had met the burden of proving the contents of the letter dated 7 March 2021 regarding the claimant's landlord and the claimant being racially motivated against the second respondent was not tainted by disability discrimination as it was a direct consequence of the claimant's "fraudulent" actions which she should not be allowed to benefit from,

Jurisdiction (time limits)

119 Given the date the claim form was presented on the 11 March 2021 and the effect of early conciliation that took place between 31.12.20 to 11.2.2021, any complaint about something that happened before 1 October 2020 may not have been brought in time. The alleged remark on 28 August 2020 was not a discrimination complaints made within the time limit set out in section 123 of the Equality Act 2010. The claim was not made to the Tribunal within three months of in or around 28 August 2020.

120 According to the claimant's own evidence and her retraction of the first week in October 2021 allegation against the second respondent, there were no further allegations of disability discrimination brought against the second respondents. The Tribunal found there was no conduct extending over a period and the alleged incident on 28 August 2020 was not part of an act extending over a period which ended on or after 1 October 2020: Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the appropriate test for a 'continuing act.' The claimant sought to rely on her other medical conditions and health issues as an argument for a continuing act, which does not satisfy the test. In short, there was no satisfactory evidence the claimant was too unwell to undergo ACAS early conciliation and issue proceedings within the primary limitation period. She was aware of her right to bring proceedings and the Tribunal inferred that she did not because the alleged incident was fabricated after the primary limitation period had expired on the 27 October 2020 approximately 2-months before ACAS early conciliation took place.

121 With reference to the issue, namely, was the claim made within such further period as the Tribunal thinks is just and equitable the Tribunal concluded it was not. The claimant has given no cogent reason why the complaint were not made to the Tribunal in time, and contrary to her evidence it found the claimant was well enough as reflected in the GP records.

122 With reference to the issue, namely, in any event, is it just and equitable in all the circumstances to extend time, the Tribunal found that it was not given the contradictions between her evidence and the pleaded claim, and the weakness in her case relating to the alleged 28 August 2021 incident.

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123 In the event of the Tribunal being wrong in respect of time limits, it has considered the substantive claims as recorded below, which in the alternative would have been dismissed on their merits.

Discrimination arising from disability (Equality Act 2010 section 15)

Knowledge

124 With reference to the issue, namely, did the respondents know or could it reasonably have been expected to know that the claimant had the disability, the Tribunal found the first and second respondent were fixed with knowledge of the claimant's mental impairment when it received the grievance/letter before action letter dated 1 March 2021 that referenced her mental health condition. It is common ground the respondent knew about the cancer disability throughout the relevant period.

125 The claimant stated she told the second claimant about her mental health issues in November 2019, which the Tribunal did not accept for the reasons stated above when dealing with credibility of witnesses. The Tribunal on the balance of probabilities preferred the second respondent's evidence that on the 9 December 2019 that the claimant did not inform her of any mental health issues. The brief accidental meeting on 15 September 2020 was not concerning the claimant's health and the claimant did not disclose any information from which the second respondent could reasonably conclude the claimant was suffering from a mental health impairment.

126 The second respondent's position up until the letter before action dated 1 March 2021 was that the claimant was dealing with her cancer and treatment for it, and there was nothing to put her notice the claimant's mental health went beyond the distress caused by her cancer. It is notable the medical evidence before the respondents, including the MED3's, referred to cancer only. The Tribunal found they cannot be reasonably interpreted to convey mental health problems, and nor was the second and third respondent put on notice the claimant could be suffering from a long-term mental health condition that substantially impacted upon her day-to-day activities. As far as the second and third respondent was concerned the claimant's absence, especially during the Covid 19 pandemic, was attributable to her cancer and treatment until the 1 March 2021 letter, and both expected the claimant to return to work. It is notable that other employees had substantial time off work with depression who were on medication, which was accepted by the supportive second and third respondent with no issue. It would be surprising had the claimant been treated any differently, as she now maintains. Had the second respondent know the claimant was suffering from mental health issues it more likely than not that she would have been fully supportive of the claimant until the 1 March 2021 letter before action when the threats were made based on untrue allegations.

The allegations

127 With reference to the issue, namely, did the respondent treat the claimant unfavourably in any of the following alleged respects the Tribunal found it did not for reasons set out above taking into account the guidance in the well-known case of Paisner together with the other legal principles referred to above.

2.2.1 28 August 2020 Suraya Bacon ("R2") questioned why the claimant was still sending in sick notes, said the claimant should not be

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returning to work and was not longer suitable to be working for R1. This incident did not take place.

2.2.2 First week of October 2020 R2 told the claimant she was no longer suitable for the care home; the care home was not suitable for her and asked the claimant whether she had considered working on the Till for Tesco. This incident did not take place.

2.2.3 From 1 March 2021 R3 monitored the claimant. This incident did not take place

2.2.4 2 March 2021 R3 drive his car next to the claimant's car and pointed his phone at her as if he was taking photographs or a video. This incident did not take place

2.2.5 Letter 7 March 2021 R3 threatened to disclose the contents of his letter to the claimant's landlord alleging her claim was racially motivated against R2.

128 The guidance in Paisner above dictates a tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of the third respondent. An examination of the conscious or unconscious thought processes is required and the Tribunal explored this at the liability hearing. It also considered whether there may be more than one reason or cause for impugned treatment recognising the "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

129 The Tribunal's starting point was the third respondent did threaten to inform the claimant's landlord if proceedings were issued by either party, but the threat was not to inform the landlord that the claimant was racially motivated against the second respondent. Nothing hangs on this as the threat to report the claimant to her landlord, for whatever reason, is sufficient for it to amount to unfavourable treatment.

130 In the circumstances of this case the actions of the third respondent amounted to unfavourable treatment. He knew in the past the claimant had experienced difficulties with her social landlord and it caused her distress. The third respondent was aware the claimant would be upset by his threat, and was using it as a lever to pressurise the claimant to drop the litigation. In short, he was meeting fire with fire when responding to the aggressive letter of the 1 March 2021 that he knew contained untruths. The third respondent believed the claimant was acting fraudulently and he reacted not as a caring employer but as a fighting litigant.

131 The test is whether a reasonable worker would consider that the treatment is unfavourable, and the Tribunal found that a reasonable worker would consider a threat to report them to their landlord by an employer unfavourable treatment. The Tribunal criticises the third respondent for the threats he made to report the claimant in the knowledge that she would be upset and worried. The Tribunal thought long and hard as to whether this was an act from which it could draw an inference of disability discrimination, concluding it could not having focused on the mind of the third respondent when he made the threat. It found the only reason was the aggressive way in which the 1 March 2021 letter had been drafted, containing the threat of litigation if he failed to pay a substantial sum of money based on

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untrue allegations which the claimant would have known were untrue. The third respondent was unconcerned with the length of the claimant's absence when he made the threat, and the "something" that caused the unfavourable treatment was not the claimant's sickness absence between June 2019 ongoing to date which had no influence whatsoever on the third respondent, and was not an effective reason for or cause of him threatening to report the claimant to her landlord.

2.2.6 Between 1 to 8 March 2021 R3 disclosed details of the claimant's claim/grievance letter and personal information to a staff meeting. This incident did not take place

2.2.7 8 March 2021 R3 at 3pm stood directly outside the claimant's home and laughed at her. This incident did not take place.

2.2.8 R3 alleged the claimant had been driving recklessly on the 8 March 2021.

132 The third respondent made this allegation against the backdrop of the threatened litigation set out in the 1 March 2021 letter – see above. The test is whether a reasonable worker would consider that the treatment is unfavourable, and the Tribunal found objectively that a reasonable worker would not consider such an allegation made in the factual matrix set out above unfavourable treatment, and nor could the claimant have reasonable believed that it was an untrue allegation given her cross-examination question based on the premise that she had managed to stop at the junction and thereof could not have been driving recklessly having maintained she had not left the house and not driven the car. The third respondent was unconcerned with the length of the claimant's absence and the "something" that caused him to allege the claimant had been driving recklessly was not the claimant's sickness absence between June 2019 ongoing to date which had no influence whatsoever on the third respondent, and was not an effective reason for or cause of him.

2.2.9 10 March 2021 R3 followed the claimant who was driving her daughter to school and back to the centre of Formby. This incident did not take place.

2.2.10 31 August 2021 a member of the public described the claimant as the racist from Maryland following R3 making unfounded allegations of racism to members of the public. This incident did not take place.

2.2.11 15 September 2021 R3 showed Mr Willoughby owner of Dapra coffee shop where a photograph of the claimant stating "be careful. She is a scammer. She sues people for fun. Watch her as she is a racist." When Mr Willoughby stated the claimant was his friend R3 responded "pick better friends. This woman is suing me because my wife is Asian." This incident did not take place.

133 With reference to the issue, namely, did the following things arise in consequence of the claimant's disability: the claimant's sickness absence between June 2019 ongoing to date, the Tribunal found that it did not. The letter of 7 March 2021 containing the threat to disclose the litigation to the claimant's landlord, separately alleging her claim was racially motivated against the second respondent and alleging the claimant had been

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driving recklessly on the 8 March 2021 were not in consequence of the claimant's sickness absence but a direct result of receiving the 1 March 2021 letter.

Harassment related to disability (Equality Act 2010 section 26)

134 With reference to the issue, namely, has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things, the claimant has not on the balance of probabilities. The third respondent has shown that there was no unfavourable treatment because of something arising in consequence of disability on the balance of probabilities and the claims are dismissed.

135 With reference to the first issue, namely, did the respondent do the following alleged things, the Tribunal repeats its findings above.

136 With reference to issue 2.2.5 and 2.2.8 the Tribunal repeats its findings above.

137 Threatening to report the claimant to her landlord amounts to unwanted conduct, taking into account the EHRC Employment Code (see above) and this conduct on the part of the third respondent created an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) EqA taking into account the claimant's perception, the past history of problems with her social landlord and assessed objectively.

138 Allegation 2.2.8 did not fall under the definition of unwanted conduct; the claimant did not have a subjective view that it had and assessed objectively alleging she had been driving recklessly on the 8 March 2021 the conduct did not have the proscribed effect taking into account all the circumstances of the case.

139 With reference to the issue 2.2.5, namely, was it related to disability, the Tribunal found on the balance of probabilities that it was not for the reasons already stated with reference to the section 15 claim. Taking into account the mental processes of the third respondent, objectively assessed, the conduct did not relate to the claimant's protected characteristic of disability but was solely caused by her solicitor's 1 March 2021 letter for the reasons already stated. As the causation test has not been met by the claimant it is not relevant that the third respondent had the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant as that purpose flowed from the untrue allegations made and threat of litigation and not the claimant's disability.

Victimisation (Equality Act 2010 section 27)

140 With reference to the first issue, namely, did the claimant do a protected act as follows: the protected act relied upon is the grievance letter dated 1 March 2021.

141 Lord Nicholls indicated in the well-known race discrimination case of Nagarajan v London Regional Transport [1999] ICR 877, HL if protected acts have a 'significant influence' on the employer's decision making, discrimination will be made out. Nagarajan was considered by the Court of Appeal in Igen (above) and Lord Justice Peter Gibson clarified that for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial.' This test was applied by the EAT in the context of a victimisation claim in Villalba v Merrill Lynch and Co Inc and ors [2007] ICR 469, EAT and it was held: 'we recognise that the concept of "significant" can have different shades of meaning, but we do not think that it could be said here that the

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tribunal thought that any relevant influence had to be important... If in relation to any particular decision a discriminatory influence is not a material influence or factor, then in our view it is trivial.'

142 Applying the test for victimisation the Tribunal must determine whether the lodging of the grievance (the protected act) had had a significant influence . The essential question in determining the reason for the claimant's treatment is what, consciously or subconsciously, motivated the third respondent to subject the claimant to the detriment? In Ms Smith's case the Tribunal inquired into the mental processes of the third respondent to establish if the necessary link between the detriment suffered and the protected act can be established in order for the claim of victimisation to succeed. On the face of it the claimant had raised a grievance and the third respondent had committed the acts alleged at 4.2.3 in response to it, and therefore the causal link is established on the basis that the protected act must have had a significant influence on the third respondent's decision-making process. The burden of proof shifted to the third respondent who satisfied the Tribunal that the claimant had made false allegations in bad faith. The third respondent used the language of fraud and fraudulent which the Tribunal has not adopted, preferring the words bona fide claim and bad faith to describe the claimant's actions. Section 27(3) of the EqA provides making a false allegation will not be protected if it is done in 'bad faith.' The claimant is aware the second and third respondent's case is she was making false allegations and should not succeed in her claims. The second and third respondent satisfied the Tribunal (a) that the allegation was false; and (b), the claimant when making the allegation in her grievance/letter before action and subsequently in pleadings, knew it was false at the time it was made. The claimant's evidence that she believed in the claim and had instructed her solicitors to make changes and her instructions were ignored, was not credible for the reasons already given, and on the claimant's own account the first week in October 2020 was false.

143 In the claimant's case the Tribunal found that the manner in which she had raised her grievance relying on untrue allegations she was aware at the time set out in a letter before action, which was litigious and aggressive referencing allegations that could not have taken place with the sole intention of receiving a payoff on resignation and there was no expectation on the claimant's part that a grievance process would follow. Even had the claimant made the allegations in good faith (despite the fact on her own evidence she knew the first week of October 2020 allegation was not true) the Tribunal would have gone on to find the third respondent acted as he did because of the threats made by her solicitors in the 1 March 2021 letter on the claimant's instructions based on knowingly untrue allegations made with a view to the claimant resigning upon payment of £22,790.

144 In conclusion, two serious allegations were made in bad faith and the claimant knew this at the time and made them with the sole intention of extricating money from the first respondent through the threat of litigation and promise of resignation.

145 The respondent shown that there was no contravention of section 27 of the EqA and the claimant's complaint of victimisation is dismissed.

TUPE transfer

146 The claimant's employment did not transferred under TUPE from the first to fourth respondent in or around 8 September 2022. The claimant's employment transferred in or around 21 January 2022.

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147 The Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246 ('TUPE') set out provisions for information and employee consultation on a TUPE transfer including the duty on the transferor to provide information to the transferee about the employees who are to transfer under TUPE. The Department for Business, Innovation and Skills (BIS) (now the Department for Business, Energy and Industrial Strategy) issued guidance on the TUPE Regulations entitled 'Employment rights on the transfer of an undertaking' (January 2014) ('the BIS Guide') which was available to the respondents at the time.

148 The respondent wrote to the claimant and offered to consult with her at a meeting in a letter dated 5 August and 7 September 2021, however the contents of the 7 September 2021 letter incorrectly stated the claimant's contract had transferred when it had not. As a result the claimant was under a misapprehension that her employer was the fourth respondent when it was in fact it remained the first respondent until in or around the 4 or 21 January 2022. The second respondent conceded that this was not satisfactory, it was important that employees are told the correct details of their employer and the claimant was not. The first and fourth respondent's failure amounts a breach of their duty to inform and consult.

149 The respondent gave no indication that it was relying on any circumstances under reg 13(9) for not complying with the duties to inform or consult, there was no evidence of any 'special circumstances which render it not reasonably practicable' to do so, and there was no suggestion that keeping the claimant update with the transfer was not reasonably practicable; a letter setting out the correct transfer date and explanation for the delay would have sufficed and was well within the second and/or third respondent's power to send out in good time before the TUPE transfer.

150 The first and fourth respondent failed to consult with the claimant and the complaint brought under regulation 15(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006/246 is well-founded and adjourned to a remedy hearing.

Remedy

151 With reference to the issue, how much should the claimant be awarded as damages for failure to consult, the Tribunal will list a 2-hour remedy hearing to be attended by the parties who will be advised of the date in due course.

152 The parties will note that when assessing compensation *appropriate compensation* is defined by Reg 16(3) as 'such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty'.

153 Under Reg 16(4), a 'week's pay' for this purpose is to be determined by reference to Ss.220–228 ERA. A 'week's pay' is a statutory construct used for the purpose of calculating what is owed to an employee. it is the contractual remuneration due to be paid to an employee for working his or her normal working hours in a week. A week's pay for this type of award is not subject to any limit with the exception of a maximum 13-weeks' pay.

154 The EAT in *Sweetin v Coral Racing 2006 IRLR 252, EAT*. held that the award is intended to be **punitive** and therefore the amount of the award should reflect the nature and extent of the employer's default. The EAT stated that while the tribunal is entitled to have regard to any loss sustained by the employees caused by the employer's failure, the focus

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of the award 'requires to be the penal nature which governs it and proof of loss is neither necessary nor determinative of the level at which to fix the award'. In essence, therefore, the employment tribunal should consider the seriousness or gravity of the default and any mitigating circumstances.

155 Given the Tribunal's finding that the claimant received both letters concerning the transfer of her employment to the fourth respondent the parties are expected to make submissions on why the maximum award should be ordered as appropriate when there has been consultation in part, and what the appropriate award should be with the 13-week maximum as a starting point in cases when there was no attempt to inform or consult which the Tribunal found was not the situation with the first and fourth respondent.

156 Finally, the parties will confirm at the liability hearing whether they accept the first and fourth respondent have joint and several liability in respect of the award that will be made, whatever that amount is.

Conclusion

157 In conclusion,

157.1 The first and fourth respondent failed to consult with the claimant and the complaint brought under regulation 15(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006/246 is well-founded and adjourned to a remedy hearing. The parties will be advised of the date in due course.

157.2 The claimant was not victimised and her claim of victimisation brought under section 26 of the Equality Act 2010 is dismissed against the respondents.

157.3 .The claimant's claim of disability discrimination brought in relation to allegation 2.2.1, and 2.2.2 were not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done), the complaints are out of time and in all the circumstances of the case it was not just and equitable to extend time. The Tribunal does not have the jurisdiction to consider the complains which are dismissed.

157.4 The claimant was not treated less favourably because of something arising in consequence of her disability and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed.

157.5 The second and/or third respondent did not harass the claimant and the claimant's claim of harassment brought under section 26 of the Equality Act 2010 fails and is dismissed.

158 Case management orders are set out below leading to the remedy hearing:

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Case Management Orders

159 The parties will write in to the Tribunal within 14-days providing their availability dates for a 2-hour remedy hearing to take place via CVP between the **11 November 2022 and 23 February 2023**. The parties will be advised of the date in due course.

160 The claimant will set out the amount of award she is seeking with submissions justifying the amount, and copies of case law duly highlighted to be sent to the Tribunal and respondent no later than **14 October 2022**.

161 The first and fourth respondent will set out the amount of compensation it is just and equitable for it to pay, recognising the punitive element of the award and producing written submissions justifying the amount, together with copies of case law duly highlighted if applicable, which will be sent to the claimant and Tribunal no later than **28 October 2022**.

162 The parties will come prepared to make submissions at the remedy hearing. If the matter settles the Tribunal will be informed immediately.

5.9.22
Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
15 September 2022

FOR THE SECRETARY OF THE TRIBUNALS

