EMPLOYMENT TRIBUNALS

Claimant: Mrs N Snape

Respondents: 1. Midshire Business Systems (Northern) Limited
2. Mr J Stafford
3. Mr N Rose

HELD AT: Manchester **ON:** 2, 3, 4, 5, 8 and 9 May 2017
10 May 2017
(in Chambers)
21 June 2017
(in Chambers)

BEFORE: Employment Judge Sherratt
Mrs L A Buxton
Mr P Dodd

REPRESENTATION:

Claimant: Mr M Islam-Choudhury, Counsel
Respondents: Mr N Cooksey, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The first respondent did not discriminate against the claimant because of something arising in consequence of her disability.

2. The first respondent indirectly discriminated against the claimant.

3. The first respondent failed to make reasonable adjustments for the claimant.

4. The first respondent harassed the claimant related to the protected characteristic of sex but not related to the protected characteristic of disability.

5. The claims against the second and third respondents are dismissed.

6. The claimant's claim of direct disability discrimination against the first and second respondents is dismissed on withdrawal.

7. The claimant's claims alleging breach of contract and/or unlawful deductions from wages against the first respondent are dismissed.

REASONS

Introduction

1. The claimant was employed by the first respondent working in telephone sales. By the time of her dismissal she had not been employed for two years.

2. The first respondent supplies photocopiers and IT solutions to all types and sizes of business. The company has approximately 80 employees and turns over £9million per annum. It is part of a group employing some 240 people and with a turnover of approximately £31million.

3. Mr J Stafford, the second respondent, is a statutory director of and shareholder in the first respondent. Mr N Rose, the third respondent, is employed as the Sales Manager.

The Evidence

4. The claimant gave evidence on her own behalf from a witness statement, a supplemental witness statement and a disability impact statement. Her husband gave evidence in support of her claim.

5. For the respondent we heard from Mr Stafford and Mr Rose at length. Deborah Wilson, the first respondent's Operations Manager, was the third longest witness and then there were a number of fairly short witnesses who were, in the order in which they gave their evidence, Tilak Bhojani, Rebeckah Guest, Hannah Watson, George Ollerenshaw, Anthony Donelan, David Warren, Laura Stafford, Daniel Buswell and Stephanie Carruthers.

6. The bundle of documents contained in the region of 400 pages.

The Hearing

7. Following a preliminary hearing in March 2016 the case was originally listed for five days starting on 31 October 2016. All parties attended on that day but counsel for the respondents became unwell and the case could not proceed. The hearing was re-listed in May 2017.

8. At the start of the May hearing counsel for the claimant invited the Tribunal to make an order under rule 43 of the 2013 Rules of Procedure in respect of the first respondent's witnesses to "exclude from the hearing any person who is to appear as a witness in the proceedings until such time as that person gives evidence if it considers it in the interests of justice to do so". The Tribunal, in this fact-sensitive case, acceded to this request and so only Mr Stafford and Mr Rose were in the

Tribunal throughout the proceedings. Each of the other witnesses came in to give their evidence and then left.

The Claims and the Issues

9. The claimant originally brought claims of breach of contract, unlawful deductions and various allegations under the Equality Act 2010. The breach of contract and Wages Act claims were not proceeded with and so those claims fall to be dismissed.

10. A List of Issues was appended to the Case Management Orders made by Employment Judge Aspden on 21 March 2016 as follows:

Disability

(a) Was the claimant a disabled person within the meaning set out in section 6(1) of the Equality Act 2010? i.e.:

(a) Does the claimant's osteoarthritis amount to a physical impairment?

(b) Was that impairment long term?

(c) Did the impairment have a substantial impact on the claimant's ability to carry out day-to-day activities – if so, what and how?

(d) Was the respondent aware of the claimant's condition or ought reasonable the respondent to have been aware (where this is relevant)?

Direct Discrimination – section 13 Equality Act 2010 ("EqA")

(b) Was the claimant treated less favourably than a real or hypothetical comparator (who was materially the same as the claimant other than in her disability) because of her disability? The claimant relies on a hypothetical comparator (paragraph 28 grounds of claim). The claimant says the less favourable treatment was her dismissal (paragraph 27 grounds of claim).

Discrimination arising from a disability

(c) Did the respondent treat the claimant unfavourably (in this case, dismiss her) because of something (difficulty climbing upstairs/working upstairs – paragraph 30 grounds of claim) arising in consequence of the claimant's disability?

(d) Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Indirect Discrimination

(e) Did the respondent implement the PCPs at paragraphs 33a and 33b of the grounds of claim?

(f) Did these PCPs put someone with the claimant's disability to a particular disadvantage compared to those without the claimant's disability as set out at paragraph 34 of the grounds of claim?

(g) Was the claimant put to that disadvantage?

Failure to make reasonable adjustments

(h) Was the respondent under a duty to make reasonable adjustments under section 20 of the Equality Act 2010?

(i) Did the respondent's PCPs identified at paragraph 36a and 36b of the claimant's grounds of complaint place the claimant at a substantial disadvantage compared to those without the claimant's disability – if so, how?

(j) What adjustment(s) does the claimant suggest should have been made (paragraph 37 grounds of claim)?

(k) Did the respondent's failure to make reasonable adjustments result in the claimant's dismissal?

Harassment

(l) Was the claimant subjected to unwanted conduct related to disability (paragraph 38a to 38d grounds of claim) or sex (paragraph 39a grounds of claim)?

(m) Did that conduct have the purpose or effect of violating the claimant's dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(n) What was the claimant's perception of such conduct?

(o) Was it reasonable for that conduct to have the effect complained of?

(p) If any of the acts complained of were older than three months at the time they were submitted to the Tribunal, can any of those acts be considered to be continuing acts or in the alternative, is it just and equitable for the Tribunal to consider those claims "out of time"?

Breach of ACAS Code

(q) Was there a failure by any party to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

(r) If so, were any of the breaches unreasonable?

(s) If so, is it just and equitable in all the circumstances for there to be an uplift/decrease in the relevant heads of compensation by up to 25%?

11. During the course of his submissions on behalf of the claimant Mr Choudhury withdrew the allegation of direct discrimination, and in relation to the four allegations of harassment at paragraphs 38(a)-38(d) of the grounds of claim he withdrew the allegations at paragraphs 38(a), (c) and (d) leaving only allegation (b) against the third respondent.

Disability

12. The claimant provided a disability impact statement dated 10 May 2016. It appended some medical information and some photographs.

13. Mr A O Ebizie, Consultant Orthopaedic Surgeon, on 11 September 2014 diagnosed the claimant with early osteoarthritis of the knees. Mrs Snape had confirmed a history of pain in the left knee over six months which had been getting progressively worse. More recently the right knee had started being painful. Climbing stairs was said to be difficult and she had to bring up the right foot to meet the left on each rise, but walking on the flat once she gets going does not aggravate the pain.

14. There was also exhibited a letter from the claimant's GP dated 23 September 2015 confirming she suffered with arthritis of the knees and had trouble climbing stairs.

15. Having considered the information provided by the claimant the respondents' solicitor said in an email on 8 August 2016 that it had been agreed by the parties that:

> "(1) The claimant was a disabled person within the meaning of section 6(1) of the Equality Act 2010 from 11 September 2014.
>
> (2) The claimant's impairment had a substantial and long-term adverse effect on her ability to ascend and descend stairs."

16. The preliminary hearing listed to consider the question of disability was cancelled.

The Facts

17. Before joining the first respondent the claimant was employed by Belmonte Business Equipment Limited. Her employment there ended with redundancy and Mr Robertshaw provided a "to whom it may concern" reference for the claimant which confirmed her employment from 8 March to 25 October 2013 in the capacity of telemarketer/appointment maker. She carried out her duties diligently and her attendance and timekeeping were very good. The company decided not to continue with that particular format of marketing and therefore they were forced to make her position redundant.

18. Mr Rose stated that when the claimant started with the company he received a verbal reference from Mr Robertshaw who knew his father. After the claimant had joined the company Mr Robertshaw called him and told him that the claimant was "a bit of a nut case" and had stolen data from him. Mr Rose investigated it with the claimant and believed that this related to printouts from Yell.com which were publicly available. Mr Robertshaw also told him that the claimant had threatened to damage

his car. Mr Rose reflected on this at the time and thought he would take her at face value and make up his own mind. She had impressed at interview and there was a six month probationary period during which his mind could be made up.

19. The claimant's probationary period was due to expire on 11 May 2014. According to Mr Rose he was concerned because although she was working hard the quality of her appointments was not great. He made a decision to dismiss the claimant and at a meeting he gave her a letter dated 22 April 2014 to confirm this. The claimant asked for another chance and he decided rather than to dismiss that he would extend the period of probation by three months to 11 August 2014. At the end of the extended period of probation the claimant's employment continued.

20. When the claimant was first employed the first respondent's undertaking was housed in one unit and space was very limited. The Sales Department was on the first floor but there was no space for the claimant so she initially sat downstairs with the accounts/administration team consisting of two or three female employees.

21. According to Mr Rose the people working with the claimant complained about the noise generated by the claimant, who would be working on the telephone making 100 calls a day seeking business for the first respondent. They complained about her use of inappropriate language such as saying "I hope your tits drop off" after putting the phone down to potential customers.

22. Hannah Watson was in the downstairs administration office working as an apprentice business administrator when the claimant joined so they were together from November 2013 until the claimant moved office in February 2015. According to Ms Watson the claimant used bad language, was loud and very outgoing. She would frequently slam down the phone when she did not get the answer that she wanted and used language like, "fuck you" or "I hope your tits drop off". She would not apologise to anyone in the administration office for her language. The other people there worked quietly.

23. Deborah Wilson, Operations Manager, gave evidence to the effect that the claimant used terrible language in the administration office, repeating the phrase used above and also alleging the claimant used the "f" word and the word "twat" liberally. In cross examination Ms Wilson accepted that the claimant was not the only person in that office who used swear words.

24. According to Mr Rose he was aware of the complaints concerning the claimant when she was working downstairs, but he did not speak to her about these issues. Anyone who criticised or coached or tried to amend her behaviour on any matter including work would in his words be "opening a door into a world of pain".

25. The claimant denied using swear words at work but in cross examination suggested that she might use mild swear words at home. She later accepted the accuracy of a note made in her medical records (presumably by a receptionist) on 11 February 2016:

> "Patient rang for TC with Dr Preston none available offered Dr Amin and others became verbally abusive swearing and shouting saying cannot get

through on f in phones nobody answers wanted to speak to Practice manager."

26. In answer to a question from the Tribunal the claimant accepted that her use of the word recorded as "f in" did amount to swearing.

27. At the beginning of 2015 the first respondent acquired the adjacent Unit 2. There was an access between the two units at ground level. It was proposed that the sales office would be moved upstairs in Unit 2 and that the claimant would join the rest of the team. According to the claimant she remembers speaking to the Operations Manager, Debbie Wilson, telling her that she was very apprehensive about moving upstairs because of her osteoarthritis and how it affected her mobility, and in particular going up and down the stairs. According to the claimant Debbie Wilson was fully aware of her condition (as was everybody else at Midshire) and after some discussion with Debbie Wilson she agreed to see how she managed with the stairs for the time being.

28. According to the witness statement of Deborah Wilson the claimant was, she thought, quite open with her and often used to confide in her. She said the claimant was looking forward to moving upstairs to the sales office early in 2015 but did not mention any concerns with her knees at that point. She denied that the claimant told her she was apprehensive about moving upstairs because of her osteoarthritis.

29. In cross examination Ms Wilson said that the claimant moved from the administration office in 2015 to the new sales office after which she rarely saw her. The claimant did not complain about pain in her knees and working upstairs. The claimant did not tell her that she was in pain and apprehensive about the move to Unit 2.

30. In re-examination she said the claimant had never told her about her knees or asked her to take action.

31. The claimant moved upstairs in February 2015 and worked with the other members of the sales team. The ladies toilets and drinks facilities were situated downstairs so the claimant had to go up and down the stairs several times a day. The Tribunal asked Ms Carruthers where the claimant drank her drinks and she said that the claimant took her drinks upstairs rather than drink them downstairs.

32. When the claimant was first working upstairs in Unit 2 there were handrails on both sides of the stairs, but the handrail on the left going up fell off the wall within a few days of the move and was never replaced. Mr Stafford confirmed that this was the case. He had made a conscious decision not to replace the second handrail. The company expended money on making good the places where the second handrail had been fixed rather than replacing it. Again according to the claimant they moved upstairs in around February 2015 and having to go up and down the stairs really aggravated her condition and her knees became very painful so that she could not stand it anymore. She remembered that she complained to Julian Stafford, the Managing Director, about having to work upstairs in or around early September 2015, after which she was brought downstairs to work in the boardroom round about 8 September 2015.

33. According to Mr Stafford the claimant did not raise with him that she had been struggling with having to work upstairs.

34. In cross examination Mr Stafford said that to October 2015 he did not notice the claimant having impaired mobility. She walked upstairs slowly but not ridiculously slowly for a lady of her age and size. She never complained about the stairs to him. The claimant never discussed her condition with him. He accepted that she mentioned on a number of occasions that she should have a stair lift, but according to him this was when she was at the top of the stairs and he was bounding up behind her and she said it in a jokey manner. If he had an idea that the claimant had a disability then he would not have joked about it. His response was jokey and flippant, and if she had thought it inappropriate she could have walked five paces to his office to have a conversation about it.

35. According to Mr Rose, he received a number of complaints about the claimant in the summer of 2015. The complaints were from Dave Matthews, Tilak Bhojani and George Ollerenshaw and concerned the claimant's behaviour including the fact that she would sing, that she was disruptive and that she was particularly unpleasant towards George Ollerenshaw. Again according to Mr Rose he sat down with the claimant and Dave Matthews, her immediate line manager, to discuss the issue of her behaviour and talk about the bad atmosphere in the department. He told her that her singing was annoying her colleagues and needed to stop. The claimant was confrontational and he told her that three separate people had complained and so it needed to be dealt with. He also referred to the quality of her leads and again she responded by being confrontational. After taking a holiday Mr Rose returned and heard that the claimant had been discussing their conversations with other members of staff and so he and Dave Matthews sat down with the claimant again to ask why she was discussing matters within the office and not simply putting things behind her and getting on with her work. According to him she was again confrontational saying she did not respond well to criticism. They had a team meeting with all of the telesales team about the issues and all present agreed to let bygones be bygones and to move on.

36. The claimant phoned in sick on 17 July and on Monday 20 July 2015 Mr Rose sat down with her to talk about the procedure for reporting absence. They then had a discussion between themselves when they each appeared to have shared some personal information about their upbringing. He sent an email to Julian Stafford copied to Debbie Wilson on Monday 20 July at 15:55. He wanted to give them an understanding of recent goings on regarding the claimant. There had been complaints about her ongoing behaviour concerning singing, swearing when the phone goes down and provocative behaviour towards George Ollerenshaw. There were complaints about the quality of her leads and getting appointments as far as six months on. He referred to the initial discussion he had had with the claimant and Dave Matthews when she was quite confrontational. They discussed the quality of her leads and how to improve them, but she responded poorly to constructive criticism. She had phoned in sick the previous Friday saying she would not be coming in for personal reasons. He had spoken to her and had emailed the whole of the sales team as to the procedure to be followed when reporting absence. He was only reporting this to Mr Stafford because he felt a little uncomfortable about how unpredictable the claimant was and because of some of the things he knew she had done in past employment. In conclusion things had been left really well and on

positive terms but he thought it best to make them both aware of what had been said. He was dealing with the situation as best he could but as they did not particularly have a company line on the documentation of informal discussions it was best they both knew what had gone on.

37. Mr Rose then decided to issue the claimant with a warning which he did on 21 July. It referred to some of the matters set out above and their previous discussions and then:

> "Unfortunately I have today been made aware that this morning you called your line manager, Dave Matthews, a 'grass' in front of numerous witnesses. You have also told a junior member of staff that you wish to sit elsewhere in the building. Again, the issues are being dragged out and this is disruptive to the rest of the office. I am left with no choice but to issue you with a formal written warning, and to remind you once again that disruptive behaviour that involves other members of staff not being able to carry out their duties will not be tolerated under any circumstances. Please do let me know if you need any clarification of the above."

38. In cross examination Mr Rose accepted that in giving the claimant this warning he had not followed any proper procedure and Mr Stafford accepted that it should not have been done in the way in which it was. At the relevant time he had been on holiday. If Mr Rose had asked him he would have suggested an oral rather than a written warning.

39. The claimant did not deal with the issue of the warning in either her original statement or her supplementary statement.

40. Again according to Mr Rose the situation did not improve after the warning. The atmosphere was terrible. The claimant refused to speak to any other members of the team and would not say "hello" or "goodbye" and she refused to acknowledge Dave Matthews as her line manager.

41. According to Mr Stafford, relationships within the sales office did not improve and in September 2015 things had become so bad that he suggested the claimant should move downstairs to the boardroom for a cooling off period. This was nothing to do with her knees or her ability to use the stairs. She was quite happy to do this and get away from the rest of the team and did not disagree, and she started to work in the boardroom in the week commencing 14 September 2015.

42. In cross examination Mr Stafford said that moving the claimant to the boardroom downstairs was not just to give her a cooling off period it was to give it to everyone. He did not accept that it was because of her knees and said:

> "She could have worked anywhere in the building. It would have been easy to have moved someone to a desk elsewhere in the building if we had known [about the problem with the knees]. It did not make sense not to – it was beyond belief."

43. Mr Stafford did not have any input into the email sent by Mr Rose, referred to below, but it was his decision that the claimant should move downstairs. The whole atmosphere in the sales team was toxic.

44. He was not aware of there being any emails on the subject of the claimant from 21 July to 8 September but he and Mr Rose talked. There was an issue concerning the behaviour of the claimant. She was not moved because of the stairs. She was moved because of the behaviour. It was never going to be a long-term fix. It was not working after three days. If the second reference (referred to later) had not arrived it might have been for longer, but the reference arriving brought forward the process that involved the claimant moving back upstairs. After the claimant and Mr Rose had reached an agreement about her returning upstairs he spoke to the claimant and they agreed they would try to be civil. They hoped to have a new beginning. His conversation with the claimant followed Nick Rose talking to her in connection with the reference. The claimant's knees were not mentioned.

45. According to the claimant, after she complained to Julian Stafford in or around early September 2015 about having to work upstairs she was brought downstairs for three days starting on or around 8 September, and in an email sent by Nick Rose to all of the sales team at 19:37 on 8 September 2015 it was stated that:

> "Nicky Snape will be relocating the boardroom in Unit 1. Nicky is moving there on her own volition as she feels it will provide her with a better and more comfortable environment. She is of course still a vital part of our team and will work upstairs from time to time when the boardroom is in use. She will be working from the same extension number for ongoing contact."

46. From the cross examination of Mr Rose he said:

> "People in the office, an open plan office, did not get on. There was a breakdown in relationships. The office was awful to be in. Like a mortuary."

47. With regard to moving the claimant down to the boardroom the email did not stipulate a timeframe – it was for as long as was required. As to the words "on her own volition", he was conscious of people not thinking that the claimant had been banished. It was not because she asked about her knees. The better and more comfortable environment did not relate to her knees. It was because it was incredibly uncomfortable upstairs. He thought he had written a balanced email. After three days there was a thought to move her back up. The boardroom was needed.

48. The email sent on 8 September dealt with three issues. He probably would not have sent it just to deal with the move of the claimant. There was no meeting with the whole sales team concerning the claimant moving back upstairs. To force someone upstairs if they had said they had a knee injury would have caused him a lot of pain. He had not heard the claimant say she had difficulties with the stairs. He had not seen any problems with her going up and down stairs. Nothing looked out of the norm to him. He would not expect her to be running up the stairs.

49. According to Mr Stafford, the associated company in the Midlands suffered from a fraud by an employee causing a loss in excess of £30,000. Written references had not been taken up for this employee. Had they been this person would never have been employed. It was decided that they would ensure that they had two references for all employees. There were nine affected employees across the group and one of them was the claimant.

50. The request for a written reference in respect of the claimant was sent to Mr Robertshaw and he responded to the Group Finance Director on 14 September 2015. He sent an email and he also answered some questions on a reference request in handwriting. In the email he apologised for taking so long to respond but he had assumed they would have discovered the claimant's true character or Nick Rose would have alerted them to the discussion he had with Mr Rose a few days after he made the claimant redundant, when he discovered she was applying for a position with Midshire. Nick Rose was most indifferent to what was said. On the Monday following her finishing she came to the office for her personal belongings. She was allowed access but gathered all sales summary sheets before leaving the building. The sheets highlighted prospects and people who had had calls from the claimant wanting their products and services. (They deal with network and printer solutions). He called the claimant on her mobile phone and she was most indignant, saying she could take whatever she wanted and only after a lengthy discussion when action was threatened did she reluctantly agree to return with the prospect sheets she had taken. He thought she had probably copied everything.

51. On the following morning he confronted her with the stupidity of her action whereupon she threw the bundle onto the reception desk and looking firmly towards him said that he "was not the first boss she had a run in with and be careful where I park my car in future in a very threatening manner". They followed up the prospects over the following weeks only to discover that most of them were not in the market for a sale and that the claimant had lied on her forecasts since she had started.

52. To summarise the handwritten reference, the claimant was non productive. She had no honesty or integrity. The quality of her work on scrutiny was poor. Her attitude was disturbing. Her relationship with colleagues was ambivalent. There was no flexibility. Her timekeeping was good and her appearance fair. As to why she should not be considered for employment he referred to her as "deceitful, lying, dishonest, threatening" and he confirmed this information had been given verbally to Mr Rose in October 2013.

53. Mr Rose was cross examined about the document. He said that from when she started he was aware of the allegations of stealing data and the threat of damage to the vehicle, but the incorrect forecasting was new to him but in line with his experience of the claimant. He was concerned that Mr Robertshaw remained angry after such a long period.

54. When the reference came in Mr Rose read it and thought he was glad it was not just him who thought like that about the claimant. He wanted to use it by saying to the claimant that this is what had been said about her. They would leave it; she would go back upstairs, integrate with the team and move on. It was not a true hold over her. Having discussed it with her downstairs he ripped up the reference in front of her, believing it was not his job to show it to her, not knowing legally whether she was entitled to see it or not. He did not want to sack her. He wanted her back upstairs and reintegrated. He was not a bully or a liar. He asked the claimant to go back upstairs. There was no discussion concerning her knees. The claimant did not give a reason why she could not move back upstairs. After more discussion on a personal level they agreed to move on. He told Mr Stafford about this and Mr Stafford then spoke to her.

55. According to Mr Stafford, he had not been made aware of the oral reference given by Mr Robertshaw to Mr Rose in October 2013. He was horrified Mr Robertshaw was so passionate and upset. If he was so passionate after so long there must be something to it. He would have thought it would have simmered down. He did not have to go into this tirade where the claimant was made redundant. He did not rely upon "to whom it may concern" references and personally did not give them.

56. Nick Rose told Mr Stafford that he wanted to use the reference with a view to talking to the claimant about it and then integrating her back into the team. They should prove Des Robertshaw was wrong. It was not a form of blackmail for the claimant. There were no threats. He understood that the reference was torn up in the room before the claimant. He thought the company was adopting a positive rather than a negative strategy towards the claimant. The last thing he wanted to do was to dismiss the claimant. According to him, they went to enormous lengths to get people to fit in. Mr Stafford wanted her integrated into the team as "many, many, many" people were.

57. Again according to Mr Stafford in cross examination, once the claimant and Mr Rose had reached an agreement he spoke to her. They agreed she would try to be civil. They hoped for a new beginning. The claimant never mentioned her knees in that meeting. He did not have a note of it or follow it up with an email.

58. According to the written evidence of the claimant, when Mr Rose told her in September 2015 that she would have to move back upstairs he referred to having received a bad reference. He would not let her read it but he read it aloud to her. She remembered there was an allegation that she had threatened Mr Robertshaw's car and that she was not good at her job. She knew the allegations were untrue. She asked for a copy but he tore it up in front of her. Having now seen the document she denies the allegations made by Mr Robertshaw. She was surprised how Mr Rose was behaving in front of her in tearing up the reference. He had always praised her for her work and her call statistics were always amongst the highest in the team. Mr Rose ought to have been alive to the fact that Mr Robertshaw had cause to say malicious things about her. She referred to various emails in which she had been praised for being good and hardworking whilst with the respondents. She remembered Mr Rose telling her after tearing up the reference that if she went back upstairs he would ignore it. She felt very intimidated by how he was behaving and felt forced to go back upstairs despite knowing it would really cause her to suffer a lot of pain. Therefore she very reluctantly moved back.

59. In cross examination the claimant confirmed this evidence.

60. According to Deborah Wilson, after the claimant had moved downstairs to the boardroom for a few days in September 2015 the claimant told her that the claimant was apprehensive about going back upstairs because of her knees. Ms Wilson suggested that she got something official from her doctor, to which the claimant replied that she was reluctant to do this as she had not hit the two year service mark and did not want to rock the boat at that point. Ms Wilson did not see a letter from the doctor. Whilst the claimant refers in her witness statement to obtaining a letter from the doctor, she does not refer to this conversation with Ms Wilson.

61. Deborah Wilson was cross examined. She said she did not think she saw the claimant use the stairs. Her office was not near the stairs. In September when she suggested to the claimant she should get something from her doctor this was the first point that the claimant really stressed to her that her knees were giving her real problems. The first time she mentioned going upstairs caused her difficulty. She said if it was causing her a problem then perhaps a letter from the doctor to state that so that they as Midshire could look at assisting if the doctor advised them to.

62. She was waiting for the letter. If presented to her she would have made Mr Stafford and/or Mr Rose aware of it. She did not tell them about her conversation with the claimant. Ms Wilson thought it was not true that the claimant believed the company would not look favourably on such a letter. If a letter was presented then the necessary help would have been forthcoming.

63. When seeing her GP on 23 September 2015 the claimant asked the doctor for a letter. Mr Snape collected the letter from the surgery and handed it to Mrs Snape. We have referred above to the letter dated 23 September 2015 signed by Dr J Dirckze confirming that the claimant is a patient at the Brooke Surgery and that he had full access to her medical records. He confirmed she suffered with arthritis of the knees and had trouble climbing stairs. It would be in her best interest to work on the ground floor thus avoiding the need to climb stairs.

64. In her witness statement the claimant deals with an allegation that the letter was faked and refers to correspondence between solicitors about it. She thought that her employer was attempting to use quite desperate measures to suggest they never received a copy of the doctor's letter, but she was adamant she gave a copy to Mr Rose but he refused to take a copy of it after reading it.

65. In cross examination the claimant was taken to an email to Ms Wilson referred to in the bundle index as having been sent on 4 November 2015 but without any clear date on it. The claimant asks:

> "Do you remember when I was in the boardroom a couple of weeks ago and we discussed my arthritis in my knees was getting worse, and you advised me to get a letter from my doctor asking for me to come back downstairs as it was making my arthritis worse climbing stairs, did you tell anyone about this at the time? Did Julian know or Nick Rose know that I was getting this letter?"

66. It was put to the claimant that she was trying to get a link with the move upstairs and the dismissal and she said she was not. She just wanted to know if anyone had been told about their conversation in the boardroom. She did not refer in correspondence to a conversation with Ms Wilson in February 2015 but there was such a conversation.

67. She was asked that if Mr Rose had rejected the letter then she would not have sent the letter to Ms Wilson in such terms. She said she was simply asking did she say anything about the letter she advised me to get from the doctor. She simply said did anyone know at the time? She showed Mr Rose the letter and he said he would "get back to me. All I was asking was did she tell anyone about the letter from the doctor".

68. The claimant was then referred to an email to Mr Stafford sent on 9 November and in particular paragraph 3 where she said:

> "I also told Debbie Wilson and she advised me to get a letter from my doctor, which I did, and I ~~gave~~ SHOWED a copy of this letter to Nick Rose…"

69. The claimant did not know why she had amended it by hand to change the word "gave" to the word "showed". She did not say Mr Rose had taken a copy. She knew she showed him a copy and he would not take a copy. He did not want a copy of the letter. "I showed him a copy but he wouldn't take it. I don't know, can't explain why I did not refer to the rejection of the letter by Mr Rose". Also she agreed that there was no reference to any comment from Mr Rose to the effect "do you think I care about your knees?"

70. According to the claimant she was due to see her GP on 23 September 2015 for cortisone injections. She remembered she had to leave work early on that day to get to the appointment and Mr Stafford commented that she was leaving earlier than usual. She told him that she had an appointment for the cortisone injections into her knees which he acknowledged and said he would see her the following day. The claimant referred us to an appointment card in the bundle showing the time as 12.30pm, and the claimant said she was certain that Mr Stafford would not have just allowed her to finish so early for no reason.

71. The claimant has not indicated who gave her permission to attend the appointment in the first place. She was already on her way out before Mr Stafford became aware of it.

72. Mr Stafford recalled one conversation when he asked the claimant where she was going as she was leaving early and she told him she was going to get some injections in her knees. He recollects saying "ok" and leaving it at that. This was, he said, the first and only time she ever mentioned a problem with her knees.

73. In cross examination he remembered a conversation with the claimant on 23 September when he asked her if she was taking an early dart? He was not aware of why she was leaving. She shouted to him that she had a doctor's appointment and that she was having some injections in her knees. He would ordinarily have asked her about how she was the next day but he just forgot and no-one reminded him.

74. According to Mr Stafford around this time it was reported to him that the claimant had phoned ACAS to find out how long she needed to be in employment before she could not be dismissed. The atmosphere in the sales office did not improve and it was his decision to dismiss her. She was not integrating with the rest of the team and was refusing to speak to other team members. He discussed matters with Mr Rose. They were aware she was coming up to two years' service which was highlighted by the reference issue and the fact she had checked out the length of service required for an unfair dismissal complaint. Her issues with others in the sales team were not getting better and the reference from Mr Robertshaw was ringing true. After two years he was still feeling strongly about matters. They had tried to resolve the issue by giving her a warning and moving her downstairs and at his meeting with her she had agreed to "bury the hatchet" with the rest of the team. He formed the view that she was the main instigator of the issues within the sales

office as the others had all agreed to move on but she was still refusing to acknowledge the rest of the team.

75. Mr Stafford's office was on the same floor as the sales team. The door between his office and the sales team was usually open although the claimant's place was at the opposite end of the room.

76. On 2 October 2015 he asked the claimant to meet him downstairs in the boardroom. He asked her to bring her bag with her "so that she had no need to go back to face her colleagues after her dismissal". She was told she could have a witness and she asked for Debbie Wilson to act as her witness. Debbie came in. He told her of the decision to dismiss her, mentioning issues with the colleagues and the poor reference – in that order. He gave her the opportunity to go back upstairs to clear her desk but she did not want to. She arranged to come back after hours with her husband. The meeting was calm and there was no shouting or raised voices.

77. According to Mr Rose it was the decision of Mr Stafford to dismiss the claimant.

78. According to the claimant, on 2 October 2015 Mr Stafford shouted across the office to her that he wanted her to come to the boardroom downstairs and to bring her bag so she would not have to bother coming back upstairs for it afterwards. This was her first notice of the meeting and she was not told what it was to be about. She asked for Debbie Wilson to be present as her witness. Mr Stafford told her he would get to the point and that having received a horrendous reference he had made up his mind to dismiss her with immediate effect. He also mentioned his belief she had not been getting on with colleagues. She thought he was making reference to events in July 2015 referred to in the warning letter the claimant mentioned for the first time.

79. After the dismissal the claimant received a letter confirming it. The letter was dated 2 October 2015 and had been written before the meeting. It confirmed termination of employment with immediate effect. It referred to reviewing all positions prior to employees reaching two years' service. It referred to the extremely negative reference received from the previous employer, and when this was considered alongside the poor working relationships with colleagues in the sales office they considered it in the best interest of the company for her employment to be terminated. She would be paid in lieu of notice and receive accrued holiday pay. Company property was to be returned immediately.

80. According to the claimant, the real reason for the dismissal was because she complained about the pain she suffered in her knees and that she was being required to work upstairs and her employer did not wish to accommodate this. The dismissal came very soon indeed after she had given Mr Rose a copy of the doctor's letter dated 23 September 2015.

81. In cross examination it was put to Mr Stafford that the reference was received from Mr Robertshaw on 14 September 2015; on or about 17 September the claimant had been moved upstairs; on 23 September the claimant had gone for knee injections, and then she was dismissed on 2 October 2015, the decision having been taken a couple of days before.

82. Reference was made to the letter from Dr Dirckze and Mr Stafford said that he had not seen it because the claimant had not shown it. It was not seen until they got into legal proceedings. It was Debbie Wilson who had told him about the claimant contacting ACAS. The claimant was not getting on with her colleagues.

83. As to the letter, if Nick Rose had declined to accept it why did the claimant not give it to him, scan it and send it to him, or send a copy to him through the post?

84. He agreed that nothing specific had happened but the atmosphere had failed to improve. The decision was made before 2 October. He understood where someone had less than two years' service no process was needed. No-one kept a note of anything. The letter was done. They did not keep notes at that point, although they did now. He had discussed the matter with Nick Rose on Thursday 1 October but again there was no note.

85. According to the claimant in her oral evidence Mr Stafford is said to have used the word "horrendous" three times in connection with the reference from Mr Robertshaw. He said that he did not remember using this word but if he did use it he did not believe he had used it three times. He did not show it to the claimant as he had been told not to show the reference to her. It was his understanding that it was not appropriate to pass on a reference without the consent of the giver.

86. It was put to him that if he had not known about the injections and the doctor's letter he would not have relied upon the reference, as the claimant was disabled and adjustments were costly. In answer Mr Stafford said that there were no costs to an adjustment. She was a telesales representative. She could work anywhere with a desk, a power socket, a laptop and a phone.

87. The claimant prepared a letter of appeal on 9 October 2015 addressing it to Mr Stafford and saying the reasons for her appeal were:-

(a) Why was a reference re-applied for from Belmonte when they had one on file supplied by her originally?

(b) Why was she not allowed to read the reference or see it, and why was the document destroyed in her presence?

(c) She was asked for a reference via Birmingham on 9 September. She spoke to Ms Barlow in Birmingham on 9 September telling her Nick Rose was aware of Mr Robertshaw and that they had spoken when she started. She then had an email saying no further action was required.

(d) With regard to poor working relationships, she had worked for 18 months with no problems whatsoever with any of her colleagues. She loved her job and was very good at it and got along with all the departments there. She felt she had been treated unfairly and would like the chance to put things right.

88. Mrs Snape hand delivered that letter to Mr Stafford when they met after normal business hours on 9 October 2015. She was accompanied by her husband.

89. According to the claimant, Mr Stafford said:

> "There is no need to go upstairs because I know you have bad knees so we will speak down here."

90. Mr Snape confirmed his recollection that Mr Stafford said there was no need to go upstairs as he knew that Mrs Snape had bad knees.

91. Mr Stafford denied saying that there was no need to go upstairs due to Mrs Snape's knees. They gave him the letter. He received it and said he would get back to them. He let them talk through the issues.

92. The claimant's knees and/or disability do not appear to have been referred to either in the meeting or in the claimant's letter of appeal.

93. On 12 October 2015 Mr Stafford wrote to Mrs Snape saying she would not be permitted to appeal against her dismissal as she had less than two years' service.

94. On 29 October 2015 Mrs Snape sent an email to Mr Stafford saying that she believed her dismissal was about her disability, and that he had constructed a falsehood of petty facts and the reference that was untrue and malicious to summarily dismiss her. She would proceed with legal action. She was shown no duty of care regarding her disability whilst at work and she reminded him that the two year limit did not apply in cases of discrimination.

95. Mr Stafford replied on 30 October 2015 denying that a reference had been constructed. He informed the claimant that she was not dismissed summarily but was paid in lieu of notice, and "I was not aware that you were suffering from a disability and can therefore assure you that this had no bearing on your dismissal whatsoever". This last sentence appeared in a different font. Mr Stafford was questioned about it and he said that legal advice had been taken before the claimant was dismissed and this might explain the final sentence in the letter being in a different font.

96. Mr Stafford's evidence was concluded at the end of Thursday 4 May 2017. On Friday 5 May 2017 Mr Cooksey, counsel for the respondents, addressed the Tribunal. He said that Mr Choudhury had asked Mr Stafford if legal advice had been taken and he said that he had made enquiries of a supplier and searched on the internet. When the Employment Judge had asked about legal advice he said that it had been taken. There was a need to correct his evidence in respect of these matters. He did receive advice in respect of a letter received from the claimant making a subject access request and the reply. According to Mr Cooksey, Mr Stafford misunderstood whether or not he could refer to the legal advice being given because of privilege. Mr Choudhury accepted that there was no need to recall Mr Stafford to deal with this point.

<u>Knowledge by the employer of the claimant's disability</u>

97. The duty not to discriminate and/or to make reasonable adjustments is a duty on the employer. The existence of this duty is dependent upon knowledge, actual or constructive, of the claimant's disability in respect of her claims under section 15 of the Equality Act, discrimination arising from disability, and section 21, failure to make

reasonable adjustments. Actual or constructive knowledge of disability is not required for the claims under section 19 – indirect disability discrimination, and section 26 – harassment.

98. For the purposes of this case we are taking the knowledge of Mr Stafford, Managing Director, Mr Rose, Sales Manager, and Ms Wilson, Operations Manager, as being knowledge of the employer. We do not take the view that any information that the claimant may or may not have imparted to her colleagues at the same level as her within the organisation amounts to knowledge of the employer.

99. There appears to have been an intermediate manager between the claimant and Mr Rose in the form of Dave Matthews, team leader, but we have not received any evidence from Mr Matthews and the claimant does not indicate that she was in discussion with him about matters relating to her disability.

100. In the words of Mr Choudhury from his submission:

> "There are so many instances where, in the Gallop (No. 1) sense, the employer did not address its mind to the question of disability that would be expected of an employer acting reasonably and competently. The evidence that they did know or ought reasonably to have known is as follows:"

101. He then goes on to refer to various matters, some of which relate to fellow employees rather than Ms Wilson and the second and third respondents. For the reasons stated above, we shall only deal with the allegations concerning Ms Wilson and the second and third respondents.

102. The claimant states that she told Ms Wilson, the second respondent and the third respondent on many occasions about her condition and that it caused pain in her knees and difficulty with stairs.

103. In the claimant's disability impact statement she refers to going for surgery on her knee on 20 December 2014, having two days off work to recover after the surgery which was then followed by the Christmas holidays when the office was shut, and "I let my employer know of the reason for my time off work when I went for this surgery".

104. The claimant then goes on to say that she gave to her manager, Mr Rose, a copy of the letter from her GP dated 23 September 2015 but he refused to take a copy after reading it. She remembered she had to leave work slightly early on 23 September and Mr Stafford commented she was leaving earlier than usual. She told him she had an appointment for the cortisone injections into her knees which he acknowledged and said he would see her the following day.

105. At paragraph 9 the claimant said it was plain to see that she struggled with stairs and her mobility. She remembered speaking to Debbie Wilson when she learnt she was to be moved upstairs, telling her she was apprehensive because she struggled with stairs and also because the toilets and canteen were on the ground floor. She asked Mr Stafford on two occasions some months before her dismissal if it was possible for a stair lift to be installed, and he said that it was not.

106. At paragraph 11 the claimant says the employer was aware of her taking time to attend medical appointments in relation to her knees, although she tried to arrange them for times and dates when she was not at work so there was as little disruption as possible.

107. Looking at the claimant's witness statement, she deals with the question of the employer's knowledge of her disability. She refers to being booked in for the surgical procedure on the knee on 20 December 2014. A copy of her holiday form is in the bundle signed by Mr Rose to confirm that she could use some of her 2015 holiday entitlement. According to the claimant, he only let her do this because she explained that she was carried the procedure carried out on her knee because of her osteoarthritis.

108. The claimant then refers to a hospital appointment letter for 5 January where she emailed Mr Rose on 7 January to ask if she could have it as holiday rather than sick because she had to go to the hospital. Her email mentions that she has given Mr Rose a copy of the letter. Whilst Mr Rose did not let her have it as holiday she thought it showed he was absolutely aware of her condition and was surprised he maintained he knew nothing at all about it, even after she had discussed it with him and he had been given letters from her about it.

109. The relevant letter was dated 22 December 2014 and informs the claimant that a consultation appointment has been arranged for Monday 5 January 2015 at 10.30am. There is nothing on the letter to indicate the reason why the consultation appointment has been arranged.

110. The claimant remembers speaking to the Operations Manager, Debbie Wilson, telling her that she was very apprehensive about moving upstairs because of her osteoarthritis and how it affected her mobility, and in particular going up and down the stairs. Debbie Wilson was fully aware of her condition and after some discussion she agreed to see how she would manage the stairs for the time being.

111. She remembers complaining to Mr Stafford about having to work upstairs in or around early September 2015. After this complaint she was brought downstairs for three days from about 8 September. With regard to the move, there is reference in the email to working downstairs providing the claimant with a better and more comfortable environment, with Mr Rose writing this because he knew of the pain she was suffering from her knees, and that the move was of her own volition because she asked to move downstairs because of knee pain.

112. When after three days Mr Stafford told her she would have to move upstairs she remembers telling Mr Stafford her knees remained a problem and she really would like to stay downstairs. According to him he told her that he was working on it, thinking he meant working on allowing her to move downstairs permanently because of the osteoarthritis.

113. She remembers later that day Mr Rose telling her she would need to go back upstairs permanently, and she remembers telling him she was going to find this very difficult because of the pain in her knees caused by the osteoarthritis, to which Mr Rose said, "Do you think I care about your knees?". This was around the time of the bad reference.

114. After moving upstairs, on 23 September she had to leave work early and Mr Stafford commented she was leaving earlier than usual, to go to her GP for cortisone injections. She told Mr Stafford she had the appointment for the cortisone injections which he acknowledged and said he would see her the following day. The appointment was 12.30pm and she was certain Mr Stafford would not have just allowed her to finish so early for no reason.

115. The claimant states that her dismissal came very soon after she had given Mr Rose a copy of the letter from the GP dated 23 September 2015.

116. The next matter in the statement refers to the time after the dismissal when the claimant went back to the premises with her husband with Mr Stafford allegedly saying to her there was no need to go upstairs because he knew she had bad knees so they would speak downstairs.

117. We remind ourselves that the claimant's diagnosis was in September 2014 when Mr Ebizie wrote to the claimant's GP on 11 September.

118. As to her medical appointment on 20 December where the claimant says she let her employer know of the reason for her time off work when she went for surgery, looking at the note of her cross examination before that the claimant said she had told Ms Wilson she had arthritis in both knees in 2014. She did not provide a copy of the report. She told her everything about the knee problem but did not tell either Mr Stafford or Mr Rose. She said she was confiding in Deborah Wilson, just informing her and not expecting her to do anything about it. She accepted that Mr Rose was her manager.

119. The claimant knew two months in advance of the scheduled surgery on 20 December. She told them nearer the time and booked the holidays with Mr Rose. She most certainly told Deborah Wilson she was going for an operation for osteoarthritis. She also told Mr Rose and he allocated time for it. She did not remember when she told Mr Rose she was going for surgery. She then said as soon as she knew she was going in for an operation she would have informed her manager, Mr Rose.

120. The December 2014 leave request was made on 1 December, six weeks after being aware of the operation. The claimant felt that giving notice on the 1st for leave on the 20th was adequate. She explained to Ms Wilson that she was having an operation on 20 December, having cartilage removed. She did not show any appointment letter but did tell Ms Wilson she was having a cartilage operation on her left knee on 20 December. She spoke with Mr Rose and told him and he agreed the holidays. She mentioned the arthritis and the osteoarthritis with Ms Wilson. She told Mr Rose she was having cartilage removed and that she had arthritis, and he let her have some days from her 2015 holidays in 2014.

121. Ms Wilson in cross examination had said she had no knowledge of the osteoarthritis. The claimant did not tell her she had it. She knew she had problems with knees but did not know to what extent. She did not tell her about the arthritis after her September 2014 MRI scan. Ms Wilson knew the claimant was having a surgical procedure and she assisted her to complete the holiday form. She knew she

was having an operation on her knees. She did not believe she communicated this to Mr Rose, who just signed the holiday form.

122. As to Mr Rose, he denied any knowledge of the claimant having problems with her knees. He did not hear her say she had difficulty with the stairs. He had become aware in the last couple of months of hearing references to her knees for the first time but not to injections. She had many visits to the doctor. He was aware once or twice of references to her knees. He did not think that this was a reason for him to ask her a question about relocating her in the building. It did not cross his mind to ask. She went to the doctor but did not choose to reveal the information and he did not ask, it not being his place to do so. If she wanted to tell she would do so. He did not think she had given him enough information to put him on notice that she had a problem.

123. As to the signing of the holiday form, Debbie Wilson asked him on behalf of the claimant. He was not told it was for surgery to her knees.

124. The next matter set out above relates to the letter from the GP, Dr Dirckze, dated 23 September 2015. We have set out above the evidence concerning this, including Mr Rose denying that it was ever shown to him.

125. The next matter concerns the claimant speaking to Debbie Wilson when she learnt she was being moved upstairs. Ms Wilson accepts that she and the claimant did discuss this issue when she was to go back upstairs in September 2015. She does not accept that there was a discussion before the claimant moved upstairs when the sales team moved into Unit 2 in February 2015. Ms Wilson recollects the claimant saying she was looking forward to moving upstairs to the sales office in early 2015.

126. As to the stair lift, we have set out above the view of Mr Stafford to the effect that this was a jocular rather than a serious reference to the installation of a stair lift.

127. Turning now to the issues in the claimant's first witness statements, the first is reference to 20 December 2014 which has been dealt with above.

128. As to the 5 January appointment, Mr Rose did not remember the letter concerning it but even if he had seen it it does not refer to the reason for the appointment. The email correspondence concerning how the day off was to be treated does not make any reference to the reason for the claimant's medical appointment.

129. The next reference was to the claimant discussing matters with Debbie Wilson at the time of the first move upstairs. We have already dealt with this from the disability impact statement.

130. The next matter is when the claimant was brought downstairs in September 2015 and the email from Mr Rose. We have dealt with this above.

131. As to Mr Stafford being told that the claimant’s knees remained a problem, that she would really like to stay downstairs and that he was working on it, he said in cross examination that the claimant's knees were never mentioned in that meeting. He did not say he was working on it because there was nothing to work on.

132. As to the allegation of Mr Rose saying "do you think I care about your knees?" after the claimant had told him she would find it very difficult going back upstairs because of the pain caused by her osteoarthritis, Mr Rose completely denies that such words were used – the claimant did not say she was unable to go upstairs because of her knees and he did not say that he did not care about them.

133. The next reference is to the claimant telling Mr Stafford she was leaving early for an appointment for cortisone injections into her knees. We have dealt with this above. In simple terms Mr Stafford was told by the claimant of the reason for her early departure but he did not take anything up with her as to why she was having the cortisone injections. The claimant, however, did not follow anything up with Mr Stafford when he failed to ask her about it.

134. As to the claimant providing the letter from Dr Dirckze dated 23 September 2015 to Mr Rose, he denied ever having seen it and he went on to say that if he had known of a genuine reason why the claimant should no longer sit in that office he would have snapped its hands off. It would have been a godsend. If they could put her in an office or at a desk downstairs that would have been wonderful for him.

135. The final matter relates to Mr Stafford allegedly saying there was no need to go upstairs because he knew of her bad knees when they met following the termination of her employment. Mr Stafford denied saying this.

Harassment

136. The claimant alleges that she was subjected to harassment related to the protected characteristic of disability and to the protected characteristic of sex.

137. As to disability, there were four specific allegations set out in the grounds of claim of which three were withdrawn by Mr Choudhury, leaving only the allegation that the third respondent said to the claimant, "Do you think I care about your knees?"

138. As to harassment in relation to the protected characteristic of sex, the List of Issues refers to paragraph 39a of the grounds of claim which is "The use of frequent and obscene language in the office referring to female genitalia." The claimant then refers to paragraphs 24 and 25 of the grounds of claim:

> "(24) The claimant worked in a team of predominantly male colleagues and found that the male employees would often use crude and offensive language relating to female genitalia in front of her. The claimant recalls that on one occasion in around August 2015 the male employees were talking about 'wet pussy' and 'wet fanny'. The claimant found this very upsetting indeed and reported this to Mr Rose who responded that it was better than them talking about 'dry ones'. The claimant was also distressed that male colleagues would regularly use the word 'cunt' in front of her and she found this very upsetting.
>
> (25) The claimant did notice there was some improvement in the language used by her male colleagues after a meeting in which she brought up her issue with the amount of crude language that was used. However the claimant will say that the crude language referring to female (and

> also male) genitalia continued right up until the date of her dismissal on 2 October 2015. In particular, the claimant remembers another employee, Tilak, talking about 'penis and cocks' on the day that she was asked to attend the boardroom."

139. The claimant dealt with the question of offensive language in her witness statement dated 26 June 2016 in this way:

> "(38) I worked in an office of predominantly male colleagues and they would often use very offensive language in the office, and in particular relating to female genitalia. As a woman, I found the use of such language very upsetting, offensive and degrading indeed and the language would often be used in a sexualised context.
>
> (39) I do apologise to the Tribunal for having to repeat such language but I remember in August 2015 my male colleagues were talking about 'wet pussy' and 'wet fanny'. I reported this to Mr Rose and much to my disbelief he replied 'well it is better than them talking about dry ones'. Again, I found this entirely degrading and did not expect my manager to condone such degrading behaviour and indeed to continue it. The word 'cunt' was also regularly used and needless to say that I also found this very upsetting and offensive.
>
> (40) We had a team meeting in August 2015 and a set of the presentation slides are in the bundle. There is a slide showing the words 'language in the sales office'. The issues was brought up that people were using language that some members of the team found offensive and that such conduct needed to stop. Whilst it was mentioned as a bit of an afterthought in my opinion I must admit that there was a slight improvement in the language used by my male colleagues. However, the crude language continued right up until my dismissal on 2 October – in particular a colleague of mine, Tilak, was talking about 'penises and cocks' shortly before I was called to the boardroom that day."

140. On 6 July 2016 solicitors for the respondents asked for further and better particulars of the complaint concerning sexual harassment. The Tribunal is not aware as to whether or not the claimant's witness statement had been served when the request for particulars was made, but in answer to the question – which male employees often used crude and offensive language referring to female genitalia in front of the claimant? What precisely was said and by who and when? The claimant replied:

> "In or around the end of August 2015, the male employees who would often use crude and offensive language were as follows:-
>
> - Nick Rose
> - David Warren
> - George Ollerenshaw

- David Matthews
- Tilak Bhojani
- Daniel Buswell
- Anthony Donelan

They would all say, at some point, 'she has nice tits' or 'I wouldn't mind shagging that' from ladies in the newspapers. Mr David Warren and Mr George Ollerenshaw talked about wearing gimp masks and wanking and about shagging the wife in what position. George Ollerenshaw said he could not shag his wife because he had a bad back – every male colleague laughed at this. Mr Nick Rose said that he would like a television putting up in the sales office so that he and other male colleagues could look at the porno channel – then he said, 'better not, this would be a Tribunal waiting to happen'. Mr David Matthews would also say, 'I wouldn't mind giving her one' also using the word 'fucking' on a daily basis, 'fucking nice tits' again out of newspapers. Mr Daniel Buswell would also say about shagging his wife in what position."

141. In answer to the question "Which male employees were talking about 'wet pussy' and 'wet fanny' and what precisely did they say?", the claimant said:

"Mr Nick Rose said that you can't beat a wet pussy and wet fanny. On hearing this I was very disturbed and shocked, especially as he is the Sales Manager. I went over to him and all the male colleagues were laughing. I felt very embarrassed and said, 'Nick, do we really have to talk about this?' and he replied 'it's better than talking about dry ones' and laughed at me. I went downstairs in shock and was upset. I sat in the ladies and cried, did not know what to do. I had already got a warning from Nick Rose in July 2015 and he had said to me, 'If I hear you moaning about anything I will give you another warning and it will go up the chain until I dismiss you' so could not report this matter for fear of losing my job. As there is no HR there is only Mr Julian Stafford MD and I know this would have been addressed with Mr Nick Rose by Mr Julian Stafford, I had to gather myself and go back upstairs and carry on with my work, very shaken and upset."

142. In answer to the question "Which male employees regularly use the word 'cunt' and in what context and what precisely did they say and when?" the claimant said:

"All of the colleagues that I have already mentioned use the word 'cunt' – ladies in papers 'she has a nice cunt in those pants' or Anthony Donelan would just use the word 'cunt' in every conversation. I sat next to Anthony and used to say to him 'please stop using that word' and he would say 'what word?' to get me to say it. I would say 'you know what word' and he would just laugh. Tilak Bhojani would use the word 'cunt' when he got a bad reply on the phone and say 'you cunt' and put the phone down, as would George Ollerenshaw and David Matthews in the same context. Anthony Donelan

> would also call George Ollerenshaw a 'ginger cunt' and George found this funny along with all the other make colleagues."

143. When asked "precisely what did Tilak say when talking about 'penis and cocks'?" the claimant replied:

> "Tilak Bhojani said this on Friday 2 October 2015 around 4.30pm 'women like men to have big penis and cocks'. Again, I felt very shocked at this. Laura Stafford, Julian Stafford's daughter was there fixing some data on George Ollerenshaw's computer. I felt for Laura as she is only young, in her twenties, and I felt ashamed and angry that he said that in front of her as well as myself. I said to Tilak, 'we don't want to hear that sort of talk, you have gone a bit far now'. Tilak apologised and no more was said."

144. The claimant was cross examined. On a related topic she denied holding up a copy of The Sun open at page 3 and saying, "don't you think I look good in this picture?"

145. As to the evidence of sexual harassment she said it was there in the bundle. The things she had recounted did happen and the words were spoken. Rather than the individual items being put to her one by one she confirmed that the further and better particulars provided by her were correct.

146. It was put to her that she had provided different versions of the conversation ending up with the comment made by Mr Rose. It was other colleagues talking generally and then Mr Rose specifically that you "could not beat a wet pussy…".

147. She was the only woman in the room. Male colleagues were talking about female genitalia. When she complained to Mr Rose that was his response.

148. Earlier in her cross examination the claimant said that she heard swearing at work but she did not swear in the workplace. She did not contribute to the language in the workplace. She heard "bloody" and "fucking" in the workplace and she was offended by it: "People swear and it is just part of being in a workforce. You'll have to accept it".

149. She went to Mr Stafford in August 2015 to complain about the language that was getting steadily worse when she moved to Unit 2. It related to foul language in the office that she found offensive. Mr Rose talking about female genitalia using the "c" word. She spoke to Mr Stafford about this use of language by Mr Rose.

150. When she worked in the administration department for 15 months there was moderate language. Very little use of the "f" word or the "c" word and sometimes the "b" word. "Bloody" offended her but not as much as the "c" and "f" words. The "c" word was used by Mr Donelan. He used it when he came down to the administration department. The claimant told him not to use the word and she heard Ms Wilson tell him as well. This information was not in her witness statement.

151. The "f" word might be used in a sentence not related to a sexual act.

152. The claimant said she did not use the words "twat", "pussy" and "fanny" when she moved upstairs. She accepted that before August 2015 she did not raise any

concerns about the use of these words. After she had made her complaint to Mr Stafford he addressed the language in the team meeting. She made no other complaint because she had been told she could not complain anymore by Mr Rose in July. If she carried on moaning he would give her a further warning. She was frightened and intimidated by this.

153. For the record Mr Rose denied having made this comment to the claimant about not moaning following giving her the written warning.

154. With regard to Mr Buswell and the lack of a sex life, it did offend her very much. She did not want to listen to that vulgar talk when she was there to make sales to schools.

155. When the words “fuck off” were used it could be a disagreement. Even if not directed at the claimant she as a woman found it offensive. It maybe was not done to insult or offend her but they should have realised there was a lady present and ladies do not like to hear that kind of language at work.

156. The claimant accepted she occasionally would swear outside work, at home, but never at work. She made it a rule not to. The strongest she would use would be “bloody”. She went on to say she said “f…in” and not the word “fucking”.

157. The claimant was then taken to the GP records and it was put to her that the initial copy had the reference to the claimant swearing at the receptionist blanked out. She said she was not trying to conceal anything. She did not see it as relevant to the case at the time. She was advised it could be blanked out.

158. She did not herself use the phrase “I hope your tits fall off”. She did not know where this came from.

159. The claimant then denied using a selection of swear words that were put to her. She accepted she was outgoing and confident but not “in your face”.

160. The claimant completely denied referring to Tilak Bhojani as a “wacky Paki”.

161. Tilak Bhojani was employed by the first respondent from April 2015 to December 2015 in telesales. When she started the claimant was in a partitioned office with George Ollerenshaw and Dave Matthews and after the removal of the partition he sat next to her. According to him she would often shout “fuck off” or “fuck off twat” or “fuck off knob head” after putting the phone down on potential customers. There was, he said, bad language used in the office by all concerned but the words “wet fanny” and “wet pussy” were not used by anybody.

162. Although the witness statement for Mr Bhojani was to the effect that he did not use the word “cunt” as the claimant alleged, he amended his evidence at the outset by saying that in response to the claimant calling him a “wacky Paki” he called the claimant a “cunt”.

163. He was not sure who used the “c” word other than when he responded to the claimant's comment to him. When he made his statement he did not think he had used the “c” word but on reflection he realised that he had. Was it not wrong for her to use colour? He felt threatened as well. All should be equal. He was going to be

aggressive back. After the "wacky Paki" comment he walked out of the office for half an hour. However, he and the claimant sorted it out and she did not say it again. He confirmed that there was no reference to a "wet fanny". The language would be toned down a little if Mr Rose was there. When the manager was there you "got on with it".

164. He denied making reference to cocks and/or penises in the presence of the claimant and Ms Stafford. He did not say women like men to have big penises and cocks. He would not say that to a woman in general and especially not to an older woman. Between April and October 2015 there was no particular change in the language used. Every day in the office was not the same. He did not remember what was said at the September sales meeting by Mr Stafford concerning the use of language.

165. Rebeckah Guest had been employed by the first respondent since April 2015 in business administration sitting with Stephanie Carruthers at the foot of the stairs. For the first two or three months of her employment she worked upstairs in the sales office where she heard bad language within the sales team – just basic swear words not aimed at anybody and nothing nasty – just what she considered to be usual workplace banter. There was nothing that she considered as particularly offensive. She did not hear the words "pussy", "fanny" or "cunt" being used. The claimant was as bad as the men in terms of the language that she used.

166. In cross examination she confirmed everyone including Nick Rose on the sales floor used to swear. She could not remember Mr Donelan using the "c" word or Mr Ollerenshaw talking about a "gimp mask" or Mr Boswell referring to his sex life. In her view it was just banter with swear words being used in the conversations. She had not heard any references to "page three girls". She did not remember Mr Bhojani using the "c" word but Mr Ollerenshaw and Mr Donelan might have. She did hear the claimant swearing. She did not remember what she said, possibly "f off" without using the full "f" word.

167. Hannah Watson started with the first respondent as an apprentice at the end of July 2014. She was put into the administration office and sat opposite the claimant until she moved to Unit 2 in 2015. She found the claimant to be "in your face". She used bad language, was loud and very outgoing. When she did not get the answer she wanted she would slam down the phone and use language like "fuck you" or "I hope your tits drop off". She did not apologise to anyone in the administration office for her language.

168. The language in the sales office was a bit blue but not nasty or directed at anyone and she had never been offended. She did hear the word "cunt" being used but not in a malicious or nasty way. She had personally witnessed the claimant herself using "cunt", "pussy" and "fanny" in the office.

169. In cross examination she said that she occasionally went upstairs to see Mr Stafford or to get some information. She did not necessarily hear blue language from Nick Rose himself. It was just generic swear words not directed at anyone. She had not heard words like "I wouldn't mind shagging that" being used.

170. Mr Donelan was the most frequent user of the "c" word. He was the only one she can remember using it.

171. George Ollerenshaw worked as a sales administrator for over six years to the end of September 2016. He worked alongside the claimant when they all moved into Unit 2. He complained about the claimant because of things occurring from early 2015 onwards. He found working alongside her to be tortuous and felt his work was suffering. She would frequently shout "fuck off twat", "fuck off you dick" "twat" and "I hope your tits drop off" after putting the phone down to potential customers. He also said she used racist language after putting the phone down on someone and on or about 18 June 2015 she referred to Mr Bhojani as a "wacky Paki" and repeated this comment a number of times.

172. Mr Ollerenshaw seems to have prepared the only contemporaneous document relating to this issue when he was invited to a meeting to discuss the claimant by Nick Rose and Dave Matthews. He did not produce a copy of his note at the time and it only came out for the purposes of these proceedings, but he confirmed it was accurate.

173. In the note after first of all dealing with his own behaviour he set out a number of issues or examples of things said or done which he considered to be unreasonable. He referred to what the claimant said at the end of telephone calls as set out immediately above. He was worried it might come over on his telephone calls and he was irritated that the behaviour went unchecked. He referred to the racial undertone at the end of a conversation with a foreign contact. She would regularly come in and read the newspaper up to 9.00am. She had a negative attitude. She became disruptive when bored. He confirmed the 18 June reference to Mr Bhojani as a "wacky Paki" and then on a Friday afternoon the claimant completely overstepped the mark with him. Without warning she came up to him and started jabbing him on the side of his arm enough to push him sideways and started asking if he liked being touched. He got highly irritated and he had to tell her to go away. She responded, "Look at his little face, miserable twat!" which he found highly antagonistic. She did not realise or did not care how irritated he was and did not apologise:

> "If Nicky feels that she has become isolated within the office, people have moved away because of her disruptive, negative and obnoxious behaviour towards both staff members and potential future customers. Like anyone else I don't mind a bit of office high jinks but this is really too much. I am not going to exclude her but I will only speak to her out of professional courtesy as I will be honest and say I do not like her as a person and in truth find it very difficult to work alongside her."

174. In his witness statement he had never heard anyone talking about "wet pussy" or "wet fanny" and he thought it laughable that the claimant was complaining about language as she was as bad as if not worse than the others. He denied ever having heard anyone refer to "nice tits" or "wouldn't mind shagging that". He had never, however, talked about "wanking" or "shagging" his wife. He had referred to a "gimp mask" but only in the context of being asked by Dave Matthews (his manager) to do something and saying, "I will put my gimp mask on then".

175. Although the word “cunt” was used, he could not recall being referred to as a ginger one. The claimant, to his knowledge, had not used the “c” word but she used the word “twat” liberally, and in a much more aggressive and antagonistic way than the “c” word was generally used by others in the office. He did not recall the allegation concerning Mr Bhojani on 2 October. He was relieved when the claimant was dismissed because she made working at the company a miserable experience for him.

176. In cross examination Mr Ollerenshaw said Mr Donelan was the main user of the “c” word. He used it as well, notwithstanding that in his statement he had neither admitted nor denied using it. He sat next to or close to the claimant. She was the only female at that end of the office. He agreed the “c” word was offensive to a woman as was the word “twat” even though this was used by the claimant. He confirmed no recollection of “wet fanny/pussy”. He could not recall Tilak referring to “big penis/cock”. He did not believe it was said. He made his note on 9 July 2015. He handed it over when he heard the business was being taken to the Tribunal. He took it off his own computer. The document was not made up or exaggerated. It was the truth. The claimant did use the words stated on regular occasions. He was not an angel and did use the “c” word occasionally. He accepted the claimant was excellent as a worker and made more calls than the others. He was doing something slightly different in his role.

177. Whilst the claimant was the only woman in a group of men he disagreed that she found it difficult to deal with.

178. He accepted Mr Stafford brought up the question of language in the sales meeting. However, from his perspective the claimant was as much a part of the environment as anyone else. She used the same language when working downstairs in an all female office so in his view it was not the claimant trying to fit in whilst upstairs.

179. He confirmed the “wacky Paki” comment which was not reported by Mr Bhojani or by him. They had a habit of winding each other up. He had never referred to the claimant as a “cunt” but in his mind no-one had.

180. The “gimp mask” related to a little joke between him and Dave Matthews. Dave Matthews asked him to do something and he said he would put on a “gimp mask for him”. It was matey banter, not in a sexual way. He would use the words “I’d be your slave” in a humorous way, not meant in a sexualised way.

181. Anthony Donelan left the company on 4 January 2017 after four years. He had been employed as a Senior Accounts Executive. In his witness statement he denied making any reference to ladies from newspapers and he could not recall anything concerning the relationship between Mr Ollerenshaw and his wife. Mr Rose did not say anything about wanting a TV to be put in the sales office so that porn could be looked at. To his knowledge there was no discussion concerning “wet pussy” and “wet fanny”. He did not deny using the word “cunt” occasionally, but never in a nasty or offensive way. The claimant used the word “twat” and he would say that she did this much more often than he used the word “cunt”. He also remembered the claimant using the phrase “I hope your tits fall off”.

182. In cross examination he told us that he was from Ireland where the word "cunt" is not considered an overly offensive word. For his part he did not find it an overly offensive word. He did not think the word was treated more seriously in England. He could not remember who else used the word.

183. Mr Buswell may have referred to his sex life occasionally but there was nothing he could recall. He would not call it "laddish" banter but definitely banter. He did not remember Mr Ollerenshaw making reference to a "gimp mask". He confirmed the claimant did swear using the word "twat" on a daily basis and hoping that people's "tits fell off". He was not making this phrase up.

184. Mr Rose would know about the type of banter going on on the open sales floor. Mr Rose did not make reference to "wet fanny" or "wet pussy". He did not remember the claimant complaining about sexualised language in the workplace.

185. David Warren was a Senior Accounts Manager having been employed for more than six years. Having read the claimant's further and better particulars he confirmed he did not talk about wearing "gimp masks" and "wanking" and "shagging the wife in what position" as the claimant alleged. This was completely fabricated. The words "pussy" and "fanny" were not used in the sales office.

186. In cross examination he confirmed he was in Unit 2 upstairs in the sales office working close by the claimant. As far as he was concerned there were used just normal swear words such as the "f" word, "f..ing", "shit…", he did not know if this was unacceptable. He had heard the word "cunt" used in the office. Some people found it offensive. He possibly used that word as well but it was not in his statement as he was not asked about the use of the word. Mr Ollerenshaw did not make references to "gimp masks" to him. He did not say it. It was not a phrase he used. He did not talk about "wanking" and "shagging" and did not recall anyone talking about their sex life in the workplace.

187. He had heard Nick Rose swearing in the workplace but not with reference to "wet or dry fannies or pussies". He would have been surprised to have heard him say something like that. He had no knowledge of a television screen with porn on it.

188. In questions from the Tribunal he confirmed he was sat near to the claimant and could hear her. If she had made a call that had not gone well the words "I hope your tits fall off" would often follow. She was known for her swearing in the office. She had a paper every morning and more than once she held it up at page three saying "don't you think I look good in this" or words to that effect. He also told the Tribunal that at one point they were told the language had to be curbed when ladies were present.

189. Laura Stafford was employed as a Marketing Executive and was the daughter of the Managing Director. She had been with the company since June 2015.

190. She had seen the reference to the alleged conversation on 2 October 2015. She recalls fixing Mr Ollerenshaw's computer but had no recollection of the alleged comment by Mr Bhojani. She was probably engrossed in working on the computer and not paying attention to what was being said. Had the comment been addressed

to her she would have remembered it and/or she would have remembered it had she been offended by it.

191. Whilst she had heard bad language in the sales office she could not recall ever hearing the use of offensive language relating to make and female genitalia.

192. In cross examination Ms Stafford accepted that the “c”, “p” and “f” words were degrading to women if used in their presence. She had never heard the “c” word used at work but knew people had admitted using it. She did not recall hearing the alleged remark of Mr Bhojani.

193. Daniel Buswell was a Senior Accounts Executive with six years’ service. He had seen the further and better particulars supplied by the claimant and denied that male employees would make reference to women in the newspapers. He did not recall any conversations between Mr Warren and Mr Ollerenshaw. He did not hear any comment by Nick Rose concerning a TV and a porno channel but it would be entirely out of character for him to say that.

194. If he had spoken about his sex life in the office he would have done so on rare occasions. He would speak to the person sat next to him on a quieter level. He classed the person he sat next to as a friend rather than a work colleague. It was Andrew Wright.

195. Mr Rose did not make the comments about “wet pussy” or “wet fanny” in his presence, and again it would be completely out of character. He had heard Mr Donelan use the “c” word but did not recall it being used by Mr Bhojani, Mr Ollerenshaw or Mr Matthews.

196. Under cross examination Mr Buswell said he had only heard the one person using the “c” word. The others did not use it whilst he was in the office. He was in 40% of the time and out doing sales for the other 60%. He definitely did not use the “c” word himself. Mr Rose did nothing about the language and did not involve himself in the banter. The banter was normally when the manager was not in.

197. Stephanie Carruthers had worked for the company for six years and was Group Billing Manager. She sat in the front reception area in Unit 2 at the base of the stairs up to the sales floor. When they moved into Unit 2 she was in the sales office for a couple of months, listening to what she considered to be usual office banter. Although the claimant was loud, Ms Carruthers was not offended by the language she heard in the sales office.

198. In cross examination she said it was the usual banter. The salesmen would laugh and joke around each other, discussing for instance what they did at the weekend. The usual swear words used were “fuck”, “shit” and “piss”. She could not recall any others. The “c” word was mainly used by one person – Mr Donelan. She could not recall who else would have said it. She agreed this word was particularly offensive to women.

199. Mr Donelan in his use of it was flippant not aiming it at anyone. She had never heard the words “fanny” and “pussy” used.

200. In questions from the Tribunal she said that the claimant used the same sort of language as everyone else.

201. She said that she was aware the claimant would come downstairs at least once in the afternoon when she was working to get a drink. She would carry the drink upstairs although she did not recall following the claimant when she was carrying a drink upstairs.

202. Mr Stafford confirmed that in August 2015 the claimant raised with him the question of the bad language used on the sales floor and so he raised it in the sales meeting on 2 September 2015. The claimant had not made a claim of sexual harassment. She did not like the language – the sexual nature of the language used.

203. Mr Stafford accepted that there was a grievance procedure which stated that if an employee had any grievance related to their employment they should raise the matter with a number of named individuals of whom he was one. The procedure said, "You may be required to put any such grievance in writing". It continues with, "Having enquired into your grievance one of the directors will discuss it with you and then notify you of their decision".

204. Mr Stafford accepted that the company's grievance procedure applied to the claimant, that he was one of the named individuals and that it did not have to be in writing. He accepted the claimant had come to him with a genuine concern, a genuine grievance and that he did not ask for her to put it in writing. This was not to keep it off the record.

205. As to notifying her of his decision, he told her what he would do, that he would raise it at the sales meeting, and according to him she was happy with what he promised.

206. He spoke to the people against whom it was alleged they had used bad language and it was addressed and dealt with. He spoke to Nick Rose first then addressed matters at the sales meeting. He has no record of any conversations and did not go back to Mrs Snape. He addressed it at the sales meeting, which he felt was the best time for him to stand and address the staff.

207. He had not heard Mr Donelan use the "c" word. He was not aware of the allegations until the claimant provided her statement. Had he investigated he quite probably would have found that Mr Donelan had used the "c" word and Mr Ollerenshaw had referred to a "gimp mask". He might have found all were using swear words and Mr Buswell had spoken about his sex life. He would have found out if he had done a thorough investigation and he would have taken disciplinary action, but he dealt with the specific complaint as publicly as possible.

208. He accepted the account of Mr Rose that the allegation against him did not happen. Mr Rose he had known for ten years, he was an honest guy and there was no reason to distrust him. He did not go round to ask the other employees what had been said. Had he been biased against the claimant he would not have raised matters so publicly. He could not have dealt with it more publicly. He had no note or minute of what was said by him at the sales meeting on 2 September concerning the use of language, but there was a clear slide concerning it in the pack for the meeting.

He did not remember saying what was acceptable or making reference to the claimant being the only woman. He was talking from the heart. He swore occasionally in the office, as did others. He did not recognise sexual innuendo or sexualised language. He did not, however, disagree that references to female genitalia were different and could be offensive to women who came into contact with such language. He did not deny the claimant felt offended by use of the "c" word but she used colourful language herself.

209. There was a complaint about words used by the claimant and that she was noisy, but there is no record of him raising matters with the claimant. They were raised although not formally. He had a brief chat with the claimant in the foyer. She did not accept the accusations against her. He did not take it any further. If the claimant said she had not said it then it would not happen again. This was early on in her career.

210. Mr Rose in his witness statement makes reference to the complaints concerning the claimant's language when she was working downstairs.

211. Within the sales team upstairs there was a lot of industrial language used but he did not say nor did he hear anyone else use more sexual language like "wet pussy" or "wet fanny", and he denies saying they were "better than dry ones" in response to a complaint from the claimant about bad language. They did not have newspapers in the office and it would not be true to say that male employees made lewd comments about women in the newspapers. He did not say he would like to have a TV in the sales office so that they could all watch porn. He was aware that Daniel Buswell did on occasion talk about his sex life in the office and that Anthony Donelan did use the word "cunt" on occasion.

212. He remembered Julian Stafford speaking about the issue of language in the September sales meeting after which the language was moderated.

213. In cross examination he confirmed he had received complaints about the claimant's language when she was working downstairs. He could have dealt with it but the claimant was not the only one who swore. He would have spent most of his working life criticising and/or coaching people if he dealt with every time someone complained about noise or swearing. In addition he was out of the office 75% of the time.

214. He confirmed that the "wet pussy/fanny" terms were not used. As Sales Manager he was responsible for the team. It is not true he did nothing about the bad language although there was nothing in the statement. He spoke to people casually. There was no sexualised banter but there was swearing.

215. He had not heard any reference to a "gimp mask" although Mr Boswell would talk his sex life on occasion. There were no derogatory terms used. This was possibly not acceptable.

216. It was not correct that he encouraged the use of bad language. He swore on occasion but did not use the "c" word. He used the "f" word. He categorically denied any reference to a "wet fanny being better than a dry one".

217. He agreed that a female might be offended by the use of bad language. He would not like such words to be used in front of his mother or grandmother.

218. He did not let a cult of banter carry on. In any event as a manager much of the language complained about was not used in front of him.

219. He thought that if Mr Buswell wanted to talk about his sex life then he was entitled to do so within reason.

220. He had not taken any action against Mr Donelan. He would request he did not use this language when he heard it.

221. He was aware of the existence of the Equal Opportunities Policy. There was one in his pack when he started. He did not know if it was the one now used by the company. It was not part of his role to know which document was current. Mrs Snape never complained to him about bad language.

222. Mr Stafford told him that the claimant had made "a ridiculous allegation" against him concerning "wet or dry fannies". He said it was ridiculous. He had not said it. She lied about it. He had been responsible for managing someone he felt was a liar for some time before. Mr Stafford trusted him to do a job for him and he felt Mr Stafford believed him. He would have been really offended if Mr Stafford had accepted her word over his.

223. He bore no grudge against the claimant. He did not see eye to eye with everyone. He had already formulated his opinion of the claimant by this time and there was nothing that surprised him in her behaviour.

224. At the end of his cross examination he was asked about TV screens in the office watching porn and he said this was absolutely not the case. They did have two televisions up in the office and they had "not watched any porn…yet…and they never would".

Submissions

225. Both counsel agreed that the outcome of this case is very much dependent upon the Tribunal's findings in respect of the evidence.

226. For the respondents Mr Cooksey produced a skeleton argument set out over ten pages and written submissions set out over 37 pages. The skeleton argument dealt with the legal issues and the written submissions analysed the evidence.

227. As to knowledge of disability he submits that the respondents had no knowledge of the claimant's disability, whether actual or constructive. The claimant generally kept matters private. Discussions with colleagues could not be construed as informing the employer.

228. Even if the claimant discussed issues concerning her knees and the climbing of stairs with Deborah Wilson, this did not result in the employer having knowledge in his submission. This was in the same context as discussing with colleagues. She never asked Deborah Wilson to take any action. When Deborah Wilson gained some knowledge of the problem in September 2015 she advised her to get the GP report.

The claimant never provided it. This was a conversation between friends not the claimant informing her employer.

229. All that Mr Stafford knew is that the claimant went for injections to her knees on or around 23 September 2015. She did not advise him of anything following the appointment. He retrospectively approved a request for annual leave in respect of 5 January 2015 without knowing the reason for the hospital appointment.

230. As to Mr Rose, he authorised leave for a hospital appointment for a condition unknown. The claimant mentioned her knees once or twice in the context of going to the doctor's about them but did not mention difficulties climbing stairs.

231. There was no knowledge of substantial disadvantage. The claimant's movement was consistent with her age and build.

232. As to discrimination arising from disability, there is no requirement for a comparator. In his submission the dismissal did not arise from the disability; it arose from the negative reference from Mr Robertshaw and the difficulties within the telesales team. In any event the respondent did not have knowledge (actual or constructive) that the claimant was disabled.

233. As to indirect discrimination, there was no PCP that an employee needed to be able to work upstairs; the telesales team was based upstairs rather than on the ground floor. The particular disadvantage pleaded was that the disability made climbing up and down stairs difficult as it led to excessive pain and discomfort. In his submission the claimant did not act in a manner consistent with suffering such particular disadvantage. She was willing to see how things went in February 2015 and only raised the matter again in September without raising concerns between.

234. Locating the sales team on the first floor was a proportionate means of achieving a legitimate aim in connection with locating all of the sales team together.

235. Moving the team upstairs was not done to disadvantage the claimant. It was not her case that the move upstairs was motivated by discriminatory factors or was a deliberate step to disadvantage her.

236. As to reasonable adjustments, the respondents were not under a duty to make reasonable adjustments as they had no knowledge of disability or substantial disadvantage. The comparator is someone working upstairs who is not disabled by the relevant disability.

237. If the claimant was placed at a substantial disadvantage and the respondent had knowledge the claimant should still fail. It was not reasonable for an adjustment to be made in the time given to the respondent after the claimant provided the GP letter (assuming the Tribunal finds that it was provided) between then and the time of her dismissal. Dismissal intervened before the conclusion of a reasonable period of time in which the respondent would have implemented any adjustment, such as moving the claimant to work in the foyer. In any event the complaint is out of time if it relates to February 2015. The failure to make adjustments did not result in the dismissal.

238. As to harassment, counsel submits that, "Tribunals must not cheapen the significance" of the words set out in section 26(1) of the Equality Act relating to purpose or effect as stated by Elias LJ in **Grant v H M Land Registry [2011] EWCA Civ 769**.

239. The conduct complained of did not relate to disability or gender on all occasions even if, which is denied, the requisite environment was created it was not actionable.

240. The conduct complained of was not unwanted conduct. The claimant was a significant contributor to language used in the telesales team. Her own language indicates her acceptance of the use of the word "twat". The phrase "I hope your tits drop off" is a reference to female anatomy used as an insult. By reason of the language used by the claimant and her conduct those she worked with would not have had reason to believe she would be offended by the language they used. The claimant did not object until she raised matters with Mr Stafford. Nothing had really changed since February 2015. The claimant accepted she did not have issues with colleagues until July 2015.

241. The conduct complained of did not have the purpose or effect of harassing the claimant. The claimant accepts the conduct was not directed at her.

242. In her appeal letter the claimant had no issues whatsoever with her colleagues and wanted her job back. In all the circumstances it would not be reasonable, having regard to her perception, to consider the conduct as having the required effect. It would not be reasonable for the claimant to complain that her dignity had been violated or that the proscribed environment had been created.

243. As to harassment on the ground of disability, the only remaining matter is the allegation concerning Mr Rose and in factual terms the words were not said. The claimant had not raised it in the dismissal meeting or in the meeting a week later or in subsequent correspondence.

244. As to harassment in relation to gender, factual disputes should be resolved in favour of the respondents. Much of the language used did not relate to gender. The use by Mr Donelan of the word "cunt" was exclamatory rather than in a sexual sense. The language was not directed at the claimant. The same language had been used since February 2015 with no complaint. It was only after Mr Ollerenshaw raised a complaint about the claimant that she has raised issues concerning him. The issues were not raised by the claimant post termination.

245. The claimant herself frequently used strong/vulgar language with the word "twat" being as much a reference to female genitalia as the word "cunt".

246. The claimant used "dick" and "knob head" which refers to male anatomy.

247. The claimant used discriminatory language referring to a colleague as a "wacky Paki". The colleague conceded calling the claimant a "cunt" in response. This person had given her a lift to the bus stop. Surely she would not take lifts from someone who had created a humiliating environment for her.

248. The other matters of fact should be found in favour of the respondents where there were disputes.

249. The “penises” and “cocks” allegation was not true. Why refer to them both? It lacked credibility. The “wet pussy/fanny” comment was the subject of inconsistent evidence by the claimant and the Tribunal should find against her.

250. As to the ACAS Code, the claimant was unable to bring a complaint of unfair dismissal due to a lack of the service qualification so there was no complaint before the Tribunal capable of having any adjustment.

251. The appeal letter did not complain of harassment related to any protected characteristic so again no adjustment is permissible.

252. For the claimant Mr Islam-Choudhury produced written skeleton submissions dealing with liability only set out over 20 pages.

253. He set out the allegations and noted that the first respondent was not running the statutory defence. He referred to the concession on behalf of the respondents that the claimant was disabled by reason of a physical impairment which “had a long-term adverse effect on the claimant's ability to ascend and descend stairs”.

254. As to credibility, he rightly noted there was much conflict of evidence but in his submission even if the credibility of the claimant was impugned it did not mean that she did not suffer the discrimination alleged. The Tribunal needs to look at the demeanour and testimony of all of the witnesses and determine its findings of fact having assessed all of it. In his submission it would be wrong, for example, if the Tribunal found the claimant's evidence was not accepted on one issue then to reject her evidence on all other issues. He contended the Tribunal should look at the sexual harassment issue first on the basis that it gave an important insight into the attitude of the respondents towards discrimination generally.

255. We shall put aside for the moment his submissions on time limits coming back to them as necessary when we have reached our conclusions in respect of the allegations.

256. Section 26 of the Equality Act 2010 defines harassment as:

> “Conduct related to sex which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, taking into account her perception, all other circumstances of the case and whether it is reasonable for the conduct to have that effect”.

257. He refers to **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** in which the EAT made it clear that the approach to be taken to harassment claims should be broadly the same regardless of the particular form of discrimination. The EAT observed that, in each context, harassment is now specifically defined in a way that focussed on three elements:

(a) unwanted conduct;

(b) having the purpose or effect of either:

(i) Violating the claimant's dignity, or

(ii) Creating an adverse environment for her.

(c) Related to the prohibited grounds.

258. The fact that an employee engages in banter or swearing in the workplace is not a defence. Mr Recorder Luba QC in the EAT in **Smith v Ideal Shopping Direct Limited UKEAT/0590/12** held that:

> "Although in principle a person may not be able to object to conduct that they have willingly participated in there can still be a line to be drawn where the conduct (in this particular case language) goes beyond what that individual was agreeing to.
>
> Furthermore, provided that the other requirements are met the conduct in question does not have to specifically directed at the time on the basis of **Moonsar v Fiveways Express Transport Limited [200] IRLR 9**, EAT where the downloading of pornographic images by the claimant's male colleagues who viewed them in her presence was held to be sufficient to amount to unwanted conduct as the images were viewed on screens in a room where she worked and she was aware of what was happening."

259. Counsel points to the conflict of evidence. The claimant states she never swore at work whereas all of the respondents and their witnesses state that she did. Whether she did or not, it is clear that she drew the line at sexualised words being used as she complained to Mr Stafford in August 2015 about the language used by the third respondent and other male colleagues in the sales team that he managed. He refers to the witness statement of Mr Stafford where he acknowledges the claimant complained about "language of a sexual nature, bad language and sexual innuendo". The second respondent accepted in cross examination that by raising this complaint the claimant had raised a grievance for the purposes of the first respondent's grievance procedure. Mr Stafford accepted that grievances could be raised orally under that procedure and that he had not required the claimant to put it in writing which he could have done under the process.

260. Mr Choudhury then went on to make submissions with regard to the facts in connection with the allegation of harassment. The first respondent has around 80 employees of whom 12 were female. The claimant was generally the only female working in an almost exclusively male sales team and only one of two females located in the same open plan area at Unit 2.

261. The second and third respondents accepted in their evidence that words such as "cunt" would be offensive to female employees. The respondents had not alleged that the claimant ever used this word and she was not cross examined on the use of it herself. She said she found it offensive. If the Tribunal finds that the claimant did swear (which she denies), this of itself does not cancel out the fact that a hostile environment was created. The claimant's alleged swearing, if found, does not go to liability but instead will be relevant to remedy.

262. Turning to the individual witnesses starting with Mr Donelan who used the word occasionally, and although he did not find it offensive that was not the point. The way he gave his evidence demonstrated his lack of any appreciation of the seriousness of his behaviour.

263. In cross examination Mr Bhojani accepted he had used the word in contradiction to his written statement (before correction) where he had denied it. On one occasion he used it in an aggressive way directed at the claimant and he accepted he probably used it on other occasions.

264. Mr Ollerenshaw admitted using the word “cunt” on more than one occasion despite his statement being silent on the issue. The same went for Mr Warren.

265. Messrs Bhojani, Ollerenshaw, Warren, Buswell and Donelan in their statements did not mention the team talk about language on 2 September, and none of them gave any convincing evidence that their behaviour changed after 2 September, supporting the claimant's contention that there was no material improvement after the meeting.

266. With regard to Mr Bhojani, he had directly contradicted himself in his evidence about the use of the word “cunt” so has little or no credibility, therefore his denial of using the words “women like men with big penises and cocks” on 2 October 2015 should, in his submission, be found against him.

267. Mr Ollerenshaw admitted in his statement to using the phrase “gimp mask”. In cross examination he put it in the context of meaning “slave” although, submits Mr Choudhury, the Tribunal will know that this is a sexualised term and is a reference to “sex slave”.

268. Mr Buswell admitted talking about his sex life on occasion.

269. Mr Rose admitted that there was bad language used by the team, in particular the use of the word “cunt” by Mr Donelan and Mr Buswell talking about his sex life. His statement did not refer to him taking any action to address the behaviour despite being the manager. In effect, submits Mr Choudhury, Mr Rose was condoning this behaviour, letting a discriminatory work environment continue to exist, and by doing so, he encouraged a laddish and crude culture to exist which would be degrading to female employees. When challenged in cross examination that he had said the team could watch pornography on television he denied it by saying flippantly that they had not watched any pornography – yet. This, submits Mr Choudhury, gives an insight into the demeanour and behaviour of Mr Rose in the workplace. The Tribunal is entitled to find that he did make a comment about watching pornography on the television screens at work.

270. Mr Stafford accepted that in or around August 2015 the claimant raised the issue of bad language in the sales office with him. She said that she did not have to listen to language of a sexual nature, bad language and sexual innuendo etc. She said she had mentioned it to Nick but that nothing had been done. She specifically mentioned an incident when she complained to Nick that someone was talking about “wet fanny” and his response was that it was “better than talking about dry ones”. Despite this very serious complaint Mr Stafford:

(a) Failed to take immediate action, delaying his response until a team talk a number of weeks later.

(b) Failed to investigate the matter, taking Mr Rose's denial at face value and preferring him over the claimant without interviewing witnesses.

(c) He did not report back to the claimant his discussion with Mr Rose about the allegation.

(d) Had he investigated he would have found a culture of sexualised language being used, which witnesses have admitted to in Tribunal, and therefore he would have had to consider disciplinary action or more robust action to address the issue.

271. In his submission the team talk given by Mr Stafford on 2 September was wholly inadequate because:

(a) It made no reference to the equal opportunities policy, and in cross examination was not sure if there was such a policy for his company.

(b) He had had no training in equality and diversity matters.

(c) There is not a single bullet point of advice contained in the slides.

(d) Mr Stafford has kept no notes of what he actually said during the meeting.

(e) There was no discussion of any training or of case studies, such as what amounted to acceptable or unacceptable conduct.

(f) There was no threat of disciplinary action being taken against anyone leaving the conduct of people like Mr Donelan unchecked.

(g) The inadequacy of the team talk is demonstrated by the fact that none of the sales team witnesses mention it in their statements, even though the purpose of their statements was to deal with the language used in the office.

272. On any assessment, submits Mr Choudhury, the environment in the sales office was degrading and humiliating to women. The Tribunal should accept the claimant's case that she was offended by the sexualised language and that it created an intimidating environment for her.

273. There can be no dispute that the sexualised language and reference to "cunt" was related to sex.

274. With regard to the third respondent, Mr Rose, he condoned and therefore encouraged a laddish and crude culture that was offensive to women. Given his demeanour and lack of any action to deal with the actions of his team members this only supports the fact that he too was involved in making crude and sexualised comments i.e. he tolerated it because he too perpetrated and participated in it.

275. Moving on to the question of disability, Mr Choudhury started his submissions with matters of law in relation to knowledge of disability. In his submission actual or constructive knowledge of disability is required for the following claims:

(a) Discrimination arising from disability – Section 15 Equality Act 2010.

(b) Direct disability discrimination – section 13 Equality Act 2010.

(c) Failure to make reasonable adjustments – section 21 Equality Act 2010.

276. Actual or constructive knowledge of disability is not required for the following claims:

(d) Indirect disability discrimination – section 19 Equality Act 2010.

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

277. He goes on to submit that employers cannot deny disabled employees their rights by simply turning a blind eye to disability or through lack of training, not knowing what to do and then claim a lack of knowledge. That would defeat the very purpose of the legislation. It is well recognised that disabled people can be reluctant to complain of disabilities for fear of losing their jobs.

278. He made reference to the Guidance on the Definition of Disability (2011). He referred to paragraphs B12-B13, in connection with disregarding the effects of treatment in assessing substantial adverse effect. At B18 and B19 progressive conditions (such as the claimant's arthritis) are treated as having substantial adverse effects before they actually have that effect – there need only be some adverse effect for the person to be found disabled from the moment the symptoms developed. At C3 “likely” should be interpreted as meaning “it could well happen”.

279. As to discrimination arising from disability, section 15(2) provides that there will not be liability for discrimination arising from disability if the employer shows that the employer did not know and could not reasonably have been expected to know the claimant had the disability i.e. the burden is on the employer to prove that it did not have actual or constructive knowledge.

280. The EHRC Code of Practice on Employment (2011) advises that employers must “do all they can reasonably be expected to do” to find out if the employee has a disability. He then referred to **Gallop v Newport City Council (No. 2) [2016] IRLR 395** where the EAT held that knowledge of disability in one part of an organisation does not mean knowledge can be imputed in the organisation more generally, and that where an individual makes a decision the important question is to consider what factors were in his mind at the relevant time. This approach is also, in his submission, relevant to direct disability discrimination.

281. As to reasonable adjustments, Schedule 8, paragraph 20(1) of the Equality Act 2010 states that an employer is not subject to a duty to make reasonable adjustments if they do not know and could not reasonably be expected to know that the disabled person “has a disability and is likely to be placed at the disadvantage referred to…” Again he submits the burden is on the employer to prove that it could

not be expected to know about the disability. Employers will not avoid the duty to make reasonable adjustments where they did know, but should reasonably have known, about an individual's disability and substantial disadvantage, therefore they should take reasonable steps and have systems in place to find out the relevant information with the EHRC Code of Practice advising that employers must "do all they can reasonably be expected to do" to find this out.

282. In **Department for Work and Pensions v Alam [2010] IRLR 283** the EAT held that there are really two questions to be answered in a reasonable adjustment case:

(a) Did the employer know both that the employee was disabled and that his disability was liable to place him at a substantial disadvantage?

(b) If not, ought the employer to have known both that the employee was disabled and that his disability was liable to place him at a substantial disadvantage?

283. In **DWP v Hall UKEAT/0012/05**, the EAT upheld the Tribunal's decision that an employer should have known about an employee's disability even though she had not specifically informed the employer that she was disabled. The Tribunal had held that Ms Hall's negative replies in a health declaration form, her refusal to let her employer have access to her medical records and her volatile behaviour should have been a warning sign. In addition a member of the interview panel that recruited the claimant knew her previously but did not mention anything about her health and disability and despite the fact that both her manager and the HR department saw her application for Disability Tax Credit they failed to make further enquiries.

284. In **Gallop v Newport City Council [2014] IRLR 411** the Court of Appeal held that the employer was wrong to have unquestioningly followed an Occupational Health adviser's opinion that an employee was not disabled. While Occupational Health assessments or other medical advice may be helpful, the court made it clear that a responsible employer must ultimately apply its own mind to the test for deciding whether an employee is disabled under the discrimination legislation. The court also made it clear that the required knowledge is of the facts of the employee's disability. The employer does not need to also realise that the particular facts meet the legal definition of disability.

285. In this case, as already set out above, the respondents on 8 August 2016 conceded the question of disability. As the claimant was diagnosed in September 2015 with osteoarthritis to her knees and she started to show symptoms from this date then in his submission she was disabled from this date.

286. Had the respondents taken the simple step of asking the claimant about the pain in her knees and what adjustments she required, if any, then they would have got the information that was provided in the letter from the claimant's GP dated 23 September 2015. The letter is significant because if the Tribunal finds that the respondents, or any of them, were aware of the letter, they cannot prove that they did not know or ought reasonably to have known that the claimant was disabled and needed adjustments. It is no surprise therefore, submits Mr Choudhury, that a dishonest employer would deny ever seeing it.

287. The claimant alleges that Mr Rose made threats to her after July 2015 and then again in September 2015 that if she did not stop moaning she would be dismissed. Further, Mr Rose admits to using the Robertshaw reference as a lever in September 2015 to turn the claimant around i.e. a threat that if she did not stop complaining and agree to his request to move upstairs she would be dismissed. These threats are relevant to assessing whether R1, R2 and R3 can prove (and the burden is on them) that they either did not know or ought reasonably not to have known that the claimant was disabled.

288. Looking at **Gallop (No. 1)** there are many instances where the employer did not address its mind to the question of disability where it would be expected of an employer acting reasonably and competently. In his submission the evidence that they did know, or ought reasonably to have known, of the claimant's disability is as follows:

(a) The claimant says she told Mrs Wilson, R2 and R3 (and many others) on many occasions about her condition and that it caused pain in her knees and difficulty with stairs.

(b) Ms Guest admitted in cross examination that the claimant had told her that the cushion between the bones of her knees had degenerated.

(c) Ms Watson admitted in re-examination that the claimant had told her that she had arthritis to the knees, and in cross examination that the claimant had told her before her move to Unit 2 in February 2015.

(d) Many of R1's witnesses admit that the claimant was complaining about her knees and having to work upstairs because of pain in her knees in September 2015. (See Wilson, Carruthers, Guest and Bhojani).

(e) Mr Stafford knew that the claimant was slow up the stairs and she would in his view joke about the installation of a stair lift.

(f) On 23 September the claimant went to have an injection to her knees. Mr Stafford knew this. Despite this he did not ask the obvious question that any normal employer would ask – is there anything they could do to support her?

(g) Mr Rose denies specific knowledge of the injection but does admit the claimant would go for doctor's appointments and show an appointment card and would say that she was off to the doctor's about her knees. Despite this he did not ask the obvious question that any normal employer would ask – was there anything they could do to support her?

(h) Mr Rose knew the claimant had brought forward holiday from 2015 to December 2014 for hospital appointments. The claimant says she told Mr Rose and Ms Wilson that it was for injections to her knees. Mr Rose tried to deny any knowledge of this in cross examination, but this did not ring true because of the email exchange in January 2015 where the claimant stated she had attended a hospital on 5 January. Any reasonable employer, he submits, would have asked if there was anything it could do to support her.

(i) Mr Rose has previous form for not keeping or disclosing medical letters – see an email where the claimant refers to a hospital letter handed to him in her email of 7 January 2015. Mr Rose does not challenge the assertion but has not kept a copy of the letter and has not disclosed it. The claimant's copy of the letter was in the bundle.

(j) The claimant alleges she showed Mr Rose the GP letter dated 23 September on 28, 29 or 30 September and he refused to take a copy. Mr Rose denies ever seeing it, but why would she obtain this letter in the first place unless she was going to show it to her employer? Given Mr Rose's previous history of not retaining or disclosing a letter of 22 December 2014 the claimant's account should be preferred.

(k) The second and third respondents discussed the claimant's dismissal on or after 30 September 2015 on or shortly after the date the claimant alleges she showed Mr Rose the letter from the GP.

(l) On 9 October 2015 (before the claimant had complained of discrimination) Mr Stafford said to the claimant and her husband there was no need to go upstairs because he knew she had bad knees.

(m) Mr Stafford accepted that in his letter of 30 October 2015 a different font was used where he stated he was not aware of the claimant's disability, suggesting this was added on from a previous draft which did not contain this assertion.

289. In the submission of Mr Choudhury the claimant did inform the respondents of her disability:

(a) In February 2015 when she was asked to move upstairs.

(b) In September 2015 when she asked to move downstairs and was placed in the boardroom.

(c) The only context in which the reference in the 8 September email to "a better and more comfortable environment" can be read is that it referred to her request to work downstairs due to her knee condition. If it was really to do with team working then there would have been an email or a team meeting to explain her return after only three days.

(d) On 16/17 September 2015 when she was asked to move back upstairs.

(e) There is no evidence from the second and third respondents asking questions to the claimant as to how they could support her because they knew she had a knee condition that made it difficult for her to navigate the stairs and they did have those discussions but now they are being dishonest to avoid liability.

290. The next part of the submissions dealt with direct disability discrimination against the first and second respondents. Mr Choudhury withdrew these claims but continues to rely upon the factual timeline in support of the section 15, discrimination

arising from disability, claim. As to that timeline, in September 2015 it is very significant:

(a) On 14 September 2015 the claimant moved down to the boardroom.

(b) On the same date the Robertshaw reference was received. Despite it being a very strongly worded negative reference the second and third respondents decided not to use it to dismiss the claimant but to use it to get her to mend her ways.

(c) On 16 or 17 December 2015 Mr Rose spoke to the claimant to say she had to move back upstairs, therefore she moved back upstairs after which there is no specific reported incident of poor behaviour on her part between then and 2 October 2015 when she was dismissed.

(d) The claimant alleges that on 16/17 September 2015 she stated to both R2 and R3 that she needed to work downstairs because of her knees. This is denied by them.

(e) Many of the first respondent's witnesses admit the claimant was complaining about her knees and having to work upstairs because of pain in her knees in September 2015.

(f) It is more likely than not that the claimant did complain to R2 and R3 about moving upstairs in September 2015.

(g) What happened to change the mind of R2 and move to dismissal? On 23 September she went to have injections into her knees. Mr Stafford knew about it. Although Mr Rose denies specific knowledge of this he admits that the claimant would go for a doctor's appointment, show an appointment card and say that she was off to the doctor's about her knees. On balance the Tribunal should find Mr Rose also had specific knowledge of the claimant's 23 September appointment for injections.

(h) On 24 September 2015 the claimant received the letter from the GP.

(i) The claimant alleges she showed Mr Rose the letter on Monday, Tuesday or Wednesday of the following week. Mr Rose denies ever seeing it, but why would she obtain the letter in the first place unless she was going to show it to the employer?

(j) The third respondent has previous form for not keeping or disclosing medical letters – see above.

(k) After the move upstairs Mr Stafford thought the claimant was talking to ACAS.

(l) R2 and R3 discussed the claimant's continued employment after she moved back upstairs despite there being no specific incident of disruptive behaviour and no team meeting to try to dispel alleged poor working atmosphere in the team.

(m) Mr Stafford has not disclosed any notes of a meeting with Mr Rose. He only gives the briefest account of what was discussed. There is no positive evidence that the claimant's condition was not discussed. Mr Stafford does not say when the meeting occurred other than it was a couple of days before 2 October. Mr Rose does not even mention it in his statement.

(n) The second respondent states that on 2 October he told the claimant the reason for dismissal was firstly “issues with colleagues” and then the “poor reference – in that order”. This should be contrasted with the dismissal letter itself where the order is reversed. The claimant states the order was that in the letter rather than that as described by Mr Stafford.

(o) Between 16 September and 2 October the only significant incidents to occur were the claimant's appointment on 23 September for injections in her knees and the letter from the doctor. There was nothing more of substance to explain why, having initially decided not to use the reference to dismiss the claimant which was relied on in the context of poor working relationships. Given the lack of credibility in the evidence of the second and third respondents the Tribunal should find they conspired together leading to Mr Stafford’s decision to terminate the claimant's employment because she was disabled so as to avoid having to accommodate her needs. If that is the reason for dismissal then a hypothetical comparator who shared all the characteristics of the claimant, but was not disabled, would not have been dismissed.

291. As to discrimination arising from disability section 15 of the Equality Act 2010 provides that it is unlawful to treat the claimant unfavourably because of something arising in consequence of her disability. If there is unfavourable treatment this may be justified if it is a proportionate means of achieving a legitimate aim.

292. The claimant alleges two incidents of unfavourable treatment: the first being the requirement to work upstairs and the second being her dismissal. In relation to dismissal the claimant relies on the points set out above that would have been used for the direct discrimination allegation. In essence if the Tribunal finds that the reason for the dismissal was in fact connected to the desire of the second respondent to avoid the claimant complaining about working upstairs because of pain in her knees or having to accommodate her needs in connection with her disability this is unfavourable treatment, unless it is justified.

293. As to justification, the first and second respondents have not pleaded any justification defence but if justification is being run the only feasible argument is that there was a need for the team to work together, meaning they would have to work upstairs. Requiring the team to work together with a potential legitimate aim but this was not proportionate because:

(a) The claimant would have difficulty with stairs, going back to the letter from the doctor of 21 October 2014 and the GP letter of 23 September 2015, meaning that her climbing the stairs caused her pain and discomfort. She was slow using the stairs and complained about the

pain in her knees. The second respondent stated it would be relatively easy to accommodate her elsewhere (on the ground floor) as all she really needed was a desk and a telephone.

(b) For the same reason requiring the claimant to work upstairs in September 2015, when she was complaining about pain in her knees, was unfavourable treatment that was not justified.

294. As to indirect discrimination, a claim against the first respondent only, section 19 of the Equality Act 2010 is relevant. There is no need for the employer to have knowledge of disability for an indirect discrimination claim.

295. The PCP was:

(a) To be required to work with the Telesales team based upstairs; and/or

(b) For employees to be required to work upstairs.

296. Both of these PCPs were applied as the claimant was required to work upstairs with the Telesales team from February to 14 September 2015 and then again from 16/17 September when she moved back upstairs to 2 October 2015 when she was dismissed. Mr Rose explained the reason for this as being it was important for the whole sales team to be together and therefore the PCP applied to the whole of the sales team irrespective of disability.

297. Clearly any requirement to work upstairs in premises where there was no lift would cause particular disadvantage to a disabled employee with mobility impairment to their knees/legs. That disadvantage was caused to the claimant. She was therefore subject to prima facie indirect discrimination subject to any justification defence. No such defence has been pleaded but if justification was being run the feasible argument was the need for the team to work together, meaning they would have to work upstairs. Although this was a potential legitimate aim it was not proportionate because:

(a) The claimant would have difficulty with stairs, and making her climb the stairs caused her pain and discomfort. She was slow up the stairs and complained about having to use them due to pain in the knees.

(b) Mr Stafford stated it would have been relatively easy to have accommodated her elsewhere on the ground floor as all she really needed to work was a desk and a telephone.

298. In these circumstances the Tribunal should find the indirect discrimination claim made out.

299. As to failure to make reasonable adjustments, Mr Choudhury submits that whereas indirect discrimination deals with inadvertent rules that have discriminatory impact, the duty to make reasonable adjustments is a positive duty to ensure that impediments to working are removed for a disabled employee. Section 20(1) of the Equality Act 2010 places a duty to make reasonable adjustments where a PCP puts the claimant at a substantial disadvantage in comparison with a person who is not disabled, and section 20(5) places upon an employer a duty to provide auxiliary aids

where a disabled person, but for the provision of the aid, would be put at a substantial disadvantage in comparison with persons who were not disabled.

300. Turning to this case, the claimant alleges the PCP was:

(a) To be required to work with the Telesales team based upstairs; and

(b) For employees to be required to work upstairs.

301. Both were applied from February to 14 September 2015 and then from 16/17 September to 2 October 2015. Mr Rose explained it was important for the whole sales team to be together, therefore the PCP applied to the whole of the sales team irrespective of disability.

302. The requirement to work upstairs where there was no lift caused the claimant substantial disadvantage as this meant she had to go up and down the stairs, causing pain in her knees. Many witnesses say the claimant complained about this and so the duty to make adjustments was triggered.

303. Notwithstanding this the claimant was required to use the stairs to get to work upstairs. Mr Stafford had stated it would have been relatively easy to accommodate her knees downstairs because she could work with a desk and telephone. Therefore there was a failure to implement reasonable adjustments.

304. As to auxiliary aids, the claimant contends that on more than one occasion she asked the second respondent for a stair lift to be installed, with Mr Stafford accepting that this was mentioned but he dismissed it as a joke. The claimant contends that any reasonable employer would have considered the request seriously, given that there was no lift in the building and a failure to do so was a failure to implement reasonable adjustments.

305. As to harassment based on disability, the submissions on the concept of harassment set out above are relevant in connection with the claim for disability related harassment. The claim is against the first and third respondents in respect of a comment allegedly made on 16 or 17 September 2015 in response to the claimant stating she found the stairs difficult because of pain in her knees when Mr Rose said “do you think I care about your knees?” Given that the claimant was disabled at the material time and was suffering from pain, this comment was a degrading and humiliating one which was unacceptable in any workplace. The claimant was offended by it as would have been any employee with her condition trying to discuss adjustments with her manager.

306. In conclusion the Tribunal should uphold all of the claimant's claims.

The Relevant law

307. The following sections of the Equality Act 2010 relate to the claimant's claims.

308. Section 15 (discrimination arising from disability) –

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

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

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

309. Section 19 (indirect discrimination) –

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are –

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;

sexual orientation.

310. Section 20 (duty to make adjustments) –

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

(b) The duty comprises the following three requirements.

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

(d) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(e) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

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

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

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

(i) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to –

  (a) removing the physical feature in question,

  (b) altering it, or

  (c) providing a reasonable means of avoiding it.

(j) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to –

  (a) a feature arising from the design or construction of a building,

  (b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(k) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(l) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(m) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	**Applicable Schedule**
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

311. Section 21 (failure to comply with duty) –

(a) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(b) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(c) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

312. Section 26 (harassment) –

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if –

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are –

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

313. Section 123 (time limits) –

(1) [Subject to section 140A] Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of –

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

314. Section 136 (burden of proof) –

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

1. Impairment

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

2. Long-term effects

(1) The effect of an impairment is long-term if -

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

3. Severe disfigurement

(1) An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.

(2) Regulations may provide that in prescribed circumstances a severe disfigurement is not to be treated as having that effect.

(3) The regulations may, in particular, make provision in relation to deliberately acquired disfigurement.

4. Substantial adverse effects

Regulations may make provision for an effect of a prescribed description on the ability of a person to carry out normal day-to-day activities to be treated as being, or as not being, a substantial adverse effect.

5. Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply –

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

6. Certain medical conditions

(1) Cancer, HIV infection and multiple sclerosis are each a disability.

(2) HIV infection is infection by a virus capable of causing the Acquired Immune Deficiency Syndrome.

Discussion and Conclusions

Credibility

315. As we have already stated, this case turns on questions of credibility. The evidence from the claimant differs materially from the evidence of the second and third respondents and the first respondent's witnesses.

316. If we look at the question of the claimant's use of swear words, we have the claimant's initial denial, then her acceptance that she did use some mild swear words but generally at home rather than in the office, and then her acceptance that she had used the word "f…in" when talking to the GP's receptionist.

317. She did not accept she had used bad language within the office environment.

318. As against this, we have the evidence of her fellow employees when she was working downstairs and when she was working upstairs. The fellow employees when she was working downstairs were female and when she was working upstairs were mainly male, but it was a consistent theme of their evidence that the claimant did swear in the office on a regular basis, both downstairs and upstairs.

319. We prefer the evidence given by the first respondent's witnesses to the effect that the claimant did regularly swear within the workplace.

320. Another particularly contentious issue relates to the letter from the claimant's GP dated 23 September 2015 and whether or not it was shown to Mr Rose at their meeting in the boardroom before the claimant returned to work upstairs. The claimant is adamant that it was shown to him. Mr Rose is adamant that it was not. There was no-one else present at the meeting.

321. What surrounding evidence do we have that might support one version or the other? We have the evidence of Ms Wilson to the effect that the claimant, having discussed getting a medical report with her, never provided a copy of it to her and the email from the claimant to Ms Wilson asking about whether she had told anyone about the letter and "did Julian or Nick know that she was getting it?".

322. We know that the respondents were so concerned about the genuineness of the GP's letter that they sought to question its authenticity.

323. The balance of the evidence leads us to conclude that it is more likely than not that the claimant did not show the doctor's letter to Mr Rose in the boardroom, and that the respondents only became aware of it during the course of these proceedings.

324. We therefore reach the conclusion that the claimant's version of events is not always to be relied upon.

Knowledge of Disability

325. The Code of Practice on Employment (2011) answers the question, "What if the employer does not know the worker if disabled?" At 6.19:

> "For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

326. At 6.20:

> "The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment."

327. Looking at the various matters set out above, in our judgment the respondents could reasonably have been expected to have followed up the issues raised by the claimant with Mr Stafford in respect of the installation of a stair lift, the reference to cortisone injections and her discussion with Deborah Wilson which prompted the claimant to get the letter from the GP. We do not accept that this letter was ever shown to anyone at the company prior to the termination of the claimant's employment but it was Deborah Wilson who suggested to the claimant that she should get such a letter in case the company needed to do anything for her.

328. The claimant in her witness statement specifically recalls asking Mr Stafford on two occasions some months before her dismissal if it was possible for a stair lift to be installed. The claimant unfortunately does not give us any specific dates and so we are unable to reach a conclusion as to when Mr Stafford was asked.

329. As to the cortisone injections, there is no doubt they were given to the claimant on 23 September 2015. The conversation with Ms Wilson when Ms Wilson suggested the claimant should go to the doctor to get a letter must have taken place

when the claimant was still downstairs. We know that the email from Mr Robertshaw was sent on 14 September 2015 and so we presume that the conversation would have been around Wednesday 16 September 2015. The evidence that we have reviewed does not in our judgment support Ms Wilson having sufficient knowledge to have placed a duty upon her to have made enquiries of the claimant prior to their conversation in September 2015. We remind ourselves that she and the claimant had not worked together in the same office and they had little contact after the claimant moved upstairs in February 2015.

330. In our judgment the first and second respondents ought reasonably to have known about the claimant's disability by 16 September 2015.

Discrimination arising from a disability

331. We remind ourselves that the question asked in the agreed list of issues is: Did the respondent treat the claimant unfavourably (in this case, dismiss her) because of something (difficulty climbing upstairs/working upstairs-para 30 GOC) arising in consequence of the claimant's disability? Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

332. The dismissal of the claimant was unfavourable treatment but was it because of something arising in consequence of her disability? We accept the evidence of the second respondent who made the decision to dismiss the claimant as to his reasons for dismissing her as set out in the letter of dismissal. In our judgment the reasons for dismissal did not relate to or arise from the claimant's disability. She was an employee who did not enjoy protection from ordinary unfair dismissal due to her length of service but who soon would have been employed for two years. The respondents knew this when they decided to dismiss the claimant. We do not find that the claimant's dismissal amounted to discrimination arising from disability.

333. In the submission of Mr Choudhury the claimant alleges two incidents of unfavourable treatment, the first being the requirement to work upstairs and the second being her dismissal. In our judgment there is only one allegation of unfavourable treatment, the dismissal, with the claimant's difficulty climbing the stairs being the "something" arising in consequence of her disability.

Indirect discrimination

334. Did the respondent implement the PCPs at paragraphs 33(a) and 33(b) of the grounds of claim? Did these PCPs put someone with the claimant's disability to a particular disadvantage compared to those without the claimant's disability as set out at paragraph 34 of the grounds of complaint? Was the claimant put to that disadvantage?

335. Paragraph 33 of the grounds of claim says that:

> "The claimant will rely on the following PCPs:-
>
> (a) That the telesales team be based upstairs/otherwise than on the ground floor;
>
> (b) That an employee needs to be able to work upstairs."

336. Paragraph 34 says that:-

> "In respect of both 33(a) and 33(b) above, either or both these PCPs puts persons with the claimant's disability to a particular disadvantage compared to those without the claimant's disability in that the claimant's disability makes climbing up and down stairs difficult as it leads to excessive pain and discomfort. These PCPs are difficult for someone with the claimant's disability to comply with and they are therefore put to a disadvantage in having to carry out this PCP. The claimant will say that she was put to this particular disadvantage. The claimant will say that this PCP is not a proportionate means of achieving a legitimate aim."

337. We remind ourselves that there is no need for the employer to have knowledge of disability in an indirect discrimination claim.

338. The respondent did put in place the first of the PCPs when all of the telesales team, including the claimant, were moved to offices upstairs in Unit 2 in or about February 2015. We think in simple terms it follows that employees in the telesales team needed to be able to work upstairs if they were instructed by management to work as part of the team which was moved upstairs.

339. It must also follow that the claimant, with her disability, was put to a particular disadvantage when compared to those without that disability. We remind ourselves of the acceptance by the respondents that the claimant was a disabled person from 11 September 2014 with an impairment amounting to a substantial and long-term adverse effect on her ability to ascend and descend stairs.

340. As to this being a proportionate means of achieving a legitimate aim we noted above the ready acceptance on the part of the respondents that the claimant could easily have worked downstairs, away from the team, as all that she needed was a desk, a phone and a computer. We note that for a brief period the claimant was instructed to work downstairs. Therefore on the basis of the evidence of the respondents we do not accept that the requirement for the claimant to work upstairs was a proportionate means of achieving a legitimate aim. We therefore conclude that the first respondent indirectly discriminated against the claimant.

<u>Failure to make reasonable adjustments</u>

341. The List of Issues asks: Was the respondent under a duty to make reasonable adjustments under section 20 of the Equality Act 2010? Did the respondent's PCPs identified at paragraphs 36(a) and 36(b) of the grounds of complaint place the claimant at a substantial disadvantage compared to those without the claimant's disability – if so, how? What adjustments does the claimant suggest should have been made (paragraph 37 GOC)? Did the respondent's failure to make reasonable adjustments result in the claimant's dismissal?

342. We note from the grounds of claim that the PCPs are the same as those pleaded for indirect discrimination – that the telesales team be based upstairs and an employee needs to be able to work upstairs.

343. Paragraph 37– the claimant will say that in respect of both paragraphs 36(a) and 36(b) above the substantial disadvantage that was caused by either or both of

these PCPs was that it would cause the claimant additional pain and discomfort in her knees. The claimant will say that the reasonable adjustment that it is alleged should have been made by the respondent is to have allowed the claimant to have worked downstairs.

344. We remind ourselves that the duty to make reasonable adjustments only arises where the employer knows, or ought to have known, that the employee is disabled. We have concluded that the respondents ought reasonably to have known about the claimant's disability by 16 September 2015.

345. Following our conclusions in relation to indirect discrimination we maintain our finding that the requirement to work upstairs and that an employee needed to be able to work upstairs placed the claimant, with her particular disability, at a substantial disadvantage compared to someone who could climb up and down stairs without difficulty.

346. The claimant suggested that she should have been allowed to work downstairs. We accept that this would have been a reasonable adjustment and one that the respondent could have made as discussed above at 340.

347. In these circumstances we conclude that the first respondent failed to make a reasonable adjustment in not allowing the claimant to work downstairs.

348. We do not find that the failure to adjust resulted in the claimant's dismissal. We have set out above our conclusions in respect of the reasons for the dismissal and that they did not relate to the claimant’s disability.

Harassment

349. Was the claimant subjected to unwanted conduct relating to disability (paragraph 38(b) only GOC) or sex (paragraph 39(a) GOC)?

350. Paragraph 38(b) is an allegation concerning the third respondent saying to the claimant, “Do you think I care about your knees?”

351. Paragraph 39(a) is the use of frequent and obscene language in the office relating to female genitalia with reference to paragraphs 24 and 25 of the GOC, which are themselves set out above at paragraph 138.

352. We shall reach our conclusions on the alleged conduct before going on to consider how the claimant was affected by it.

353. As to the allegation against Mr Rose, we have set out the claimant’s evidence above at paragraph 113 and at paragraph 132 we have set out Mr Rose’s denial that he used the words alleged. No-one else was present and there is no corroboration coming from either side. We might have expected that the claimant would have raised this issue during the course of her employment or, if not, shortly after its termination but she did not.

354. In our judgment we find it more likely than not that the words allegedly said by Mr Rose were not said.

355. Turning now to the alleged frequent use of crude and offensive language in the office referring to female genitalia, having reviewed the evidence in chief of the alleged perpetrators together with their cross-examination we find that certain male employees did often use crude and offensive language relating to female genitalia in front of the claimant. We have set out where various members of staff used the "c" word in front of the claimant. We find that although the claimant did not refer to it in her pleadings the word was on one occasion used directly against the claimant by Mr Bhojani in response to the claimant using racially abusive words towards him.

356. As to the various other matters raised in the further and better particulars provided by the claimant we accept them where the particular witnesses have accepted the allegations related to their conduct but otherwise we do not given our view that the claimant's evidence is not always to be relied upon.

357. There is a clear dispute of fact as to whether or not there was talk of "wet pussy" and "wet fanny". The claimant asserts that such items were discussed. The respondents and their witnesses deny that such items were discussed in the sales office.

358. We have set out above at paragraph 138 the words used by the claimant in her grounds of complaint at paragraphs 24 and 25, followed by what the claimant said in her witness statement at paragraphs 38-40, and then we have set out the claimant's further and better particulars.

359. In the grounds of complaint the claimant recalls on one occasion in around August 2015 the male employees were talking about "wet pussy" and "wet fanny". The claimant found this very upsetting indeed and reported this to Mr Rose who responded that it was better than them talking about "dry ones".

360. In her witness statement she refers again to male colleagues talking about "wet pussy" and "wet fanny". She reported it to Mr Rose, and much to her disbelief he replied that it was "better than them talking about dry ones". In the subsequent further and better particulars when the claimant was asked which male employees were talking about "wet pussy" and "wet fanny" and what precisely did they say, the response is that Mr Nick Rose said, "You can't beat a wet pussy and wet fanny". On hearing this the claimant was disturbed and shocked as he was the Sales Manager. She went over to him and all the male colleagues were laughing. She felt very embarrassed and said, "Nick, do we really have to talk about this?" and he replied, "It's better than talking about dry ones" and he laughed at the claimant.

361. We note there are differences between the way in which the claimant puts this allegation in her witness statement and in the particulars. In the witness statement the talk was initially by her male colleagues and the claimant went to Mr Rose to complain, then in the particulars it was Mr Rose who made the comment and the claimant approached him after he had said it. The claimant is, however, consistent that Mr Rose said it was "better than talking about dry ones".

362. Mr Rose insists that these words were never said by him. None of the female witnesses heard such words being used. The witnesses from the sales team all denied that such words were used.

363. In relation to this allegation we find that the claimant has not satisfied us that these words were used by Mr Rose.

364. We accept that the crude language relating to female genitalia continued to be used in front of the claimant up until the claimant's dismissal albeit with some improvement following the September sales meeting held by Mr Stafford.

365. As to the specific allegation that Mr Bhojani made reference to "penis and cocks" on the day the claimant was dismissed, we have a similar situation to the comment allegedly made by Mr Rose. Mr Bhojani specifically denies making this comment, and indeed in the view of the Tribunal it would be strange to talk about "penis and cocks" rather than one or the other when the terms are synonymous. Ms Stafford did not hear the words used. We conclude that the claimant has not satisfied us that it is more likely than not that Mr Bhojani used these words.

366. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? When deciding whether conduct has such an effect we must take into account the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

367. On the basis of her evidence we find that the conduct complained of was not wanted by the claimant and that it related to sex.

368. With regard to the general conduct in the sales office involving the use of obscene language relating to female genitalia, we do not find that it was used with the purpose of violating the claimant's dignity, but we are satisfied that that was the effect that it had on the claimant. We are satisfied that it was reasonable for the conduct to have had that effect on the claimant as a woman working in an office with men notwithstanding our finding that the claimant herself used swear words in the workplace.

369. With regard to the unpleaded allegation concerning Mr Bhojani's response to the racially offensive language used towards him by the claimant we would not have considered it reasonable in those particular circumstances for that language to have amounted to harassment of the claimant on the grounds of sex.

370. As to whether or not such claims are out of time, we are satisfied that the offensive language continued until the claimant's dismissal and that for the purposes of section 123 it was conduct extending over a period which is to be treated as done at the end of the period, thus bringing the claim within time.

Breach of ACAS Code

371. The List of Issues asks: was there a failure by any party to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures? If so, were any of the breaches unreasonable? If so, is it just and equitable in all the circumstances for there to be an uplift/decrease in the relevant heads of compensation by up to 25%?

372. Paragraph 44 of the GOC makes reference to the disciplinary process. Mr Choudhury did not make any submissions on this question so we shall not make any findings on it. The matter can be raised in connection with remedy.

Conclusion

373. We have found that the first respondent indirectly discriminated against the claimant and that there was a failure to make reasonable adjustments. We have found that the claimant was harassed in that she was subjected to unwanted conduct related to sex. All other claims are dismissed.

374. We invite the parties to reach an agreement on the question of remedy, but if this cannot be done the claimant shall write to the Tribunal to request the listing of a remedy hearing.

Employment Judge Sherratt

22 June 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

29 June 2017

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FOR THE TRIBUNAL OFFICE