Case Number: 3200179/2017

STO

EMPLOYMENT TRIBUNALS

Claimant: **Ms V A Sarpeh**

Respondent: **London Borough of Hackney**

Heard at: **East London Hearing Centre** **On: 30, 31 August 1, 4 and 5 September 2017**

Before: **Employment Judge O'Brien**

Members: **Mrs B Saund**
Mr P Quinn

Representation:

Claimant: In person
Respondent: Mr Kohanzad of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. **The claimant's complaint of direct disability discrimination under s13 of the Equality Act 2010 fails and is dismissed.**

2. **The claimant's complaint of discrimination arising from disability under s15 of the Equality Act 2010 fails and is dismissed.**

3. **The claimant's complaint of indirect disability discrimination under s19 of the Equality Act 2010 fails and is dismissed.**

4. **The Claimant's complaint of a failure to make reasonable adjustments under section 21 of the Equality Act 2010 fails and is dismissed.**

5. **The Claimant's complaints of harassment under s26 of the Equality Act 2010 fail and are dismissed.**

6. **Pursuant to rule 76(1)(a) and rule 78(1)(a) of the Employment Tribunal Rules of Procedure 2013, the Claimant is ordered to pay to the Respondent the sum of £1,200 in respect of its costs by 17 October 2017.**

REASONS

1 On 23 February 2017, the claimant presented a claim of disability discrimination (comprising complaints of direct discrimination, indirect discrimination, discrimination arising from disability and failures to make reasonable adjustments) and harassment. The respondent resists the claims.

ISSUES

2 A list of issues was agreed between the parties at a preliminary hearing before Employment Judge Brown on 8 May 2017 as follows:

2.1 Does the claimant's asthma have a substantial and long-term adverse effect on her ability to carry out her normal day-to-day activities?

If so:

2.2 Did the respondent treat the claimant less favourably contrary to s13 of the Equality Act 2010 by intimating disciplinary proceedings for unauthorised absence because of her asthma?

2.3 Did the respondent treat the claimant unfavourably contrary to s15 of the Equality Act 2010 by intimating disciplinary proceedings for unauthorised absence because of something arising in consequence of her asthma? The something arising in consequence of her asthma is the need to take time off work because of her asthma.

2.4 If the answer to 2.3 is yes, was the respondent's act done by proportionate means in pursuit of the legitimate aim of ensuring regular attendance in the workplace?

2.5 Did the ventilation system and temperature in the respondent's office located at Lower Clapton Road from July 2016 until the date of the lodging of the claim put the claimant at a substantial disadvantage in comparison to those who do not have asthma contrary to s20(4)?

2.6 Did the respondent in applying the PCP of requiring as defined by s20(3) the claimant to work in its office located at Lower Clapton Road from July until the date of the lodging of the claim put the claimant at:

2.6.1 A substantial disadvantage in comparison with those who do not have asthma contrary to s20(3) because of the ventilation system and temperature in that office?

2.6.2 At a particular disadvantage in comparison with those who do not have asthma contrary to s19(2)(b) because of the ventilation system and temperature in that office?

2.7 If the answer to 2.6.1 or 2.5 is yes, what steps was it reasonable to take in order to avoid that disadvantage? The claimant contends that the respondent should have taken the following steps:

2.7.1 The respondent should have managed the control of the air conditioning until so that the staff could not alter the temperature setting in the building to make it excessively hot or cold and;

2.7.2 The respondent should have ensured that the ventilation system was checked and up to standard to provide fresh air to the building.

2.8 If the answer to 2.6.2 is yes, did it put the claimant to that disadvantage?

2.9 If the answer to 2.8 is yes, was the PCP applied by proportionate means in pursuit of a legitimate aim to provide a modernised office?

2.10 Did Davina Clark on 3 November 2016 engage contrary to s26 of the Equality Act 2010 in unwanted conduct related to the claimant's asthma by discussing with other staff the claimant's Landesk report filed with the Landesk on 28 October 2016? Did Seamus Adams engage contrary to s26 of the Equality Act 2010 in unwanted conduct related to the claimant's asthma by sending the claimant the letter containing the threat of disciplinary action dated 5 December 2016?

2.11 If yes to either or both of the above, did that 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?

2.12 If so, was it reasonable for the conduct to have that effect taking into account the perception of the claimant and the other circumstances of the case?

2.13 In relation to the claims under ss15 and 20 of the Equality Act 2010 can the respondent show that it did not know and could not reasonably have been expected to know that the claimant was disabled at the material time?

2.14 In relation to the claim under s20 of the Equality Act 2010 can the respondent show that it did not know and could not reasonably have been expected to know of the disadvantage caused by the application of the PCP?

2.15 Are any of the claims out of time?

2.16 If so, is it just and equitable to extend time?

3 Over the course of this hearing, the Tribunal took evidence on the basis of written witness statements. The claimant gave oral evidence on her own behalf. She relied on the witness statement of Earle Nottingham, which it was agreed could be taken as read. On behalf of the respondent we heard oral evidence from: Michael Wiktorko (the claimant's line manager), Sarah Wain (finance manager), Seamus Adams (Head of Parking and Street Trading Services), and Andrew Large, an occupational health hygienist. The respondent also relied on the written witness statements of Harry Hughes, Howard Stoneham and Kevin Keady. All but the latter it was agreed could be taken as read. Where a witness was not called but their evidence was not agreed, the Tribunal placed less weight on their contested evidence than if the evidence had been tested in cross-examination.

4 The Tribunal was also provided with a joint bundle comprising approximately 750 pages, and an addendum bundle of 220 comprising the reports of Mr Large and associated documents (including extracts from the claimant's medical records).

5 The parties each made oral submissions, which we took into account when determining the issues before us.

FINDINGS OF FACT

6 In order to determine the issues as agreed between the parties, the tribunal made following findings of fact, resolving any disputes on the balance of probabilities.

7 The claimant commenced employment with the respondent on 24 January 2011 as a debt recovery officer. She remains employed, albeit on long-term sickness absence. She is presently receiving sick pay at the rate of half of her full pay.

8 The claimant has asthma. It was determined at an open preliminary hearing on 24 August 2017 that the claimant was thereby a disabled person within the meaning of the Equality Act 2010. The claimant did not declare that she was disabled in her application paperwork. Ms Wain was aware nevertheless that the claimant had asthma. Ms Wain had asthma herself; however, she did not consider herself or the claimant to be disabled in the lay sense of the word.

9 In July 2016, the claimant's department moved from Keltan House to Lower Clapton Road following the latter's refit. In particular, a new air conditioning system had been installed at Lower Clapton Road.

10 The claimant worked in an open plan office on the first floor, the temperature of which was controlled via a thermostat mounted on the wall outside the server room and away from the sealed windows along two of the outside walls of the office. Meeting rooms were available on the second floor of Lower Clapton Road, the air conditioning to each of which could separately be controlled, or switched off, by its own thermostat.

11 Lower Clapton Road is set up to facilitate hot desking. The claimant could therefore log on to any workstation to complete her duties.

12 In preparation for the move, the claimant's line manager, Mr Wiktorko, sent an email to his staff, saying:

> 'I am in the process of completing the requirements for our new office and have the following questions to answer for each of you, can you please advise me of the following:
>
> 1. Do you have/want/need a desk fan?
> 2. Do you have/want/need footrest?
>
> Also, can you please tell me your preferences as to the seating (I can't promise anything, but I will try my best to accommodate all or as many as possible). These can be something like: window seat, end of desk-bank seat, close or far from air conditioning unit, close to printer and so on.'

13 The claimant responded the same day thus:

> 'Can I have a footrest and possibly a seat away from any air conditioning units and or windows that may be opened.'

14 Consequentially, Mr Wiktorko positioned the claimant at a desk as far away from the air conditioning vents as possible.

15 Approximately 6 weeks after the move, problems began to be experienced with the temperature at Lower Clapton Road. Initially, it was thought that the problems lay with the air conditioning system itself. However, by around September 2016, the respondent realised that in fact the issue was that all and sundry were adjusting the temperature setting to maximise their individual comfort. The problem was compounded by the fact that there was a lag of up to two hours before the system could achieve the temperature selected. As a result, the temperature often fluctuated between extremes of hot and cold.

16 Many individuals complained about the temperature issues. The claimant completed a 'Workrite' workstation assessment on 21 September 2016. She noted that the temperature at her workstation was excessively cold. She did not, however, indicate that the cold was causing problems for her asthma.

17 The claimant and her colleagues met with the Mr Wiktorko at a routine team meeting on 19 October 2016. Under 'any other business', the claimant raised amongst other things the temperature in the office. Recollections differ slightly as to what she precisely said; however, we are satisfied on balance that the claimant said that she had a cough and was finding the temperature uncomfortable. She did not, however, mention her asthma or the effect of the temperature on it.

18 The claimant had seen her GP a few days previously on 13 October, and recorded in her notes was the following:

> 'Patient has notice [sic] cough (dry) for the past few days. Known asthmatic. Not having to use inhalers. No [shortness of breath], wheeze or chest pain. Non smoker.'

19 We find no reason to doubt the accuracy of these notes. The claimant was not suffering any symptoms of asthma at the time or indeed when she saw her GP on 7 November 2016. In fact, it is clear that the claimant's last inhaler had lasted approximately two years, indicating to us that her asthma had been latent for some considerable time.

20 Mr Wiktorko advised the claimant to try other desks to see if they were better or to use one of the meeting rooms, in which she could set the temperature to her own requirements. The claimant did not at any time take up these suggestions.

21 He also advised the claimant to raise this issue via Landesk, an intranet-based fault reporting system. It transpired that this was no longer the route by which such issues should be raised; however, we note that the claimant had raised temperature issues in Keltan House via Landesk on 30 October 2015. She did not in that report suggest that the temperature was causing her health problems.

22 The claimant did raise the issue with Landesk but not until 28 October 2016. We infer from the delay that the temperature, whilst perhaps uncomfortable, was not unbearable and was not causing the claimant any material health difficulties.

23 In the Landesk report, the claimant said:

> 'Prior to moving to this new building I was asked about my working requirements and I specified that I do not want to be positioned near a fan as it makes me ill and if I am unwell I will not be able to work effectively.
>
> There are no windows in the building therefore we rely solely on the temperature unit to modify the heat and cold in the room. Very often the room is either too hot or too cold as different staff adjust the temperature to their own personal requirements.
>
> When the fan is on a cold breeze blows onto my head and back. On some days it is bearable but on days like today when I have a cough (which I feel may have been the result of sitting directly under the aircon) I have to cover my head, neck and shoulders with a scarf.
>
> During the day the room can go from hot to cold and then hot again within minutes as people change the temperature gauge.
>
> This is not a sensible or practical way to work.
>
> I would be grateful if you could assist in finding a solution.'

24 On 3 November 2016, Jackie Fagon from IT emailed her colleague, Davina Clark about the Landesk report. Ms Clark was also an occupant of Lower Clapton Road and was known for complaining if her work area was too cold. Ms Fagon jokingly wondered if Ms Clark had submitted the Landesk report under an alias. Ms Clark, however, recognised that the report had been raised by the claimant and went to the claimant's workstation to advise her that she had used the incorrect vehicle to raise her complaint.

25 The claimant was not at her desk. In fact, the claimant was on a day's leave. Ms Clark would have returned to her own workstation and sent a follow-up email to the claimant except for the fact that Mr Nottingham offered to pass on a message. When Ms Clark told Mr Nottingham that Landesk was not the correct means to raise such issues, he said that the team had been told by management to raise everything through Landesk. There followed a few minutes of light-hearted banter in which Mr Nottingham offered various scenarios (including reporting toilet problems) which he must have known that Ms Clark would say were inappropriate to use Landesk to report. This banter was entirely unconnected with the claimant's own report. No personal or medical information of the claimant was discussed; indeed, we find no evidence that Ms Clark discussed the claimant's personal or medical information with anybody.

26 Ms Clark's conversation with Mr Nottingham was overheard by Damian Julian. When he was spoken to by Kevin Keady in the subsequent investigation into the claimant's grievance, he was asked if he had joked about the Landesk report and said:

> 'Yes I did. At first, she was quiet and I knew that something was wrong so I stopped the conversation. I asked her later what was wrong and she said she was upset that others knew about her raising the temperature issue with LAN desk.'

27 When she returned to work and perceived that she had been the butt of colleagues' jokes, the claimant became upset and emailed Mr Wiktorko and was later allowed to go home early. This email was the first time that the claimant had asserted that the temperature was triggering her asthma. That day, the claimant emailed Property Services in near identical terms to her Landesk report.

28 The claimant was on annual leave on Monday 7 November and was expected to attend training on 8 November. However, instead of attending training, the claimant emailed Mr Wiktorko, Ms Wain and Owen Selkeld in substantially identical terms. Her email to Mr Selkeld read:

> 'It was a very unfortunate and sad day for me last Friday. I have considered this carefully and I feel I have no other choice but to not attend the building to work at this moment. I feel my health, safety and reputation are at stake. I have sent the emails below to both Michael and Sarah.
>
> Following on from the events that took place last Friday 4/11/2016 in the office, I wish to inform you that I no longer feel safe to carry out my duties as a Debt Recovery Officer for Parking Services at 136-142 Lower Clapton Road. Due to the incident on that day and other concerns, I no longer feel confident to come into the building ("136-142 Lower Clapton Road") for the main reasons listed below.

Issue – main reasons for taking this decision

Safe Working Environment

Firstly, I do not feel safe working in 136-142 office work stations, where the room temperature is often adjusted to a very low level (too cold) or a high temperature level (too high). This is not the first time I have raised concerns regarding fluctuating temperatures in my work area. I have clearly stated in the past that environmental factors and conditions including the use fans, air conditioning units and stressful situations triggers and worsens my health condition. I have been patient by trying to cope with the current conditions hence doing everything I can to protect myself whilst awaiting a reasonable solution from management, but I feel the incident that happened on Friday tipped me over the edge and I no longer wish to continue working under such conditions.

Secondly, I have stated that the chair provided to me at my work station is too high for me, it is very uncomfortable as my legs do not touch the floor in a sitting position, this has led to a constant mild pain in my lower back. I highlighted this as part of my DSA assessment two months ago. Last month my request for specific equipment to aid my work effectively was denied with no clear reasons.

Thirdly, on 3/11/2016, Davina Clark advised my colleagues of my health and safety concerns and about the room temperature in the building. I did not authorise Davina to share my health information/concerns and this was done in my absence. On 4/11/2016 I was personally humiliated as a result of the information Davina shared with staff in the Service.

Fourthly, when I raised this concern with ICT, they advised me on 4/11/2016 to contact Facilities Management however, I believe this advice was incorrect. Evidentially, the intranet states that Facilities management do not deal with hating and electrics, but rather it is Property Services. Therefore even if I had emailed Facilities as advised, it may also have been the wrong department.

CCTV monitoring me in the office – I was not consulted or advised, neither was I warned upon moving into a new office, there was going to be CCTV filming/monitoring activities on site. I feel that the trust and good faith relationship between employer and employee has been breached and I no longer feel confident in working in the office.

I request a full formal investigation into the matters listed above'

29 The claimant went on to request certain information, asked that the investigation not be shared with anyone not directly involved in the matter and concluded:

'I am happy for you to contact me on this email or text me if you don't hear from me within a reasonable time.

I hope this is taken seriously, I await your response.'

30 James Barnet responded to the claimant's email to Property Services on 7 November 2016. He proposed two solutions to the temperature issue: limiting authority to set the office temperature to a handful of responsible people, or removing the thermostats and controlling the building's temperature centrally. We disagree that the first proposal merely reflected the status quo; his suggestion was clearly to ensure that only authorised personnel adjusted the office temperature. The second option was investigated and found to be impossible without a complete redesign of the air conditioning system.

31 Seamus Adams became aware of the claimant's grievance on his return from annual leave on or around 15 November 2016. He notified Mr Selkeld that he could deal with the case, as Mr Selkeld was due to go on a month's leave. He also notified the other recipients of the grievance of his involvement.

32 He considered that the claimant's concerns were not such as to justify her withdrawing her labour and wrote to her on 23 November 2016 giving initial responses to her concerns. However, the letter was emailed to an incorrect address and had to be resent the following day. A second letter was also sent requiring that the claimant contact Mr Adams without delay. That second letter was sent by email and special delivery.

33 The claimant responded by email on 25 November 2016, and Mr Adams wrote again that day. He said:

> '…whilst we are happy to meet with you to discuss the matters raised, I remain of the view that the working environment is such that the withdrawal of your labour is both unreasonable and unjustifiable as there has been no serious or imminent danger to your health and safety.
>
> As previously advised, your absence from yesterday is being recorded as unauthorised absence and therefore I again urge you to return to work. If your absence remains unauthorised we will have no option but to deal with it as a matter of misconduct which if it continues, could amount to an act of gross misconduct which would place your employment with the Council at risk.'

34 The claimant did not indicate an intention to return to work and so Mr Adams sent a further letter on 5 December 2016, headed 'Re: Unauthorised Absence' saying

> 'Despite my previous letters to you regarding your decision to withdraw your labour and advising you that with effect from the 24th November 2016 your absence from work is being recorded as unauthorised absence, not only have you failed to return to work, but you have failed to take any action that would change the status of your absence.
>
> I therefore write again not only to extend the opportunity to discuss the various concerns you have raised, but to formally give what I consider to be a reasonable instruction for you to return to work in accordance with your terms and conditions of employment. As you were previously informed unauthorised absence can amount to an act of Gross Misconduct which can ultimately lead to the termination of

> employment and therefore I strongly advise you to take this on board and bring your unauthorised absence to an end.
>
> Please consider this letter as the final opportunity to avoid the need for formal disciplinary action. I will delay any decision in this regard until Monday 5th December 2016, in the hope that your unauthorised absence comes to an end. Please do not assume from this decision that any absence up to the 5th December has been authorised.
>
> In the hope that you do return to work as instructed, I once again confirm my commitment to meet with you at the earliest opportunity in order to discuss the various issues you raised.'

35 Mr Adams, it is clear, had written that letter in advance of 5 December 2016, and had taken advice from the Respondent's HR department about its contents. He understood that the letter would be sent on the same day, as was the respondent's practice and as had happened with the previous letters. As it transpires, for reasons outwith Mr Adams's control, the letter did not leave the respondent's offices until 7 December 2016 by which time the claimant had sent a fit note reporting that she was unfit to work through stress.

36 No further letters were sent in respect of unauthorised absence. Indeed, on 22 December 2016, Mr Adams sent a letter in response to the claimant's fit note and notifying her of a referral to Occupational Health. This was, in effect, a capability and attendance management letter.

37 On 8 November 2016, Ms Wain had told the claimant that he had dealt with the temperature issue by having Ieva Laurinaviciute, PA to Mr Adams, lock the system to 22□C. However, it soon became apparent that other employees were able to unlock the system and continue to adjust the temperature settings themselves.

38 Therefore, by no later than 7 December 2016, the respondent was informing personnel at Lower Clapton Road not to adjust the temperature. This resulted in a significant reduction in complaints. There were, nevertheless, isolated incidents where unknown employees were adjusting the temperature to their own desires, as a result of which the respondent sourced lockable boxes from Amazon in approximately June/July 2017. The temperature can now only be adjusted by someone with a key to the box.

39 Mr Adams instructed Mr Keady at some point before 22 December 2016 to investigate the claimant's grievance. His report, dated 24 February 2017 was sent to the claimant on 16 March 2017 together with a health and safety assessment of the workplace undertaken by Harry Hughes at Mr Adams's request.

THE LAW

40 Section 6 of the Equality Act 2010 (EA) defines disability as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.

41 A person directly discriminates against another if because of a protected characteristic he treats that other less favourably than he treats or would treat other people (section 13 of the Equality Act 2010 (EA)). Disability is such a protected characteristic. Section 23 EA provides that 'on a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to the case.'

42 An employer contravenes s15 EA (discrimination arising from disability) if he treats a disabled person unfavourably because of something arising in consequence of that person's disability and cannot show that the treatment is a proportionate means of achieving a legitimate aim.

43 Pursuant to s19 EA (indirect discrimination), 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. Disability is a relevant protected characteristic. Section 19(2) provides:

> (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.

44 In respect of harassment, s26 EA provides:

> (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.
> …
> (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—
> …
> disability;
> …

45 Where harassment is alleged, the Tribunal should consider separately whether any conduct proved was a) unwanted, b) had the proscribed effect and c) was related to the relevant protected characteristic (**Richmond Pharmacology v Dhaliwal [2009] IRLR 336**).

46 Pursuant to s20 EA, where, in particular, a provision, criterion or practice of the employer and/or a physical feature of the workplace, places a disabled person at a substantial disadvantage in comparison with persons who are not disabled then the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. However, an employer does not contravene the duty to make reasonable adjustments if he did not know and could not reasonably have known that the employee was disabled and about the substantial disadvantage.

47 Consideration of whether the duty arises will require asking the following (applying **Environment Agency v Rowan [2008] IRLR 20** (modified to apply to the EA):

47.1 whether there is a provision, criterion or practice applied by or on behalf of an employer; or

47.2 whether there was a physical feature of premises occupied by the employer; or

47.3 whether there was a need for an auxiliary aid;

47.4 the identity of the non-disabled comparators (where appropriate); and

47.5 the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

Burden of Proof

48 Pursuant to s136 EA, if there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision of the Act, the Tribunal must hold that the contravention occurred unless the employer can show to the contrary. There is no burden of proof on the claimant to prove such facts; the Tribunal must consider 'all the evidence, from all sources, at the end of the hearing, so as to decide whether or not "there are facts etc"' (per Laing J in **Efobi v Royal Mail Group Ltd (Race Discrimination) [2017] UKEAT 0203/16/DA**).

49 The key question is why the treatment complained of occurred. A Tribunal must be alert to the fact that individuals will rarely admit to discriminatory behaviour event to themselves and draw whatever inferences are appropriate from secondary findings of fact (**Igen Ltd v Wong [2005] IRLR 258**). However, as observed in the case of **Madarassy v Nomura International plc [2007] IRLR 246**, it is not sufficient to show merely a difference in treatment and a difference in characteristic; there must be 'something more' to indicate a connection between the two.

50 Regarding reasonable adjustments, the Tribunal must find the existence of a PCP and/or workplace feature, the consequential substantial disadvantage and facts from which a breach of the attendant duty could be found, before the burden of proof passes to the employer (see **Project Management Institute v Latif [2007] IRLR 579**).

Time Limits

51 A claim to the employment tribunal in respect of a breach of the Equality Act 2010 must be brought within the 3-month period (extended as appropriate for early conciliation) beginning with the date of the breach in question. The Tribunal may extend time when it considers it to be just and equitable to do so.

52 A failure to make reasonable adjustments is a continuing omission (**Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288**). A claim must be brought in respect of such a failure within the three months (extended as appropriate for early conciliation) beginning with the date on which the failure was decided upon. In the absence of evidence to the contrary, the decision was taken when the employer does an act inconsistent with making the adjustment, or, if the employer does no inconsistent act, on the expiry of the period in which the employer might reasonably have been expected to do it.

53 Pursuant to s33 of the Limitation Act 1980 (power to extend time in personal injury actions), a court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

54 In **British Coal Corpn v Keeble [1997] IRLR 336**, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (**Southwark London Borough v Afolabi [2003] IRLR 220**). The burden lies on C to persuade the Tribunal that it should exercise its discretion.

CONCLUSIONS

The Environment at Lower Clapton Road

55 The claimant brings complaints of indirect disability discrimination and a failure to make reasonable adjustments in respect of the environment at Lower Clapton Road.

56 The claimant asserts in her ET1 that she began coughing in September 2016 and went to her GP a short time later. She says in her disability impact statement that she developed a sore throat in the middle of September. However, the first time she sees her GP about such matters was on 13 October 2016. She is recorded as having noticed a cough for the past few days and she was diagnosed with a common cold. No connection is drawn to her asthma. Indeed, she is recorded as having no shortness of breath, wheeze or chest pain. Even on 7 November 2016 she is recorded as being non-symptomatic of asthma.

57 We are satisfied that the claimant is exaggerating the effect on her asthma of the temperature at the material time and find that there was none. At most, she had developed a common cold and we have heard no evidence that asthma places the claimant at any greater risk of such infections than non-asthma sufferers.

58 In short, we do not find that the claimant was placed at any substantial disadvantage compared to non-disabled employees by the air conditioning system at Lower Clapton Road or the requirement to work at that location.

59 Even if the claimant was placed at a substantial comparative disadvantage, at no stage did she say so prior to 4 November 2016, the last day she has attended work.

60 The claimant had never before intimated that asthma prevented her carrying out normal day-to-day activities or that it was affected by temperature. In fact, commendably, she had only had 1 ½ days sickness absence in the previous years. She was able to carry out all of her duties at work without limitation.

61 Even had the respondent asked for sight of the claimant's medical records they would have seen that her last inhaler had lasted 2 years and that the asthma was non-symptomatic. They would not, therefore, have been on notice that her asthma had an adverse effect on normal day-to-day activities or that she was at a substantial disadvantage because of the temperature at Lower Clapton Road. In summary, we are satisfied that the respondent did not have actual or constructive knowledge of either her disability or the alleged substantial disadvantage.

62 It follows that no duty arose to make reasonable adjustments. Even if it did, we accept that Mr Wiktorko offered the claimant on 19 October the opportunity to try other desks or to work in a meeting room, where she could set the temperature to her own comfort or turn off the air conditioning all together. The latter would, in our judgment have avoided the alleged disadvantage completely.

63 In any event, the respondent's instructions to staff in December 2016 not to adjust the temperature was a reasonable step to reduce any disadvantage. On the odd occasion that rogue staff occasionally ignored the instruction, the claimant could have raised the issue with management and other arrangements could have been made.

64 Similarly, we do not find that the environment at Lower Clapton Road put the claimant at a particular disadvantage, let alone one to which other asthma sufferers were put.

<u>Davina Clark</u>

65 The claimant alleges that she was harassed by Davina Clark when she discussed the claimant's Landesk report with the latter's colleagues.

66 It is common ground that Ms Clark did discuss the claimant's Landesk report with Mr Nottingham in the hearing of at least Mr Julian. However, the claimant's disability was merely the background to her making the report and was not connected in any way to the

reason for Ms Clark's discussion, which instead concerned the inappropriateness of using Landesk to report temperature issues. Even if there were some loose connection, the subsequent discussion was the result of Mr Nottingham suggesting various scenarios, none of which were connected to the claimant's disability.

67 In any event, we are entirely satisfied that the conversation could not reasonably have had the proscribed effect. It is clear to us that the claimant felt humiliated because she had been criticised for using the wrong vehicle to report temperature issues. This was not harassment.

Seamus Adams

68 The claimant alleges that the letter dated 5 December 2016 sent by Seamus Adams constituted direct disability discrimination, indirect disability discrimination and harassment related to disability.

69 We are satisfied that Mr Adams wrote to the claimant in the terms he did on 5 December 2016 because he considered her to have no good reason for withdrawing her labour, rather than because she was absent per se. The letter was posted after the claimant's medical note was received; however, we accept that Mr Adams had thought that it had already been dispatched. This was a case of mistake rather than conspiracy.

70 There are no grounds to believe that the claimant would have been treated any differently in the circumstances had she not been disabled. Indeed, we are satisfied that Mr Adams did not know she was disabled. Her direct discrimination claim must therefore fail.

71 As for the claimant's s15 claim, we note that the claimant had five reasons for withholding her labour: the temperature, her seat, Ms Clark's behaviour, getting the wrong advice, and CCTV coverage of the office. Of these, only the claimant's complaints about the temperature and Ms Clark are on the face of it are matters which arise from the claimant's disability. However, we accept that Mr Adams corresponded in the terms he did because he considered the claimant's reasons to be inadequate and that he considered her absence to be unauthorised rather than because of the absence in itself.

72 The Tribunal is not satisfied in the circumstances that the letter of 5 December 2016 is of itself disadvantageous treatment. Even if it were, it was sent not for a reason arsing for the claimant's disability but instead because she had withdrawn her labour for reasons which in Mr Adams's genuine and reasonable belief were inadequate. Furthermore, the letter was sent for the legitimate aim of ensuring regular attendance in the workplace and was entirely proportionate in its effect.

73 In respect of harassment, the claimant says that the letter was sent deliberately after receipt of her medical note and not in accordance with the respondent's template letters. It is clear that Mr Adams did not follow the templates; however, the templates are predicated on early intervention and resolution of unauthorised absence (to be sent in the second and fifth days of absence) in circumstances where the employer does not know the circumstances of the absence. In the instant case, Mr Adams was aware of the

claimant's position and had given her significantly more time and opportunities to engage, having made his own position clear.

74 Again, we are satisfied that the letter was not related to the claimant's disability but rather the unauthorised nature of her absence and could not, in any event, have reasonably had the proscribed effect. Moreover, we are satisfied that the letter had been written and had been understood by Mr Adams to have been posted before receipt of the medical note, after which his correspondence changed to that of capability and attendance management.

Costs

75 At the conclusion of the hearing, Mr Kohanzad applied for an order for costs on the grounds that the claimant had:

75.1 Exaggerated and/or lied about the effects of her asthma for the purposes of and at the preliminary hearing to determine the question of disability;

75.2 Exaggerated and/or lied about the state of her health in October/November 2016 for the purposes of and at the final hearing

75.3 Failed to withdraw her claim and/or enter into settlement negotiations on completion of her oral evidence or at all.

76 It was submitted that each were instances of the claimant's unreasonable conduct of proceedings.

77 The respondent had produced for today a schedule of work undertaken by its in-house solicitor since 1 June 2016, showing 240.25 hours at the rate of £75 per hour, totalling £18,018.75. It also produced a fee note for Mr Kohanzad's advice and representation, including a fee of £1,750 for appearing at the preliminary hearing and fees for appearing at this hearing comprising a brief fee of £5,750 and refreshers of £850.

78 The claimant was given some time to consider the above information as well written submissions prepared by Mr Kohanzad, and was given the opportunity to apply for an adjournment if necessary. She urged the Tribunal to deal with the application today.

79 Mr Kohanzad supplemented his written submissions orally. He relied principally on the Tribunal's finding today that the claimant had exaggerated a key element of her claim (the effect on her asthma of the air conditioning in her office), and the earlier finding in the preliminary hearing of exaggeration of the effect on normal day-to-day activities of her asthma. He also relied on her failure to recognise the futility of her claim, despite his having explained its weaknesses to her immediately after she finished her evidence.

80 The claimant in turn submitted that she had not exaggerated her evidence and that it had been reasonable for her to continue with the claim notwithstanding the respondent's view that it would not succeed.

The Relevant Rules

81 A costs order is an order that one party makes a payment to another in respect of costs (rule 75(1)(a) of the Employment Tribunal Rules of Procedure 2013), Tribunal fees (rule 75(1)(b)) and/or attendance expenses (rule 75(1)(c)).

82 Rule 76 provides:

> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
>
> …
>
> (4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.
>
> …

83 Pursuant to rule 77, a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

84 A costs order may in particular order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party (rule 78(1)(a)) or to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles (rule 78(1)(b)).

85 In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay (rule 84).

86 In respect of the quantum of costs under an order granted on the basis of unreasonable conduct, in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78** at para 41 Mummery LJ said:

> 'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.'

87 In **Raggett v John Lewis plc [2012] IRLR 906**, Slade J said that the proper approach to costs under the vexatious/unreasonable conduct limb is as follows: (a) the tribunal need not identify the particular costs incurred by particular conduct; instead it should look at the whole picture and the overall effects of the conduct; (b) the tribunal may also take into account the conduct of the party applying for costs; (c) rejection by a claimant of a 'Calderbank' type offer may be taken into account if that rejection was unreasonable; (d) although the CPR do not apply directly to Tribunal proceedings, in general the Tribunal should follow their general principles (though not necessarily to the letter in all cases).

88 Whilst it would appear that the claimant was found by Judge Goodrich to have exaggerated the effects on normal day-to-day activities of her asthma, the fact remains that she was found to be disabled. Even if we were to agree that the claimant had behaved unreasonably in so exaggerating her case before Judge Goodrich, that behaviour was immaterial and appeared to have had little if any impact on the conduct or ultimate outcome of the case.

89 We accept that the respondent attempted to persuade the claimant to settle her claim after the preliminary hearing and again after concluding her evidence. We take into account the fact that she is a litigant in person and do not accept that she acted in the circumstances unreasonably.

90 However, we did find that she exaggerated the effects of her asthma in the period October/November 2016. This was a key element of parts of her claim and we find that in doing so the claimant acted unreasonably. That said, it is likely that the claimant would have brought her claim nevertheless, in particular in respect of the actions of Mr Adams and Ms Clark. Whilst she was ultimately unsuccessful in those parts of her claim, we do not find that the claimant acted unreasonably in bringing them.

91 Looking at the extent and the overall effect of the claimant's unreasonable conduct, we believe they caused the hearing to last around one day longer than necessary . Therefore, the respondent was put to at least the extra expense of one day's fees for Mr Kohanzad (but not for attendance on him by his instructing solicitor), as well as additional preparatory work by his instructing solicitor in respect of the ss19 and 21 claims.

92 Taking into account the claimant's means, we conclude that it is appropriate to make an order for costs and that the appropriate amount is £1,200 to be paid within 42 days of today.

Employment Judge O'Brien

2 October 2017