EMPLOYMENT TRIBUNALS

Claimant: Mrs K Rogers

Respondent: Carewatch Care Services Limited

HELD AT: Liverpool **ON:** 12 and 13 October 2017
11 and 12 December 2017
14 February 2018
(in Chambers)

BEFORE: Employment Judge Shotter
Mr R Tyndall
Mrs J C Ormshaw

REPRESENTATION:

Claimant: Mr Rogers, Husband
Respondent: Ms A Mulholland, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is –

1. The claimant was disabled by the mental impairment of depression within the meaning set out in section 6 of the Equality Act 2010.

2. The claimant was not unlawfully discriminated against on the ground of her mental impairment, and her claims numbered 2.1. to 2.6 for unlawful direct discrimination brought under section 13 of the Equality Act 2010 are dismissed.

3. The claimant was subject to unlawful direct race discrimination post employment when an untruthful reference was provided, and her claim for unlawful direct race discrimination claim numbered 2.6 brought under section 13 of the Equality Act 2010 is well-founded and adjourned to a remedy hearing.

4. The claimant was not unlawfully discriminated against on the grounds of her race under claim numbered 2.5 brought under section 26 of the Equality Act 2010, and her claim for harassment is not well-founded and is dismissed.

5. There did not exist a course of conduct in respect claims numbered 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6, the direct discrimination claims relating to the claimant's suspension on 30 July 2015; her disciplinary on 7 August 2015; the disciplinary

warning given on 7 August 2015 and appeal made in the claimant's favour, proceedings having been issued 4 October 2016. It is not just and equitable to extend the statutory three month time limit and the Tribunal does not have the jurisdiction to consider the claimant's complaints. Complaints numbered 2.1, 2.2, 2.3 and 2.4 brought under S.13 of the Equality Act 2010 which are dismissed.

6. The case is listed for a remedy hearing to be heard at **Liverpool Employment Tribunal, 3rd Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L2 2BX** on **18 June 2018** starting at **10.00am** with an estimated length of hearing of three hours.

REASONS

Preamble

1. In a claim form received on 4 October 2016 (ACAS Early Conciliation Certificate dated 24 September 2016) the claimant makes a number of complaints, namely; unfair dismissal, direct race and disability discrimination and harassment. A duplicate claim of race and disability discrimination was received on 4 October 2016 and dismissed by a Judgment given on 1 August 2017. The claimant provided further information on 3 February 2017 concerning the alleged claims of intimidation amounting to direct discrimination and the fact she was relying on a hypothetical comparator.

2. At a preliminary hearing held on 19 December 2016 the claimant produced a number of documents, including an impact statement, medical report dated 21 December 2012 prepared by Dr S Dax to counteract the respondent's denial that she was disabled for the purpose of S.6 of the Equality Act 2101 ("EqA") and a German medical report. The Tribunal has had sight of these reports in addition to the GP records. The Case Management Order dated 19 December 2016 set out the claimant's complaints as follows:

2.1 Following a period of five days' sickness absence the claimant was suspended from work. In this regard she claims direct race and disability discrimination.

2.2 The claimant was put through a disciplinary procedure up to and including a disciplinary hearing to face an allegation of unauthorised absence in respect of which she received a disciplinary warning (subsequently overturned on appeal). With regard to the disciplinary procedure and warning she makes claims of direct race and disability discrimination.

2.3 Despite succeeding with her appeal the outcome letter contained a further warning to the claimant about her attendance at work. The claimant pursues a claim of direct race and disability discrimination.

2.4 The claimant says that she was harassed and intimidated during her employment. In respect of harassment and intimidation the claimant claims both direct discrimination and harassment because of/related to the protected characteristics of race and disability. In further and better particulars dated 3 February 2017 the claimant clarified her claim as follows: The claimant says

that she was harassed and intimidated in email correspondence, changing shifts and making alterations to the required availability to work'.

2.5 On 11 August 2016 (post employment) the claimant submitted a formal grievance and the respondent took no action in respect of it. The claimant pursues claims of direct race and disability discrimination.

2.6 Post employment the claimant requested an employment reference and she says that the content of that reference was so negative that the job offer that had been made to her was withdrawn. In respect of the unfavourable job reference the claimant claims direct race and disability discrimination."

3. At a Case management Preliminary Hearing held on 1 August 2017 it was agreed the Tribunal would consider the question of the claimant's disability as a preliminary issue and then go on to consider the discrimination complaints including race based on the claimant's German nationality.

Witness Evidence

4. The Tribunal heard evidence form the claimant on her own account, and on behalf of the respondent it heard evidence from Anthony Mark Smith, acting HR director and Christina Emily Taylor, who worked in a variety of roles for the respondent.

5. The Tribunal found the claimant's evidence confusing at times. Taking into account the contemporaneous evidence the Tribunal reached a view that the claimant never expressly informed any person working for the respondent during the relevant period that she was still suffering from depression, taking medication (albeit on an irregular basis) and this was the reason why she wanted to reduce the length of the working day/hours. The Tribunal accepted on balance, the evidence of Christina Taylor, that she was not told the claimant was disabled during the relevant period.

6. With reference to the claim of race discrimination it is notable the claimant made no mention of this in her written statement, although she did refer to race discrimination in oral evidence given on cross-examination. Even taking into account the fact the claimant is a litigant in person and her first language is German, it is incomprehensible to the Tribunal why there was no reference to specific allegation of race discrimination made in her evidence in chief. In written submissions made on behalf of the respondent, Ms Mullholland referred to the claimant's evidence being "very confused, unclear and at points very random, at cross purpose and off topic." The Tribunal agreed with this observation; the claimant found it difficult to give evidence and she was confusing on a number of points. Nevertheless, the Tribunal was able to sift thought the contemporaneous documentation and make sense of the claimant's oral evidence in order to arrive at its findings of facts below.

7. There was an issue with whether the claimant's husband and representative, who is not legally experienced, should give evidence on whether he informed the respondent of the claimant's sickness absence before her suspension. The respondent was given the opportunity to cross examine Mr Rogers on whether he telephoned or not. Mr Rogers was not called to give evidence, and the Tribunal

accepted the claimant's evidence that she had witnessed her husband's telephone call, the respondent not putting forward any evidence to rebut this.

8. The Tribunal found Anthony Smith, who had taken on the role of acting HR in April 2017 and who works "closely with HR policy implementation, and the respondent's second witness, Christina Emily Taylor, were credible witnesses who gave honest evidence. It is notable both were unable to cast light on the events which led to the claimant bringing this action. To Mr Smith's credit he was open and honest in his evidence concerning zero hours contracts and his expectation that employees working under a zero hours contract would provide 4-weeks notice if they wished to change their availability, they can hand back shifts without punitive action being taken, but would not receive any hours back to replace the hours they were unable to work. Mr Smith confirmed had he been faced with the same set of facts as those which resulted in the claimant being suspended, disciplined and given a written warning, he would not normally have taken such a course of action and there was no company policy that restricted the number of times an employee on a zero hours contract could change their availability. When asked in cross-examination if a restriction to one change per year was wrong Mr Smith responded that it was. He was unable to confirm whether the claimant was provided with or had access to the respondent's policies and procedures, Mr Smith's evidence was that the policies and procedures were available on the respondent's intranet accessible only by office based staff.

9. Ms Taylor gave oral evidence on cross-examination to the effect that she had an understanding of depression but had not been specifically trained on it, she was unaware whether the claimant had been issued with terms and conditions of employment but thought she may have, she had played no part in the preparation of the reference and had not provided information for it. The usually practice was for the team to collectively put a reference together. Finally, Ms Taylor confirmed her understanding, in direct contrast to the evidence given by Mr Smith, that an employee on a zero hour's contract can only change their availability once a year. The Tribunal accepted on balance, the evidence of Christina Taylor to the effect that she was never informed the claimant was disabled during the relevant period. However, Christina Taylor was not in a position to give evidence on the knowledge of other managers key to the claimant's allegations, particularly Sharon Lindley to whom the claimant handed in her notice and who provided the negative reference.

10. It is unfortunate that Lisa Case and Sharon Lindley were not called to give evidence, as many of the allegations can only be responded to by them. It is particularly notable that the allegation concerning the negative reference produced by Sharon Lindley could only be explained by her, and the Tribunal has dealt with the adverse inferences raised as a result of the inadequate written explanation given. Anthony Smith confirmed Lisa Case and Sharon Lindley had left the respondent's employment; however, that does not prevent either of them from being called and/or witness summonsed to give evidence, and there was no indication that the respondent attempted to seek a witness order in respect of either.

Issues

11. With reference to the issues in the case, these are as follows –

Disability status

(1) Was the claimant a disabled person for the purpose of the Equality Act 2010, namely under section 6(1)? Did she have a mental impairment, and if so, did the impairment have a substantial long-term adverse effect on the claimant's ability to carry out normal day-to-day activities?

(2) Was the claimant's condition likely to have a substantial adverse effect but for the treatment in question?

(3) Did the respondent possess actual or constructive knowledge that the claimant was disabled under S.6 EqA during the relevant period?

<u>Direct disability discrimination – section 13 Equality Act 2010</u>

<u>Claim 2.1</u>

(4) Was the claimant treated less favourably by the respondent than the respondent treated or would treat a hypothetical comparator when it suspended the claimant on 30 July 2015? Was the claimant treated less favourably when following a period of five days' sickness absence she was suspended from work?

(5) Was the complaint of disability and race discrimination presented to the Tribunal before the end of the period of three months beginning with when the act complained of was done?

(6) If out of time, is it in all the circumstances of the case just and equitable to extend time?

<u>Claim 2.2</u>

(7) Was the claimant treated less favourably when she was disciplined on 7 August 2015 than the respondent treated or would treat a hypothetical comparator?

(8) Was the claimant's complaint presented after the end of a three month period beginning when the act complained of was done, and if not, in all the circumstances of the case, is it just and equitable to extend time?

<u>Claim 2.3</u>

(9) Did the claimant suffer a detriment when the claimant on appeal was made in the claimant's favour in that it contained a further warning to the claimant about her attendance at work?

(10) If the claimant establishes the detrimental action relied upon, did the respondent treat the claimant less favourably than the respondent treated or would treat a hypothetical comparator?

(11) Was the claim presented to the Tribunal before the end of the period of three months beginning with when the act complained of was done?

(12) If not, in all the circumstances of the case, is it just and equitable to extend the time limit?

Claim 2.4

(13) Did the respondent engage in unwanted conduct relating to the claimant’s protected characteristic of race and disability?

(14) Was the respondent’s email correspondence, changing shifts and making alterations to the claimant's required availability to work conduct that must have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant – section 26(1)(b), taking into account, in effect only, the claimant's perception, other circumstances of the case and whether it is reasonable for the conduct to have had that effect?

Direct discrimination

(15) Has the claimant established detrimental action relating to email correspondence, changing shifts and making alterations to the required availability to work?

(16) If so, did the respondent treat the claimant less favourably than the respondent treated or would treat a hypothetical comparator?

(17) Was the claim presented to the Tribunal before the end of the period of three months beginning when the act complained of was done?

(18) If not, in all of the circumstances of the case is it just and equitable to extend the time limit?

Claim 2.5 (post employment)

(19) Has the claimant established the detrimental action relied upon i.e. that the respondent took no action in respect of a formal grievance?

(20) If so, had the respondent treated the claimant less favourably than the respondent treated or would treat a hypothetical comparator?

(21) Was the complaint presented to the Tribunal before the end of the period of three months beginning when the act complained of was done?

(22) If not, in all the circumstances of the case is it just and equitable to extend time?

Claim 2.6

(23) Has the claimant established the detrimental action relied upon, being a negative reference?

(24) If so, had the respondent treated the claimant less favourably than the respondent treated or would treat a hypothetical comparator?

(25) There is no issue on time limits in respect of this allegation.

12. The claimant relies upon a hypothetical comparator who is not German and who is not disabled with a mental impairment (depression).

13. The Tribunal was referred to two bundles of documents and it also took into account oral submissions and written submissions presented by the parties which the Tribunal does not intend to repeat, but has attempted to incorporate the points made within the body of this Judgment with Reasons, we have made the following findings of the relevant facts.

<u>Preliminary issue – disability status</u>

14. Turning to the medical evidence and the German language report dated 21 July 2017, which is in dispute, the Tribunal notes that there has been much confusion over this report, and whether it should have been translated by the claimant, the respondent or both. It is notable the respondent made an offer for both parties to share the costs of obtaining joint medical evidence/translation which appeared not to have been taken up by the claimant, and the report has never been translated. It was the Tribunal's view that the claimant, as she intended to rely upon the report to support her contention that she was disabled for the purpose of section 6 of the Equality Act 2010, ought to have had it translated and she failed to do so.

15. Only one word in the report can be understood, and that is the word "depression" which cannot be read out of context and without reference to the other words in the sentence, taking into account the sentences that make up the meaning of the report. The report does not assist the Tribunal in any way, and having heard oral submissions and received written submissions on the weight to be given to the 21 July 2017 German report, the Tribunal has given it no weight.

16. The Tribunal has considered the evidence given by the claimant under oath, and in her impact statement, which it did not find to be easy to follow chronologically and, at times, logically. In her personal statement the claimant described how she struggled getting up in the morning and simply going downstairs "has made me breath like if I have run a marathon", and yet she was capable over a lengthy period of time of getting herself out to work and performing well in her duties towards clients. The Tribunal accepted on the balance of probabilities, the claimant was telling the truth as to how she has been affected by depression; the problem is that her description does not reflect what transpired during the relevant period, which is between her dates of employment from September 2014 to May 2016.

17. The Tribunal accept the claimant's evidence given under cross examination that she has had, in the past, a depressive order having suffered from depression since childhood. The Tribunal took into account the medical records, concluding she had been admitted to hospital in Germany in 2008. It is clear from Dr Dak's report dated 21 December 2012 sent to the claimant's GP, that the claimant had been in psychiatric treatment with him at the Department of Community Mental Health of British Forces, Germany, from October 2010 until October 2012. He referred to a psychiatric diagnosis of borderline personality disorder (principal diagnosis) and

depressive disorder, recording she had undergone intensive therapy, had several crisis hospital admissions as well as a long-term hospital treatment episode over approximately six months, and had been prescribed medication. The claimant's oral evidence on this was persuasive; she described how she had been placed on a high security award for a period of 4 months due the extreme nature of her depression. Dr Dak's confirmed the claimant's condition "has steadily and markedly improved" and the claimant was "fully adherent to her medication regime". He concurred with the claimant that she should be maintained on her "current psychotropic medication regime" which should be continued for a period between six and 12 months at least, "at which time a gradual and incremental downward titration could be commenced with the objective of discontinuance of medication treatment". It was the claimant's aim to reduce her medication.

18. The claimant's GP records reflect as at 15 August 2013 that the claimant had "endogenous depression and personality disorder" and was prescribed medication of 300mg bupropion and 50mg aripiprazole. This state of affairs continued and there were repeat issues of medication. The GP records record on 15 July 2014 a mental health review took place and it was noted the claimant "feels better – mood is better – wants to come off these tablets…no suicidal ideation, advised to reduce them and I will take some advice from the psychiatrist as well…".

19. The GP record of 3 August 2015 referred to the claimant following a mental health review as: "Would like MED3. Will continue meds. **Discussed importance of doctor involvement. Not managing meds herself and importance of taking regular**. **To bring back backlog of meds to pharmacy.** [my emphasis] Re-refer psych (amber drugs)…H ex depression and borderline personality. Doing well last nine months, weaned off meds. Has now put self back on meds. Has backlog at home…Recent weeks/mths increased stress at work and home. Carer zero hours contract 14 days etc. Feels drained. Has some time off to go to Germany. Youngest daughter living in Germany. Anxious for her and upset. She has left the nest. Remains sane. Not low per se. No psychosis. No suicidal thoughts. Waking at night. Busy with housework and going out in day…MED3 not fit for work…Diagnosis, stress." There is a reference to a backlog of medication at home. This is an important entry as it confirmed the claimant's oral evidence, which was that she was trying to manage her own medication, self-prescribing from a backlog of medication she held from German prescriptions.

20. There are a number of other entries and on 27 April 2016 it was recorded: "Lots of stress with work, unsupported, expecting lots hours, last minute request to work, requesting 24 hour notice for sick leave, works carer…has handed in notice. Feels drained, exhausted. Not down per se…MED3…not fit for work…diagnosis stress." It is notable at the claimant was not diagnosed with depression, however, the evidence before the Tribunal was that she taking medication on a sporadic basis, self prescribing.

21. Finally in an entry dated 8 August 2016 there is a reference to the claimant "thinks may be work stress for months; **previously** [my emphasis] had depression". In a later entry that is undated, there is a reference to the claimant being on a ward in Germany for six months with depression "years ago" and "feeling tired/no motivation. Not depressed".

22. The Tribunal accepted the claimant's evidence that she was a conscientious worker (as recorded in the respondent's appraisals and other documents) and it was the work coupled with her relationship with clients, and medication (albeit self-prescribed at times and taken sporadically) that made her poor mental health condition more manageable. The Tribunal found, as set out in GP records, the claimant had been prescribed medication and which she had tried to wean herself off, taking medication from a hoard at home, using it as and when she felt it was needed. It is difficult, therefore, to conclude with reference to the GP medical records only, that the claimant had stopped taking medication altogether.

23. On behalf of the respondent it was not accepted the claimant was disabled for the purpose of section 6 Equality Act 2010, and it was argued her illness at the material time reflected a reaction to adverse circumstances in the claimant's life, i.e. the claimant's daughter's move to Germany, rather than the label of clinical depression as set out in the guidance contained within the EAT decision of J v DLA Piper UK LLP [2010] ICR 1052.

24. The Tribunal accepted Ms Mulholland's submission that the claimant's impact statement was not an entirely reliable account of the claimant's condition in that it contradicted the fact that she was fully able to provide personal service to the respondent's clients for whom she received positive appraisals and supervision. The Tribunal also accepts that the evidence given by the claimant under cross examination was unclear and at points very random. However, there is no getting away from the fact that the claimant had been diagnosed with a psychiatric condition of borderline personality disorder and depressive disorder, which are unquestionably impairments within the meaning of section 6. There is also no denying the fact that the claimant was prescribed medication to deal with that disorder, and without the medication the deduced effect would no doubt be the claimant's description of her struggling to get up in the morning and her inability carry out day-to-day activities such as washing dishes, hovering and washing clothes, bearing in mind the fact that the claimant had spent six months in hospital, four months of which were in a secure unit because she was a danger to herself. The medical records clearly show the claimant had a mental health condition that was being dealt with and monitored by St Catherine's Hospital Mental Health, and the GP.

25. It would have been preferable had the claimant evidence i.e. medical report or a letter from her doctor to show the effect of the claimant no longer taking medication in the short-term. This information was not available to the Tribunal. The GP records show the claimant was attempting to wean herself off medication in or around July 2014; medication was still being prescribed, and on balance the Tribunal accepts the claimant's evidence that despite a request for her stash of medication to be returned to the GP Practice, that she relied upon it, self prescribing as and when necessary.

26. The respondent submits that the claimant was not suffering from depression when she commenced employment with it in September 2014. However, the Tribunal is satisfied, on balance, the claimant was on medication self-prescribing some of the time, and she still had the diagnosis of depression and borderline personality disorder, a condition which the claimant states (and there is no reason for the Tribunal to disbelieve this given Dr Dak's report) has affected her since childhood. This is a pre-existing reoccurring condition managed by various therapies, long-term hospital treatment and medication. It cannot therefore realistically be said that by the time the claimant commenced her employment with the respondent the

claimant's condition would not have had a substantial adverse effect on her day-to-day activities without the medication. When the claimant commenced her employment with the respondent she indicated that her depression "was under control" and this indeed reflected the true position.

27. It was submitted on behalf of the respondent that it was not open to the Tribunal to conclude that the claimant's illness at the material time is a reoccurrence of her previous episode of depression without the support of an expert medical opinion. The Tribunal has not come to that conclusion. Had the claimant not been taking her medication sporadically, it is likely that the Tribunal would have concluded the claimant was not disabled by reason of depression. The Tribunal agrees with the respondent that it was not open to the Tribunal to look beyond the MED 3 references to stress.

28. The Tribunal were referred to the EAT decision in Herry v Dudley Metropolitan Borough Council UKEAT/100/16 which endorses the J v DLA Piper judgment recognising that: "Stress in connection to adverse life circumstances can become 'entrenched' but that does not necessarily mean that they constitute a mental impairment." The respondent's position is that the claimant's condition at the material time was stress in reaction to adverse life circumstances, i.e. her daughter living in Germany, and that the medical evidence contradicts assertions that she was depressed during this period. The tribunal has dealt with this above.

29. Turning to the effect of the antidepressant medication, it was submitted on behalf of the respondent that the claimant had weaned herself off the tablets for a period of seven months, and she started taking her medication again in August 2015 to manage her stress, but this was at a lower dose of one tablet of each per day from the backlog of pills she had to hand. It is correct that the medical records do not show the claimant was prescribed any more tablets after August 2015, and the claimant states the reason for this was that she changed her GP. The Tribunal is unconcerned; there is no reason to disbelieve the claimant and in any event, the relevant period is that before the claimant's resignation and termination of employment. It was difficult for the Tribunal to understand precisely how much medication the claimant had taken during the relevant period, whether it was at a reduced dose and whether there had been long spells when medication had not been taken; given the claimant did not really know herself and was quite vague at times. Despite the Tribunal's reservations concerning the claimant's evidence on disability and its impact on her day-to-day activities, it accepted on the balance of probabilities that the claimant had been prescribed medication for a number of years; she had a stash of medication into which she dipped as and when necessary in addition to the medication prescribed at various occasions by her GP, with the result that she could not always manage normal day-to-day tasks without taking medication, albeit with gaps in time.

30. The Tribunal were directed by the respondent to the EAT case of Royal Bank of Scotland PLC v Mr M Morris [2010] UKEAT/0436/10/MAA_which referred to "deduced effect" in respect of medication, this being just "the kind of question on which the Tribunal is unlikely to make safe findings without the benefit of medical advice…It would be difficult for the Tribunal to assess the likelihood of that risk, or the severity of the effect if it eventuated without expert evidence". The Tribunal were referred to paragraph 36 as follows:

> "…In cases where the disability alleged takes the form of depression or cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert evidence…It is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of reoccurrence which arise directly from the way the statute is drafted."

31. The respondent's position is that the medical evidence before the Tribunal does not provide sufficient information about the claimant's condition so as to enable it to safely conclude that the claimant meets the legal definition of a disabled person, and there is nowhere within the medical records an opinion to describe the deduced effect of the claimant without medication. Further, it was submitted that there was no evidence to suggest there is a link between the claimant's symptoms of stress in August 2015 and her depressive illness from 2012.

32. It is notable in the GP entry on 19 February 2015 that administration NO5 meds from 17 July 2014 was not collected and destroyed. It appears, therefore, that from 17 July 2014 to 19 February 2015 the claimant was not prescribed medication from her GP. The Tribunal's view is reinforced by the GOP entry dated 3 August 2015 to the effect that medication was now being prescribed and there is a history of "Self weaned antidepressant and antipsychotic. Put self back on as current stress". There is also the reference to the backlog of medication at home. From a number of entries within the GP records it is clear the GP was aware of the claimant's intention to wean herself off medication, the fact that she self-prescribed and the "backlog" of medication at home, which the claimant referred to in these proceedings as her "stash." There is no denying that it would have been preferable had medical evidence been produced as to the deduced effect of medical treatment on the claimant, and the effect of the claimant attempting to wean herself of the medication over a nine month period as set out in the 3 August 2015 GP record; this evidence was not available and it is open to the Tribunal to consider the factual matrix supported by the claimant's oral evidence, which the Tribunal found believable on this point.

33. In determining whether the claimant's impairment had a substantial effect on her ability to carry out normal day-to-day activities, and ignoring the effect of medical treatment, the Tribunal cannot disregard Dr Dak's report dated 21 December 2012 and the diagnosis of borderline personality disorder and depressive disorder together with the history of the claimant's treatment. It appears that the treatment received by the claimant i.e. intensive therapy, long-term hospital admission of six months and so on, resulted in some improvement in the claimant's condition, so much so that she attempted to wean herself of the medication and was doing well in the nine month period leading to the GP record dated 3 August 2015. There is no suggestion in the medical evidence before the Tribunal that the claimant had made a permanent recovery; her mental health condition required managing.

34. In determining the effects of the claimant's impairment without medication the Tribunal has taken into account the claimant's oral evidence as to how her abilities have been affected at the material time, nine months of which she was attempting to wean herself off the medication. The Tribunal acknowledges it is not straight forward, without the benefit of relevant up-to-date medical evidence to assess what the effect would have been but for the medication, known as the deducted effect, against a lengthy historical background of the claimant psychiatrically diagnosed with a

borderline personality disorder and depressive disorder. As a matter of logic, such a diagnosis coupled with the fact the claimant self medicated from her backlog at home, has led the Tribunal to conclude on the balance of probabilities that there were times during the relevant period where the claimant's impairment had a substantial effect on her ability to carry out day-to-day activities but for the fact that she was taking antidepressant medication, albeit sporadically in an attempt to wean herself off over a period of nine months or so.

35. The view of doctors on the nature and extent of claimed disability is relevant, at the end of the day the crucial issue is one for the Tribunal itself to decide on all the evidence. It is not appropriate to have an examination for the purposes of discovering the causes of an alleged disability, since, whatever the cause, a disability which produces the effects specified in legislation will suffice. In considering what amounts to 'impairment', its effect, not cause is what is of importance. This approach is set out in the Guidance issued under the EqA 2010, where (at para A8) it is stated that 'it is not necessary to consider how impairment is caused, even if the cause is a consequence of a condition which is excluded. Accordingly, on the balance of probabilities, the claimant finds the claimant has discharged the burden of proving she was disabled in accordance with section 6 of the Equality Act 2010.

36. The Tribunal appreciates that this is a finding which does not assist the claimant in her claim for disability discrimination, given its conclusion for the reasons set out below that the respondent did not have actual or constructive knowledge that the claimant was unable to carry out normal day-to-day activities as a result of depression during the period of her employment.

Facts

37. The respondent is a national provider of care services throughout the UK supporting individuals to maintain their independence within their own home. The respondent's service users will have a variety of needs including pastoral care, mental illness and depression. The respondent employed approximately 4,500 people largely as caseworkers on different types of contracts including a zero hour's contract, during the relevant period.

38. The respondent's policy on zero hour contracts was not set out in writing. It was understood at head office there was no obligation on the respondent to offer employees on zero hour contracts hours of work, and in turn, employees were required to give their availability which could be changed on 4-weeks notice. Rotas were sent to employees on zero hour contracts one week in advance, they could review the rota and can say if they cannot work that rota. If the employee were to hand back the shifts no putative action would be taken. An employee need not work a shift, but is required to give one months notice to change shift availability. Anthony Smith, acting HR director with responsibility for all HR practice in the respondent, worked closely with "HR Policy implementation."

39. The Tribunal accepted Mr Smith was not the acting HR director during the relevant period, however, the Tribunal would expect him to have obtained information about the relevant practices and it did not accept, as suggested in re-examination by Ms Mullholland, that he was not qualified to comment on such matters. As acting head of HR is was eminently qualified. However, it appears from the evidence of Christina Taylor the Carewatch Bromborough Branch applied their

own particular local arrangement of zero contracts to employees, restricting the possibility of changing their availability to once a year in order to meet the flexible needs of service users, turnover of staff and absence cover. There was a major disparity in policy and protocol of zero hours contracts that applied to the respondent as a whole, and the Bromborough Branch zero hours contract was a major departure from head office principles articulated by Mr Smith, incorporating a practice clearly detrimental to employees on zero hour contracts, including the claimant who was not singled out in the way she was exploited, when it was made almost impossible for her to change her shifts in the manner set out by Mr Smith.

<u>The zero hours contract</u>

40. The claimant appeared not to have been issued with a written employment contract or a statement of terms and conditions; there was no copy in the bundle. She was not provided with any policies and procedures, which could only be viewed either in the Bromborough office or by the staff based in Bromborough via the intranet, which the claimant could not access as she was not office based. The claimant was not issued with the respondent's Equal Opportunity Policy introduced into the bundle marked R1. The claimant understood she had agreed to a zero hour contract, and her limited understanding of how this should have worked was that she could change her hours if required.

<u>The applicant profile form</u>

41. The claimant completed an applicant profile form setting out her nationality as German and on 18 August 2014 she informed the respondent in writing that she had "depression, mental health needs/problems…condition under medical control." The evidence before the Tribunal was that the applicant profile forms were not kept in the personnel file, and thus the claimant's information would not necessarily be brought to the attention of her managers. The claimant was unable to dispute this evidence.

42. Within the form the claimant confirmed she intended to work night's on a regular basis and in response to the question whether there was no "illness or medical condition that prevented you from attending work or your normal duties for more than one week during the past year?" the claimant answered in the negative. The Tribunal accepts the claimant's evidence that she was not questioned over her responses at any stage during her employment. If there was any doubt on the part of the respondent as to whether the claimant was disabled or not, the claimant confirmed she did not have a disability and did not consider herself to have a mental impairment which had a substantial and long term adverse effect two weeks prior to commenting her employment. The claimant did not provide the respondent with any information during the term of her employment sufficient to put it on notice that her mental health needs/depression had taken a turn for the worst and she considered herself to be disabled by depression/mental health needs or problems.

43. The claimant also completed an availability form at the same time. There is an issue concerning the availability form in the bundle, and whether or not it was completed by the claimant. The claimant was the only person who could give evidence on this, evidence which was not rebutted by the respondent and the Tribunal accepts the claimant's evidence that she did not fill in all of the boxes, as she would not have worked a Thursday afternoon because of Bingo. Nevertheless,

when the claimant started her work pattern was for long days into the night and a substantial number of hours.

44. The offer letter dated 8 September 2014 referred to a contract of employment following; there was no satisfactory evidence the claimant was sent a contract or statement of terms in accordance with S.1 of the Employment Rights Act 1996 (the ERA") and the Tribunal conclude that she was not. The claimant was provided with a schedule that did not comply with s.1 of the ERA that set out hours of employment as "zero", journey time between clients included in her hourly rate and she put a cross in the box that she may "wish to work more than 48 hours per week" before signing the form on 31 October 2014 and again on 15 December 2014.

45. The claimant commenced her employment 1 September 2014, and throughout she was subject to assessments and field based observations, a number of which were in the bundle. The claimant was considered to be an excellent employee, conscientious and caring, although she had problems with three of the service users, one of whom made a particularly racist comment that upset her, which does not form part of the claims before the Tribunal.

46. On 5 December 2014 the claimant sent her availability to the respondent, and it was confirmed by return she would be accommodated and holidays were also authorised during this period. It is clear the claimant's availability was for substantial periods of time. By February 2015 the claimant wanted to reduce the number of hours she spent working nights, but this did not suit the respondent who was struggling with staff retention and attracting a sufficient number employees to cover its obligations towards the service users.

47. In an email sent 27 February 2015 the claimant requested to come off nights as "the long days are taking a toll on my health." The claimant threatened to look for alternative work, and referred to the verbal abuse that she had suffered by a service user due to her German nationality. The latter allegation has not formed part of the claimant's claim and there is no need for the Tribunal to consider it any further, the respondent having made alternative arrangements for the patient to be looked after by another employee. The claimant did not make it clear that the toll on my health" was referable to her pre-existing mental health condition, and given the claimant's response to the pre-employment questionnaire that she was not disabled and her depression/mental health was under control, there was no information to put the claimant on notice that "long Days" were adversely affecting the claimant's mental health, especially given the fact she continued to seek and work many hours.

48. On the 3 March 2015 a memo was sent to all staff, including the claimant, about changing availability. The Memo stated; "Please can I inform all staff that changing availability is a request on your part. If we can accommodate the change of availability we will agree this but also to bear in my mind this will not always be granted as we need to ensure the work is covered safely." This appears to be a much less flexible understanding of a zero hours contract that that held by head office, and came about due to staffing pressures. The claimant in oral evidence, stated that employees who were not on zero hour contracts but on more regular contracts were largely family, friends and relatives of other employees and managers, and by comparison those employees on zero hour contracts were treated badly. The claimant's difficult is showing that she was treated less favourably than other employee on zero hour contracts, and given the contemporaneous

documentation, it appears employees on zero hour contracts were treated the same, and the claimant was not singled out; accordingly, she has not established a prima facie case of discrimination and the burden of proof has not shifted to the respondent.

49. During this period the claimant's supervision records were favourable to her, and at no point did the claimant say she had problems with depression. In a 20 March 2015 email the claimant wrote;" I would like to cut my hours down as it is getting too much for me. I would like my new hours to be only from 8.00 till 18.00 as soon as possible…" This does not put the respondent on notice that the claimant was disabled.

50. By 26 May 2015 the claimant had completed her probation period on a positive note. At no stage during any of the meetings with management did she reference to any disability, and the Tribunal took the view this could not have not been inferred. By this stage the claimant was no longer being prescribed medication, and this state of affairs continued for a number of months although it she irregularly took medication from the store kept at home as and when needed. Apart from the claimant's request to reduce night working, it is not disputed that the information before the respondent was that the claimant was happy at work; she was performing well, and had only had a small amount of sickness absence. There are numerous emails, which the Tribunal does not intend to repeat, where the claimant is setting out her hours, annual leave changing hours etc, reflecting this was an ongoing dialogue and it appears she was being accommodated at times. There was no indication to the respondent the claimant was seeking any adjustments because she was disabled, and there was nothing to put the respondent on notice that the claimant was disabled with depression during this period.

51. At the end of the probationary review form it was stated: "Always on time, very reliable, has a bit of sickness, need to reduce levels, and very caring…customers speak highly…care watch are brilliant…staff are very supportive…"

52. On 16 July 2015 an internal memo written by Lisa Case, the registered branch manager, which was sent to all staff, including the claimant, under the heading "sickness" there was a reference to:

> "…any days off…it will all be logged. It is still classed as unauthorised absence. Can I also inform you that calls cannot be covered at short notice so please remember this as we have a duty of care and also when care worker sickness occurs we need time to get calls covered in a timely manner to safeguard our customers."

53. Under the heading "changing rota" the following was set out: "When any care worker starts with the company they are asked to complete an availability form. The office uses this to allocate you work. Can I please add that care staff are not allowed to change their availability, especially not on a week to week basis. Again I have stressed in the past that this is a request on our part and that the company does not have to accept this. This does not mean it won't get looked into by me. I will look at this and review whether it will work for business and also does not affect our customers."

54. In an email sent to Tina Taylor at 21:37 on 28 July 2015 the claimant wrote: "Hi, I would like to inform you that I'm absolutely burnt out. If you would like me to come back to work I can do so as of 13 August but I will only be able to do half days. I am willing to work from 8:00 until 17:00 for one week and 12:00 to 21:00 the next."

55. The claimant's case is that her reference to "I'm absolutely burnt out" was that this phrase was sufficient to put the respondent on notice of her disability; the Tribunal did not agree, bearing in mind that the claimant continued to work, was performing well and more importantly did not inform her managers (or any other person) that she was disabled with depression and not just tired, which the reference to "I'm absolutely burnt out" could reasonably be interpreted to mean.

The incident that gave rise to the warning

56. Having put in a holiday request for 11 to 22 July 2015, which was agreed, the claimant returned to work on the 23 July 2015 and went off ill on the 24 July 2015 when she did not attend work. There is a dispute as to whether the claimant returned to work on 23 July 2015, clearly there was some misunderstanding about the dates and whether the claimant's husband had contacted the respondent by telephone informing it the claimant was to be absent. The Tribunal is in no doubt Mr Rogers rang the respondent to inform it of the claimant's absence, we do not know, however, whether Lisa Case was informed of this. Administratively the claimant self-certified for 7-days, following which a GP MED3 would be necessary to support the absence.

57. In a letter dated 30 July 2015 the claimant was suspended on full pay by Lisa Case for "some matters have come to light that I may need to discuss with you as a disciplinary matter." The claimant was instructed not to visit the premises or contact staff without prior arrangement with Lisa Case.

58. The claimant submitted a sick note dated 3 August 2015 certifying her absence from 25 July 2015 to 17 August 2015 with stress, which she posted to the respondent taking the view she was not allowed on the premises in accordance with the suspension. By the ordinary course of post the letter would have arrived in or around 5/6 August 2015 and the self-certification would have expired well before the Med3 arrived. For some unknown reason the claimant did not email or make telephone contact with Lisa Case to say a MED3 had been issued on 3 August 2017 and on the face of it there appeared to be a period of absence not covered by a self-certifying sick note or MED3.

59. In an undated invite letter headed "Disciplinary Hearing letter (Gross Misconduct)" the claimant was invited to a disciplinary hearing on 7 August 2015 conducted by Lisa Case to consider an allegation with regards to unauthorised absence…you will be advised that if the allegation is found to be proven, it will be considered gross misconduct under the company Disciplinary Rules and your employment may be summarily terminated." Understandably, the claimant was very upset by this.

Disciplinary hearing on 7 August 2015

60. The claimant attended the disciplinary hearing on 7 August 2015 heard by Lisa Case. The allegation was changed to "you have taken unauthorised absence without given certification of sickness and no end date of when you were returning back to work." The claimant appealed referring to her self-certification and GP MED3.

61. In oral evidence she challenged the disciplinary hearing notes (which were not provided to the Tribunal) on the basis that they did not "mention the conversation we had about the stress not being caused by the amount of hours my working day is spread over. You said that you had looked into my hours and had come to the conclusion that the cause of my stress could only be down to my daughter moving to Germany." The Tribunal finds that the claimant's evidence was credible, however, she made no mention of her disability during this period, and it could not be inferred by Lisa Case and/ or respondent the claimant was suffering not from stress but from depression. There is difference between stress and depression, and as a matter of causation it must follows that however badly the claimant felt she was being treated during the disciplinary process and when she was seeking a reduction in the number of hours worked on a shift, there was no causal connection between the suspension, disciplinary and disability and so the Tribunal found. Had the claimant made it clear during this period that she was suffering from a debilitating depression, the outcome may have been different.

62. The claimant was understandably determined to enjoy her work and put behind her the traumatic and difficult period in her life, especially the circumstances of her being admitted to hospital in Germany. The claimant did not want to perceive herself as disabled, this much was clear from her oral evidence, and it was important for her that she was perceived as somebody who really cared for clients, valued her clients and was good at their job. The Tribunal was in no doubt this was the case given the feedback she received, and to the claimant's credit, her aim was to enhance the happiness of her clients when she saw to their needs. This made the dishonest and destructive reference given after the claimant's resignation all the more upsetting for her, as she tried her very best to be a good employee despite the difficulties encountered in changing hours and availability.

63. At the disciplinary hearing the claimant was issued with a written warning to remain on file for 6-months "during which time the following implementation/change in behaviour is expected to be made an improvement with your sickness absence and also regular communication with your line manager. This also needs to be done via telephone calls and not emails. Any repetition of such an incident or any further misconduct may lead to disciplinary action up to and including dismissal." In her witness statement the claimant recorded the written warning was to last for 12-months; she is incorrect.

Appeal hearing 24 September 2015

64. By a letter dated 17 August 2015 the claimant appealed setting out in detail her grounds. Her appeal was successful. The claimant was sent the appeal outcome in a letter dated 25 September 2015 from Roberts Elsgood, HR Business Partner, who concluded that the decision to suspend her on full pay was: "A disproportionate act, and even though I understand there was some uncertainty over your situation there was no need to suspend you on full pay over this issue."

65. With reference to issuing of a written warning, he concluded that: "Regarding the severity of the outcome of this case…a written warning was excessive given that there was some obvious confusion and you were of the belief that your zero hours contract enabled you to work as and when you wish. In the circumstances I have decided to remove this warning…However, should there be any instances in the future where you fail to follow your absence reporting procedure, without good reason, disciplinary action may be taken against you…" The claimant complains about Mr Elsgood's reference to the possibility of disciplinary action over attendance at work and claims this was inserted on the grounds of either her race, disability or both. On the balance of probabilities the Tribunal found the claimant had not established any prima facie evidence that it was causally connected to race or disability. There were problems in the claimant's reporting procedures and she was merely being informed that should there be instances in the future disciplinary action "may" be taken. The claimant did not adduce any evidence from which the Tribunal could infer that her hypothetical comparator, in exactly the same circumstances, would have been treated any differently on appeal. The burden of proof did not shift to the respondent.

66. During this period the claimant continued to liaise with Tina Taylor concerning managing her working hours. She emailed Tina Taylor on 14 October 2015 as follows: "I am writing to you because it is now eight weeks ago since I asked about changing my hours. It is too much for me when it's my working weekend so I would like to either change my hours on the weekend or on a Monday…So if you please let me know as soon as possible what we are going to do because I already waited eight weeks without a comeback."

67. The claimant made no reference to depression, and nor did she connect it with the hours she was working and the request for those hours to be reduced. Tina Taylor responded on 15 October: "Hi Hon, I wasn't aware of your request. So basically you need either lunches dropped on your weekend on and stay or drop Monday mornings? Leave it with me, hon, I'll try and sort it out." The email is amicable, and there is no suggestion the claimant was being refused the hours she sought either because she was German, disabled or both.

68. The claimant responded by return: "Yes please, that would be very helpful," which suggested the claimant accepted the dialogue was not entirely unexpected given the respondent's attitude towards all employees on zero hour contracts when it came to changing their hours and shifts.

69. The claimant continued working and on 23 October 2015 she was appraised by Tina Taylor. The appraisal form completed by the claimant revealed how well she got on with the clients, and how she tried her hardest to please the clients. The part of the form completed by Tina Taylor was positive, referring to the claimant as patient, caring, good time management with good communication. There is a reference to sickness levels and to the claimant bringing sickness levels down. She was expressly invited to "speak to us if any problems". There is no evidence before the Tribunal that the claimant ever tried to speak to Tina Taylor about her disability and the problems it was causing her working the hours of her shift. Tina Taylor further commented that the claimant was "patient and caring with customers. Customers are happy with your care and find you go the extra mile". The claimant commented, "Really loving my job" and signed the form on 23 October 2015. The claimant's comment underlines the fact that she said and did nothing to put her

managers on notice that her medical condition of depression had resurfaced and as a result her hours needed to be changed.

70. In an email sent 16 December 2015 the claimant requested a reference from Tina Taylor, and this was followed by an exchange of emails concerning the claimant splitting her shift pattern. She wrote on 21 December 2015: "I have asked on a number of occasions to stop this split shift pattern that I have been working on as it is too much and affects my health. I am constantly being told that there is a shortage of staff but I am not here to pick up other people's problems. The problem is not the hours that I work, it's the length of the day that my hours are spread over…On two occasions so far I have had to take time off because I have burnt myself out. I am close to that again. I am not sure I can even manage that I normally work to, so I'm not willing to do any hours after 8.00pm." It was credible that Tina Taylor throughout this period understood the claimant was tired, not seeking a reduction in her hours, but a change in her working day and she could not have reasonably suspected the claimant was seeking this as an adjustment due to any disability.

71. In a second email sent on 21 December 2015 the claimant referred to the reason why she can only work until 8.00pm is "because I'm struggling with the split shift I have now been doing for a year". She also referred to the shift "**starting** [my emphasis] to affect my health" and having to look at other options.

72. In a field based observation held on 22 December 2015 there are references to the claimant being described as "very good" by the client.

73. There continued an exchange of emails into January 2016 with the claimant indicating that she was not willing to work split shifts any longer, but was willing to help out with weekends until there were more staff. It is apparent by the emails the respondent was struggling with finding sufficient staff to cover the shifts, and a direct consequence of this it was a reluctant to change the claimant's shift pattern. Tina Taylor wrote on 8 January 2016:

> "I have explained to you we can only accommodate changes when we can, we run a care business and our priority is to cover the calls. If you change availability we have to have staff to take over the shifts you can't do, also you're only allowed 1 x availability change per year requested and that can be declined if we cannot accommodate the change. You have requested your whole availability to change. We have worked hard changing it for the weekend shifts, your weekend WILL HAVE TO STAY AS IT UNTIL WE CAN ACCOMMODATE, that's how it works, not both ways…Unfortunately you will have to leave them calls on you, we will not take them off, any problems please call the office and ask to speak to Sharon Lindley."

74. The claimant was unhappy with the response, and despite the positive field based observations she remained unhappy. In one observation dated 12 April 2016 the claimant was referred to as "very smart and friendly" with the client commenting on how "helpful and friendly" she was.

75. On 18 April 2016 the claimant requested a copy of her terms and conditions of employment, which was not provided.

<u>The offer of alternative employment 25 April 2016</u>

76. The claimant applied for alternative employment and a conditional offer of employment made to her on 25 April 2016 by Everycare subject to satisfactory references.

77. In a meeting held with all staff between 26-28 April 2016 at 13:30 (the discrepancy in the dates remained unexplained) called by Sharon Lindley, there was a reference to her explaining that if employees decide to stay on a zero hours contract, then hours may be lost and transferred to those employees who accepted a guaranteed hours contract and "although we will try to maintain the hours on a zero we cannot guarantee them". There was also reference to a new sickness policy which could result in disciplinary action.

Absence and MED3 dated 27 April 2016

78. The claimant continued to feel unhappy at work. She had requested changes to her shift numerous times, the respondent's view was that the request created operational difficulties and they were not acceded to. It is notable during this entire period at no stage did the claimant indicate she needed her hours to be accommodated because of depression. Stress was given as the reason for her absence in the MED3 dated 27 April 2016 and the claimant had referred to tiredness. During the period leading up to her sickness absence the claimant's supervisions remained positive, and it is clear the claimant worked hard at keeping the client's happy. The claimant wanted to be working on a zero hours contract in the true sense and the respondent, who did not want to guarantee any hours on a zero hours contract, was unable to accommodate the claimant when she had, over a substantial period of time, requested a change in her working pattern. The respondent was unable to accommodate this; Lisa Case and Sharon Lindsey took the view that the claimant's availability, or not as the case may be, was skewed in favour of the respondent's operational needs.

79. Despite the zero hours contractual position, the claimant was not given the freedom to dictate her own hours and she was pressurised into working the hours dictated to her by the respondent. The Tribunal took the view, taking into account the factual matrix, there was no causal connection with the claimant's race or disability status (of which her mangers were unaware). It was a direct result of the claimant, a vulnerable employee on a zero hours contract, being unable to dictate her working hours because this did not suit the respondent. According to the claimant's own evidence, other employees on zero hours contracts were not treated as well as those on a guaranteed hours contract as evidenced by Sharon Lindley's message to staff referred to above. The Tribunal takes a dim view of the respondent's treatment of employees on a zero hours contract; however it does not necessarily follow that direct discrimination was automatically made out; as a matter of causation the respondent treated zero contract employees as if they were on permanent contracts with set hours, and the claimant has failed to discharge the burden of proving its actions was causally connected to race and/or disability.

The claimant's resignation

80. At the end of March 2016 the claimant resigned with notice which expired 27 May 2016, the effective date of termination. The claimant made no reference to her disability or depression at any stage up to and including the period following her resignation. She confirmed her resignation in a letter dated 26 April 2016 which also

made no reference to her disability or depression. Sharon Lindley sent the claimant an undated resignation acceptance letter accepting one week's notice ending 2 May 2016. The claimant submitted a sick note dated 27 April 2016 for the period of one month referring to stress for which no adjustments were set out, and she did not physically work her notice. During this period she did not request any alterations to shits and required availability to work, and the last such request having been made in or around March/April 2016.

The reference

81. Following the claimant's resignation, a reference questionnaire was sent to the respondent for the position of health and social care assistant and/or healthcare assistant. The questionnaire was completed by Sharon Lindley on 26 May 2016 who confirmed the following:-

(1) She had known the claimant for six months.

(2) The claimant's duties were care work, personal care, medication and support.

(3) With reference to question 3, "Would you re-employ the claimant?" she ticked "no".

(4) With reference to question 4, "Was the applicant to your personal knowledge dependent upon drugs or medication?" she did not tick yes or no but handwrote "not known".

(5) With reference to question 5 she ticked the box confirming that the claimant as not reliable, not trustworthy, not tactful and was not able to work alone.

82. Sharon Lindley completed the questions in the negative, despite the evidence of the claimant's good performance, the appraisals and field based observations as to the claimant's excellence as a worker, her reliability (with the exception of her sickness absence) and the fact that she was worked alone and tactful. There was nothing to show or suggest that the claimant was not trustworthy in any way.

83. With reference to question "Attitude towards colleagues" Sharon Lindley ticked the box "satisfactory". With reference to question 7 "Attitude towards supervisor" she ticked the box "poor", and with reference to question 9 "Do you consider that the applicant relates well with/would relate well with service users in his/her care?" she ticked the box "unsure" despite the appraisals and field based observations which revealed the claimant related very well with service users. With reference to question 10, record of attendance, Sharon Lindley ticked "poor" and at question 11 she referred to the claimant having six weeks' absence on four occasions in the last 12 months, and "no notice given to latest episodes of sickness which left clients unattended". Sharon Lindley commented that the claimant had "found clients diagnosed with dementia or behavioural problems difficult to manage. Claudia would often request them to be removed from her rota".

84. As a result of the reference the job offer made to the claimant was withdrawn.

85. On 8 June 2016 the claimant made a data subject access request and it was through this request she was able to read Sharon Lindley's reference. The claimant who took much pride in her work, as the positive client contact made her mental health condition more bearable because she felt valued and respected, was understandably very upset by it, given the very positive feedback she had received during employment from clients and supervisors/managers.

86. The claimant instructed solicitors, and on 13 June 2016 a letter before action was sent to Sharon Lindley regarding the negative reference, setting out the points at which the reference was incorrect. The Tribunal does not intend to set out the entire letter, which was detailed and aimed at putting right the damaging reference. For example, with reference to point 4 it was stated:

> "You have answered 'no' to whether you consider our client to be reliable, trustworthy and tactful. There is no evidence upon which you can substantiate this assessment. During our client's employment she has received no warnings. There was one issue where she was suspended for unauthorised absence and given a warning after a disciplinary hearing. However, on appeal it was found that this was entirely unjustified and the warning was lifted…Our client has received throughout her employment assessments on a three monthly basis. All of these assessments have been positive…Our client had her annual appraisal approximately seven or eight months ago and once again her appraisal is excellent. Our client was clearly…in her role, working within a position whereby she was trusted. She was attending clients on her own and was given access to security codes. There have been no issues whatsoever and no complaints from any of her clients. We fail to see how you can have rated our client as not reliable, not trustworthy and not tactful. You will be required to provide evidence to substantiate these assessments."

87. The letter continued in a similar vein and in the penultimate paragraph there was a reference to Sharon Lindley's reference resulting in "the claimant suffering damage by the loss of the job and the income which would have come from that job".

88. On behalf of the respondent during the liability hearing in closing submissions Ms Mulholland referred to the fact that there were no allegations of race discrimination set out in the letter of 13 June 2016, the inference being that the claimant did not at this time think the act of providing the reference was an act of race discrimination. The Tribunal has read the 13 June 2016 letter closely. Ms Mulholland is correct, there are no allegations of race discrimination or indeed disability discrimination; the letter is solely concerned with the reference and putting that reference right. No inferences can be raised to the effect that the claimant did not believe it was an act of race discrimination and so the Tribunal found.

<u>Sharon Lindley's explanation and amended reference</u>

89. Sharon Lindley responded in an email sent at 12:50 on 21 June 2016 stating that she had met the claimant on one occasion. She explained that the "answers were based on the attached journal entries". It appears that a number of the entries were incorrect and with reference to question 4 she wrote:

> "I have reviewed the supervisions and appraisals, I will amend. This was an organisational oversight as Mrs Rogers'; compliance should have been

> monitored and completed by the care coordination team not a field care supervisor."

90. The response in question 5 was now referred to as, "As stated in response to question 4", and in respect of question 6 there was a reference to "Mrs Rogers failing to sign in the visitor's book", and with reference to question 7, "supporting statements from the care coordination team…not included in Mrs Rogers file prior to the reference request. I will remove the information from the reference".

91. This is the only explanation the Tribunal has from Sharon Lindley as to why she completed the initial reference so negatively, presumably in the knowledge that such a reference would make the claimant unemployable. Her responses are not satisfactory, and nor can they be said to be untainted by race discrimination. It is notable that once she had received the solicitor's letter Sharon Lindley produced a completely different reference.

92. An amended reference was produced by Sharon Lindley which included at paragraph 2 a negative response to the question "would you re-employ the applicant?". With reference to question 4, "Was the applicant to your personal knowledge dependent upon drugs and medication?" Sharon Lindley had ticked the "no" box, and with reference to question 5 she ticked that the claimant was reliable, trustworthy, tactful and was able to work alone. She also reconfirmed (as per the original reference) that the claimant was punctual, approachable, discrete and self motivated. The claimant's attitude towards colleagues was changed form being "satisfactory" to "good". Her attitude towards supervisors was "good" and instead of rating the claimant's level of competency and common sense as requested in question 8 initially as "satisfactory", the amended reference rated the claimant as "good" in both respects. With reference to question 9 Sharon Lindley confirmed the claimant related well with the service users; and with reference to question 10, her attendance record was "poor", number of absences due to sickness "six weeks on four occasions". The comments concerning the claimant finding "clients diagnosed with dementia or behavioural problems difficult to manage" and requesting them to be removed from her rota, was no longer included with the reference, and there were no criticism of the claimant's performance.

93. Everycare wrote to the claimant on 22 June 2016 withdrawing the conditional offer of employment made on 25 April 2016 "with immediate effect". The letter stated: "As you are aware the offer of employment was conditional upon and subject to the receipt of satisfactory references. Unfortunately we have received unsatisfactory references. With this in mind you have failed to meet all of the requirements for confirmation of the appointment."

94. In an email sent 29 June 2016 from the claimant's solicitors (whom the claimant was paying at an hourly rate) a legitimate criticism was made concerning the amended reference as follows:

> "The company have responded to the amended reference to state that this is not acceptable within the care industry due to the Care Quality Commission requirements. You have answered 'no' to the question 'would you re-employ the applicant?'. However, based on the remainder of the reference and on the concessions which you have made in relation to our client's appraisals and

performance, this conclusion is not supported with evidence and once again gives a misleading impression."

95. Reference was also made to the claimant's periods of sickness, which apart from 2-3 days was due to "stress from the workplace". There is no reference to the claimant's disability, and nor is there a reference to the claimant's absence relating to her mental health condition of depression. It is the Tribunal's understanding that the amended reference, as drafted, still stands. Fortunately, the claimant did obtain alternative employment later based on the amended reference.

96. In August 2016 the claimant raised a grievance after her employment had terminated, which the respondent refused to hear on the basis that, according to its own procedures, she was not longer an employee and it was not open to her to raise a grievance as the Procedure expressly applied to employees only, and so the Tribunal found.

Law

Disability status

97. S.6(1) of the Equality Act 2010 ("EqA") provides that a person, 'P', has a 'disability' if he or she 'has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

98. Schedule 1 of the EqA 2010 sets out factors to be considered in determining whether a person has a disability. S.6(5)of the EqA 2010 provides for the issuing of guidance about matters to be taken into account in deciding any question for the purposes of determining who has a disability, and such guidance came into force on 1 May 2011. When considering whether a person is disabled for the purposes of the EqA regard should be had to Schedule 1 ('Disability: supplementary provisions') and to the Equality Act (Disability) Regulations 2010, and the 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' under 6(5) of the Equality Act 2010 should be taken into account.

99. The relevant time to consider whether a person was disabled is the date of the alleged discrimination; see McDougall v Richmond Adult Community College [2008] IRLR 227, [2008] ICR 431.

100. For any claim to succeed, the burden is on the claimant to show, on the balance of probabilities, something in the nature of'impairment' whether it is a mental or physical condition. In the case of Millar v ICR [2005] SLT 1074, [2006] IRLR 112, the Court of Session held that a physical impairment can be established without establishing causation and, in particular, without being shown to have its origins in any particular illness.

101. Finally, the Tribunal were referred to the EAT decision in Royal Bank of Scotland PLC v Mr M Morris [2012] WL 608851 with reference to that decision at paragraph 55 as follows:

> "The burden of proving disability lies on the claimant. There is no rule of law that that burden can only be discharged by adducing firsthand medical evidence, but difficult questions frequently arise in relation to mental impairment."

102. In Morgan v Stafford University [2002] ICR 475 Judge Lindsay P presiding observed that: "The existence or not of a mental impairment is very much a matter for qualified and informed medical opinion. At paragraph 59 it referred to it being necessary for the Tribunal to consider:

1. Whether the impairment had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities; and

2. Whether that effect was long-term in the sense defined within the legislation.

103. In the case of Mrs Rogers, the medical and oral evidence before the Tribunal established that she had suffered from a serious impairment which had lasted for at least 12 months and continued, given its finding that the claimant self prescribed medication during some of the period when she was employed by the respondent. The Tribunal acknowledged, as in the case of Mr Morris, that the claimant had an opportunity to jointly obtain a medical report with the respondent and she failed to take this up, with the result that the medical evidence before the Tribunal could have been more extensive.

104. On behalf of the respondent the Tribunal was referred the EAT decision in Herry v Dudley Metropolitan Council & another UKEAT (2017) which dealt with substantial effect in the claimant who had required some adjustment for his dyslexia, and the stress of conducting litigation was not a normal day-to-day activity. The Tribunal were also referred to IPC Media Limited v Ms Miller UKEAT/0395/12/SM, an EAT decision, dealing with knowledge.

Direct discrimination

105. Section 13 of the Equality Act 2010 states that direct discrimination is less favourable treatment "because of a protected characteristic". In this case the claimant is alleging that the respondent has treated her less favourably than they would treat others because of her disability (depression) and race (German). These are the protected characteristics she relies upon. An employer directly discriminates against a person if it treats that person less favourably than it treats or would treat others, and the difference in treatment is because of a protected characteristic.

106. In the well-known Court of Appeal decision of Anya v University of Oxford & another [2001] ICR 847 it was recognised that where an employer behaves unreasonably, that does not mean that there has been discrimination, but it may be evidence supporting that inference if there is nothing else to explain the behaviour. This is also relevant in connection with the claimant's claim set out in claims 2.1, 2.2 and 2.4. The Tribunal have dealt with this below in further detail.

107. On behalf of the respondent the Tribunal were referred to IPC Media Limited v Miller [2013] IRLR 707 which established that: "Where A is the ultimate decision maker, but has been influenced by others, this enquiry should be omitted to A's own mental processes, assuming that it is A's discriminatory act about which B is

complaining." The Tribunal were also referred to Reynolds v CLFIS (UK) Limited [2015] EWCA, a Court of Appeal decision, in which it was held: "It was fundamental to the scheme of the legislation that liability could only attach to an employer where an individual employee or agent for whose act it has responsible had done an act which satisfied the definition of discrimination. That meant that the individual employee who did the act complained of had to himself have been motivated by the protected characteristic…The correct approach in a tainted information case was to treat the conduct of the person supplying the information as a separate act from that of the person who acted on it."

Harassment

108. The definition of harassment is set out in S.26(1) EqA. It states that a person (A) harasses another (B) if:

- A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and

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

109. A standalone claim of harassment under S.26 EqA, does not require a comparative approach.

110. There are three essential elements of a harassment claim under S.26(1):

- unwanted conduct

- that has the proscribed purpose or effect, and

- which relates to a relevant protected characteristic.

111. The second limb of the statutory definition of harassment requires that the unwanted conduct in question has the *purpose or effect* of:

- violating B's dignity — S.26(1)(b)(i), or

- creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her — S.26(1)(b)(ii).

112. In deciding whether the conduct has the effect referred to in S.26(1)(b) (i.e. of violating a person's (B) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B), each of the following must be taken into account:

-the perception of B

-the other circumstances of the case, and

-whether it is reasonable for the conduct to have that effect — S.26(4).

113. In order to constitute unlawful harassment under S.26(1) EqA, the unwanted and offensive conduct must be 'related to a relevant protected characteristic'. However offensive the conduct, it will not constitute harassment unless it is so related.

114. The EHRC Employment Code adopts a broad interpretation of the term 'related to'. It gives the following example: a female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex (see para 7.10).

Burden of proof

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

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

117. Direct discrimination can be hidden. In the well known case of Glasgow City Council v Zafar [1998] ICR 120, a House of Lords decision, Lord Browne-Wilkinson observed with reference to the special problems of proof: "Those who discriminate do not in general advertise their prejudices: indeed they may not even be aware of them…Claims of unlawful discrimination in employment are more favourable to the claimant…once a claimant proves facts from which the Tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination, the Tribunal is obliged to uphold the claim unless the employer

that it did not discriminate." This observation is relevant in respect of the damaging reference and to a lesser extent the amended reference.

Time limits

118. S.123(1)(a) EqA sets out the time limit for presenting a disability discrimination complaint. It provides that the relevant time limit for starting employment tribunal proceedings runs from the date of the act to which the complaint relates. S123(3)(a) states that conduct extending over a period of time is to be treated as done at the end of that period. Failure to do something is to be treated as done when the person in question decided upon it – S123(3)(b). In the absence of anything to the contrary, a person is taken to decide on failure to do something either when the person does an act inconsistent with deciding to do something else, or, if they do no inconsistent act, on the expiry of the period on which they might reasonably have been expected to do it – S.123(4).

119. Tribunals have a discretion to hear out of time discrimination cases where they consider it is "just and equitable" to so do – S.2123(1)(b) EqA, provided that it is presented within such other period as the Tribunal thinks just and equitable – S.123(1)(b). The burden lies with the claimant to convince the Tribunal it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule, and the claimant has not discharged that burden.

Conclusion - applying the law to the facts

120. There is no dispute between the parties as to the relevant law.

121. With reference to the first issue, being disability status, the Tribunal found the claimant was a disabled person for the purpose of S.6 EqA in that she had a mental impairment by way of depression, and that impairment would have had a substantial long-term adverse effect on the claimant's ability to carry out normal day-to-day activities had it not been for the medication for the reasons set out above.

Claims 2.1 to 2.4

122. With reference to claims 2.1, 2.2, 2.3 and 2.4 the Tribunal found they were time barred; the earlier complaints were not raised until a year after the event, and with reference to claim number 2.4 it appears the claimant she did not request any alterations to shifts and required availability to work, the last such request having been made in or around March/April 2016 before the claimant went off ill and resigned. Proceedings were lodged on 4 April 2016 following the issuing of an Early Conciliation Certificate on 24 September 2016. The claims are substantially out of time, and there is no evidence if a continuing acts that would bring them within time, even if the Tribunal were to take into account Sharon Lindley's reference. The claimant appeared to deal with Tina Taylor in respect of her request to shift changes ad hours of work and there was no evidence before the Tribunal that Sharon Lindley was a decision maker.

123. The claimant has not offered a reason why such claims should be considered in time. There is no evidence before the Tribunal that the claimant was not well enough to submit the claims, quite the reverse, as the claimant obtained alternative employment and was able to instruct solicitors to act on her behalf.

124. The Tribunal accepted the submissions put forward by Ms Mulholland that each of the claims before the Tribunal are distinct and severable in that they all deal with different managers, different issues and arise at different points in time. The Tribunal is aware that Sharon Lindley at some stage exited the respondent business and it is difficult to see the link between the managers dealing with claims 2.1-2.4 and claims 2.5 and 2.6, which were in time. The Tribunal were reminded by Ms Mulholland that the ultimate decision maker should be taken into consideration in all of these claims, and the claimant has not led any evidence to establish that the claims are linked as part of an ongoing course of conduct towards her. The Tribunal agrees. The Tribunal found there was no course of conduct in respect of these claims that would bring the claimant's earlier claims within the statutory time limits. There was no satisfactory explanation given as to why the claimant was unable to comply with time limits, and given the fact proceedings were issued on 4 October 2016, more than 12-months after the alleged events, the claimant's silence in correspondence, including her grievance and solicitors letters, as to alleged discrimination, and the Tribunal found in all the circumstances of the case it was not just and equitable to extend time.

125. If the Tribunal is wrong on the time limit issue, it would have gone on to find as set out above the respondent had no actual or constructive knowledge that the claimant's depression had returned, and there was no causal link with either race or disability.

126. The starting point in any case of disability discrimination is the thought processes, conscious or unconscious, of the putative discriminator: in this case Lisa Case, who suspended and disciplined the claimant; Robert Elsgood who heard the appeal; Tina Taylor who dealt with the working pattern/hours requests and Sharon Lindley who wrote the reference. There is no evidence before the Tribunal that any of these individuals had knowledge of the claimant's medical history, and it is clear from the contemporaneous documents that the claimant did not herself inform them. The information set out in the claimant's emails was indicative of an employee suffering from tiredness and stress, and the respondent was entitled to take the MED3 at face value. There was nothing in the contemporary documentation evidencing any awareness of the claimant's medical history by the individual employees cited above; all of the evidence pointing to the claimant being "burnt out", "stressed" and "tired". There was no evidence upon which the Tribunal could draw an inference that the three employees who made the decisions knew of the claimant's medical history, and accordingly the burden of proof has not shifted to the respondent.

127. In short, the Tribunal preferred the submissions made by Ms Mulholland that the respondent was not aware of the claimant being disabled. Tina Taylor was unaware of the claimant's depression whilst working with the claimant. This was reflected in the appraisals and it was not unreasonable for her to believe that the claimant's references to being "burnt out" referred to tiredness and not depression and the Tribunal accepted that this was the case. Tina Taylor was not motivated by the claimant's race or disability, her sole purpose was to ensure sufficient cover was provided by staff, including the claimant, in circumstances where staff retention was problematic for the respondent.

128. With reference to the issue of the actual or constructive knowledge, applying the burden of proof provisions, there was no satisfactory evidence before the

Tribunal that the relevant decision makers, including Sharon Lindley, were aware that the claimant was not managing her depression, and the burden of proof has not shifted. At the very highest, the respondent as a business was aware that the claimant had had depression, had mental health needs/problems in the past; the condition was under control; there was no illness or medical condition that prevented her from attending work or normal duties for more than one week during the last year, and that she did not consider herself to have a disability or a mental impairment which had a substantial and long-term adverse effect. There was nothing the claimant said or did after completing her application profile form which put the respondent or its managers on notice that her depression/mental health needs/problems were no longer under medical control; with the result that she had a disability/mental impairment which had a substantial and long-term adverse effect.

129. Having made a finding that the relevant managers (Lisa Case, Robert Elsgood, Tina Taylor and Sharon Lindley) did not possess actual or imputed knowledge, there is no requirement for the Tribunal to consider the direct disability discrimination complaint. In the alternative, if we are wrong on this point, the Tribunal would have gone on to find the claimant had not been unlawfully discriminated on the grounds of her disability or race.

130. If claims 2.1 to 2.4 were in time (which they were not), and had the Tribunal accepted the respondent had knowledge of the claimant's disability during the relevant period (which for the avoidance of doubt it did not), the Tribunal would have gone on to find that all of the discrimination claims bar the Sharon Lindley reference, lacked tangible evidence, were not well founded. The claimant is relying upon hypothetical comparators to establish her less favourable treatment, and the Tribunal was of the view based on the memos and communications sent to all members of staff, including the claimant, that she cannot show less favourable treatment. If the Tribunal were to ask itself whether someone without the claimant's protected characteristic of disability and race would have been treated in the same way as the claimant, it would have concluded that they would bearing in mind that there must be no material difference between the circumstances relating to each case when determining whether the claimant had been treated less favourably than her hypothetical comparator. In other words, like must be compared with like. It is the Tribunal's view that a hypothetical comparator on a zero hours' contract would have been treated in exactly the same way.

131. The Tribunal would have found the treatment of the claimant was causally connected to the fact that she was an employee on a zero hours contract, and it had no causal connection whatsoever with disability or race. In accordance with the Court of Appeal decision in Anya the fact that an employer behaves unreasonably does not mean that there has been discrimination, and in the claimant's case the clear evidence before the Tribunal was that employees on a zero hours contract were not treated particularly well with regards to the flexibility that comes with such a contract, as clarified by Mr Smith.

132. With reference to the claimant's claim 2.4 of harassment in email correspondence, changing shifts and making alternations the required availability to work alleging unwanted conduct relating to her disability or race that the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for her, the Tribunal found there was no

satisfactory evidence to this effect. It is undisputed the claimant sought alterations to her shift and working hours; the factual matrix set out above relates the history.

133. The EHRC Employment Code notes that unwanted conduct can include ‘a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person’s surroundings or other physical behaviour’ — para 7.7. The conduct may be blatant — (for example, overt bullying) — or more subtle (for example, ignoring or marginalising an employee). An omission or failure to act can constitute unwanted conduct as well as positive action i.e. a failure to deal with an employees request for a reduction in hours over a lengthy period of time. The unwanted conduct can arise from a series of events i.e. a series of rejections for changes to an employees working pattern.

134. The EAT in the well-known case of Thomas Sanderson Blinds Ltd v English EAT 0316/10 pointed out that "unwanted conduct" means conduct that is unwanted by the employee. The necessary implication is that whether conduct is ‘unwanted’ should largely be assessed subjectively, i.e. from the employee’s point of view. The Tribunal accepted the claimant sought an adjustment of her working pattern to which she believed she was entitled under the zero hours contract, and the respondent’s failure to deal with this by granting her the request to work a different shift pattern and/or reduction in hours was unwanted.

135. The claimant was clearly unhappy at work by the way she had been treated and ultimately this led to her seeking alternative employment and resigning after she had made numerous requests over a long period of time for changes to her shift pattern. Taking into account the claimant’s perception and all of the circumstances of the case the Tribunal found objectively it was not reasonable for the conduct to have the effect of violating the claimant’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for her. She had made it clear to managers her working pattern was causing her distress, using strong words such as “the long days are taking a toll on my health “(27 February 2015) “I would like to cut my hours down as it is getting too much for me” (20 March 2015), “I’m absolutely burnt out” (to Tina Taylor 28 July 2015), “It is now eight weeks since I asked about changing my hours. It is too much for me…” (to Tina Taylor 14 October 2015) “I have asked on a number of occasions to stop this split shift patters…it is too much and affects my health. I am constantly being told there was a shortage of staff…” (Tina Taylor 21 December 2015) and “I am struggling with the split shift that I have now been doing for a year…starting to affect my health” (to Tina Taylor 21 December 2015). However, in her appraisals the claimant expressed how she was “really loving my job” during the period when requests were being made for reduction in hours/shifts which does not suggest an employee working in an intimidating, hostile, degrading, humiliating or offensive environment. Further, the communications between the claimant and Tina Taylor are neither offensive, intimidating or hostile, they were friendly and amicable in style, the claimant being referrer to as “Hon.”

136. Conduct that is intended to have that effect will be unlawful even if it does not in fact have that effect, and conduct that in fact does have that effect will be unlawful even if that was not the intention. A claim brought on the basis that the unwanted conduct had the purpose of violating the employee’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment involves an examination of the perpetrator’s intentions. The respondent’s view was that the

claimant's request created operational difficulties and it was refused on this basis alone.

137. Context is important, and had the Tribunal found the conduct had violated the claimant's dignity and created an intimidating, hostile, degrading, humiliating or offensive environment for her, which it did not find considering the evidence objectively, the Tribunal would have conclude Tina Taylor was not motivated by the claimant's race or disability, her sole purpose was to ensure sufficient cover was provided by staff, including the claimant, in circumstances where staff retention was problematic for the respondent.

138. In conclusion, the claimant has not established on the balance of probabilities she was subjected to harassment and her claim brought under S.26 of the EqA is dismissed.

Claim 2.5

139. With reference to the post employment claims, which were lodged within the statutory time limit the Tribunal found in relation to claim 2.5 the respondent had taken no action in respect of a formal grievance. In not doing so, it had not treated the claimant less favourably than the respondent treated or would treat a hypothetical comparator.

140. The claimant raised a grievance in August 2016 after her employment had terminated, which the respondent refused to hear on the basis that she was no longer an employee. The claimant pursues claims of race and disability direct discrimination in respect of a grievance procedure that applies to "all employees." The claimant was not an employee, and the Tribunal accepted the evidence of Tina Taylor and Anthony Smith that the respondent did not accept post termination grievances. The claimant adduced no evidence whatsoever that post termination grievances took place and she had not discharged the burden of proving in refusing to hear a post termination grievance she was treated less favourably than a hypothetical comparator.

141. The claimant has not adduced any prima facie evidence from which it can be inferred direct discrimination took place, and the burden of proof has not shifted to the respondent. If the Tribunal are wrong, and the burden has shifted, the Tribunal finds that the respondent's policy of applying a grievance procedure to employees only, and not to ex-employees such as the claimant, was not tainted by discrimination. The fact the claimant made no reference in her grievance letter to allege race discrimination as submitted on behalf of the respondent, is a factor that has been taken into account by the Tribunal; it is not determinative and the Tribunal took the view, on balance, that the factual matrix surrounding the grievance procedure far outweighed the claimant's failure to mention its discriminatory effect.

Claim 2.6

142. With reference to the final issue relating to claim 2.6, namely, had the claimant established the detrimental action relied upon, being a negative reference, the Tribunal found that she had and the respondent treated the claimant less favourably than the respondent treated or would treat a hypothetical comparator who was not German. In arriving at this decision the Tribunal took into account the stark

difference between the first reference, the reality of the claimant's good performance and her excellent relationship with clients, the contents of the second reference compiled by Sharon Lindley after the threat of legal action and the explanation she gave for the differences as set out in the email sent at 12:50 21 June 2016. Her responses are not satisfactory, and nor can they be said to be untainted by race discrimination. It is notable that once she had received the solicitor's letter Sharon Lindley produced a positive reference, almost as if it concerned a different person. The references are starkly dissimilar, and yet despite the changes she still confirmed the claimant would not be re-employed by the respondent, which made no sense given the positive comments made in the amended reference.

143. Direct discrimination is more often than not hidden. The observation of Lord Browne-Wilkinson referenced the special problems of proof cited above is relevant in respect of the damaging reference and the amended reference. In respect of the references only, the Tribunal found Mrs Rogers had proven facts from which the Tribunal could infer that there was a prima facie case of direct race discrimination. The burden of proof shifted to the respondent, and the Tribunal found Sharon Lindley's written explanation was unsatisfactory, and it did not discharge the burden as she not shown the references were not tainted by an act of direct race discrimination.

144. In conclusion, the claimant was disabled by the mental impairment of depression within the meaning set out in section 6 of the Equality Act 2010. The claimant was not unlawfully discriminated against on the ground of her mental impairment, and her claims numbered 2.1. to 2.6 for unlawful direct discrimination brought under section 13 of the Equality Act 2010 are dismissed. The claimant was subject to unlawful direct race discrimination post employment when an untruthful reference was provided, and her claim for unlawful direct race discrimination claim numbered 2.6 brought under section 13 of the Equality Act 2010 is well-founded and adjourned to a remedy hearing. The claimant was not unlawfully discriminated against on the grounds of her race under claim numbered 2.5 brought under section 26 of the Equality Act 2010, and her claim for harassment is not well-founded and is dismissed. There did not exist a course of conduct in respect claims numbered 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6, the direct discrimination claims relating to the claimant's suspension on 30 July 2015; her disciplinary on 7 August 2015; the disciplinary warning given on 7 August 2015 and appeal made in the claimant's favour, proceedings having been issued 4 October 2016. It is not just and equitable to extend the statutory three month time limit and the Tribunal does not have the jurisdiction to consider the claimant's complaints. Complaints numbered 2.1, 2.2, 2.3 and 2.4 brought under S.13 of the Equality Act 2010 which are dismissed.

145. The case is listed for a remedy hearing to be heard at **Liverpool Employment Tribunal, 3rd Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L2 2BX** on **18 June 2018** starting at **10.00am** with an estimated length of hearing of three hours.

CASE MANAGEMENT ORDERS

146. To assist the parties prepare for the remedy hearing the following case management orders are made:

1. The claimant will send to the respondent an up-to-date schedule of loss that will include the amount of injury to feelings she is claiming no later than 26 March 2018.The claimant may wish to consider information set out in the Employment Tribunal website and other websites concerning injury to feelings awards and the Vento band.

2. The claimant will send to the respondent a witness statement and documentary details of new employment obtained after she had resigned including the offer letter and the employment offered and withdrawn as a result of the reference, no later than 26 March 2018.

3. The respondent will send to the claimant a counter-schedule of loss no later than 16 April 2018. It may, if so advised, also provide a witness statement dealing with remedy issues.

4. A bundle incorporating all of the relevant documents relating to remedy (including schedule and counter-schedule of loss) will be prepared by the respondent, who will lodge the bundle and witness statements(s) on the day of the hearing at 9.30am.

12.3.18

Employment Judge Shotter

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

21 March 2018

FOR THE TRIBUNAL OFFICE