EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms D Richardson	**v**	**B & Q PLC**

HELD AT **London South** **ON 4, 5, 6 December 2017**

BEFORE Employment Judge Gillian Phillips
Members: **Ms BC Leverton**
Mr P Mills

Appearances
For Claimant: In person
For Respondent: Mr D Piddington, Counsel

FULL MERITS HEARING JUDGMENT

It is the unanimous decision of the Tribunal that the Claimant's claims of disability, race and age discrimination did not succeed.

REASONS

1. The Claimant, by her IT1 dated 22 August 2016, brings claims of disability, race and age discrimination. Although she initially sought to bring a wide number of individual claims of disability, race and age discrimination, plus claims for unfair dismissal and breach of contract, the vast majority of those claims were found to have been made out of time and, apart from the two claims set out at paragraph 2 below, were dismissed at the Preliminary Hearing on 9, and 10 May 2017 by Employment Judge K Andrews. In addition, although the Respondent accepted that the Claimant's lupus was a disability, there remained a live issue as to whether any of the other physical and mental impairments that the Claimant suffered from also amount to disabilities.

2. The two claims that remained for determination by the full Tribunal at the Full Merits Hearing were [50]:

1. Whether the Respondent's delay in sending the Claimant an SSP1 form was disability discrimination on the grounds that there was a failure to make reasonable adjustments under s 39(5) Equality Act 2010 and / or harassment on the grounds of disability under s 40(1)(a) Equality Act;
2. Whether (i) the error in the date of the letter setting out the outcome of the Respondent's investigation into the Claimant's September 2015 grievance (18 March 2016) was a deliberate fabrication or backdating; and / or was motivated or tainted by disability, race or age discrimination; and (ii) the Respondent's investigation of the Claimant's September 2015 grievance was motivated or tainted by disability, race or age discrimination under s 39(2)(b) Equality Act.

Procedural history

3. The Employment Tribunal received the ET1 on 22 August 2016. The case was initially listed at the Bristol Employment Tribunal. On 6 September, the Bristol Employment Tribunal made an Order of its own volition under Rule 31 of the Employment Tribunal Rules of Procedure 2013, for the Claimant to provide further details of her claims. These were provided in a letter dated 11 October. The ET3 was served on 26 October 2016. A Preliminary Hearing was held at Bristol on 16 November before EJ Parkin. That hearing identified a number of physical and mental incapacities suffered by the Claimant. It also identified that the Claimant was of West Indian (St Vincent) ethnic origin and contended that she had been subject to racial harassment since 2004 by people of African origin, which had not been stopped by management. She also contended that she had been discriminated against on the grounds of her age, because the Respondent's employees made suggestions that she should retire early. The Claimant was ordered to provide full details of each act of discrimination or harassment that she relied upon on or before 14 December. The Respondent contended that many claims were out of time, and that a COT3 Agreement had settled some in 2007.

4. The case was moved from the Bristol Employment Tribunal to London South.

5. On 14 December 2016, the Claimant served a detailed schedule of additional information, listing 53 alleged acts of discrimination. The Respondent served an amended ET3 in response to this. On 3 March 2017, a further Preliminary Hearing took place before EJ Andrews. At this hearing, in addition to clarifying further the nature of the discrimination claims, the Claimant listed 6 physical and mental capacities that she relied on for her disability discrimination claim. The Tribunal listed the case for a 2 day Preliminary Hearing in May to determine whether any of the discrimination claims identified by the Claimant in her additional information along with the unfair dismissal claim were out of time.

6. At the Preliminary Hearing on 9 and 10 May before EJ Andrews, the claim of unfair dismissal was determined to have been submitted out of time and was dismissed. Claims 3 to 53 from the claims listed in the additional information submitted on 14 December were also determined to have been submitted out of time and were dismissed. The two claims referenced at paragraph 2 above remained to be determined. As far as the second of those claims was concerned, EJ Andrews made clear that the scope of the matters left to be determined by the Tribunal

related to the investigation process on the grievance and not the underlying events that were the subjects of the grievance. The live matters for this Tribunal to determine at the Full Merits Hearing were therefore the two claims set out at paragraph 2 above and whether, in addition to the disability of lupus, any of the other impairments listed by the Claimant also amounted to a disability within the meaning of the Equality Act.

Evidence

7. Both parties had submitted witness statements – the Claimant had provided a statement running to some 187 pages and consisting of over 750 paragraphs, although a considerable proportion of this related to the reproduction of her September 2015 grievance. The Respondent submitted witness statements from Adam Whitehouse, (at the relevant time, the manager of the Roneo Corner store, who carried out the investigation into the matters raised by the Claimant's grievance); Ayanna Palmer (at the relevant time a Human Resources Administrator with the Respondent); and Natalie Bertelsen-Macey (a Payroll Manager with the Respondent).

8. Each individual who had provided a witness statement gave oral evidence, and was available for cross-examination. Their witness statements were taken as their evidence in chief. The Tribunal panel also had the opportunity to ask questions of their own of each witness.

9. In addition, the Tribunal had before them two volumes of documents (the Bundle) prepared by the Respondent based on both parties' discovery. Where relevant, references to documents in the Bundle in this Judgment will be referred to by their page number as [xx]. During the hearing the Claimant also provided various additional documents, which had not made it into the Bundle. These mainly related to sick notes, but also included some letters and pieces of correspondence between the Claimant and the Respondent. The Respondent also produced, at the Tribunal's request, copies of the Claimant's pay slips between September 2015 and March 2016. Where relevant these are also referred to below.

10. Additionally, the Respondent provided, at the Tribunal's request, a Chronology and a Note summarising references to specific medical issues in the Bundle.

11. The Tribunal considered all the evidence before it, both written and oral, in reaching its decision.

Factual background

12. The Claimant started work as a customer assistant, mainly working on the tills, at the Respondent's Purley Way branch, in April 2000. In April 2001, she transferred to the Respondent's West Norwood branch, which was closer to her home, where she remained in employment until her eventual dismissal on 31 March 2016. The Claimant's dismissal arose out of a Pay and Reward review conducted by the Respondent across the whole of its business. Staff were asked to agree to new terms and conditions. The Claimant, who was signed off as not fit to work at the relevant time, did not agree to the changes and was dismissed for some other

substantial reason. The dismissal and the circumstances of it did not form part of the two claims we heard.

13. There are three particular background matters that we should mention.

The Claimant's relationship with her colleagues

14. The Claimant was considered by colleagues and management generally to be a good employee and colleague. Both Mr Whitehouse and Ms Palmer in their evidence were complimentary about the Claimant, who we were told was a good and reliable member of staff and there were no criticisms or concerns about her work. For example, in a petition signed by 15 members of the West Norwood staff in January 2011, (which was not in the documents bundle but was produced by the Claimant during the Hearing) it was recorded that "Daphne .. has been an asset to our store … has always been a solid, reliable member of staff and we feel that to lose her would be of no benefit to our store". However, as also reflected in that petition, the Claimant had a difficult relationship with some of her colleagues, which seems to have lasted for a long part of her employment. The petition referred to above, opens by referring to an "incident between two members of our team". This reflects the fact that the Claimant had a particularly fraught relationship with one female colleague, which she put down, in part at least, to racial differences between them, in that the colleague was a black African, whereas she was of West Indian origins. Other colleagues acknowledged the troubled nature of this relationship, although they found it difficult to allocate blame, as to whom, if any one of the two, was responsible. The evidence before us was that both had been subjected to at least one disciplinary proceeding arising from their relationship.

15. The Claimant in her evidence to us also alleged that, on occasions, colleagues ganged up against her and harassed and bullied her. She said she was the subject of verbal abuse and physical intimidation. The Claimant lays blame at the Respondent's door for what she said was their failure to prevent what she maintained was systematic and continued bullying and harassment of her by other staff. Many of these matters were included in the Claimant's September 2015 grievance, the investigation of which does form part of the matters we heard, but the contents of which do not. Many of these matters were also included as part of the further information supplied by the Claimant to the Tribunal and the Respondent in December 2016, most of which were struck out by EJ Andrews at the Preliminary Hearing in May 2017 as being out of time. None of these matters themselves however constitute anything other than background to the matters this Tribunal had to decide, (the relevant time frame for those purposes is September 2015 to April 2016). They were not matters therefore the Respondent had any direct opportunity to challenge. They are disputed by the Respondent. We did not find it necessary to explore these matters in any detail, as they were not material to the matters we had to determine. Mr Piddington made clear that these allegations were all disputed and denied.

The Claimant's health

16. The Claimant has the misfortune to suffer from a number of physical ailments and incapacities which meant she often worked in pain and which resulted in a lot of times when she was unable to work and was signed off sick. The most debilitating and persistent condition that the Claimant suffered from was lupus. The Claimant's evidence [orally and see too, 96, 174], was that lupus is an auto-immune disorder the symptoms of which can include skin rash and irritation, hair loss, joint pain especially in fingers and toes, and fatigue. Depression and stress are also associated with lupus. This condition was first noted in a Fit Note produced by the Claimant in October 2005 [456]. A letter from a doctor in March 2009 recorded that she had been "diagnosed with discoid lupus in 2006" [478]. From the Claimant's medical history, it was apparent that the lupus was episodic and could flare up at any time. The Claimant said it was exacerbated by stress at work caused by colleagues and management. There was no specific evidence to support that contention. On the basis of the available evidence, including occupational health reports and letters from a lupus clinic the Claimant attended, the Respondent accepted that the Claimant's lupus amounted to a disability at all material times, namely that the Claimant's lupus is a long-term condition which would be capable of having substantial adverse effects on normal day-to-day activities.

17. Despite a number of medical referrals and references to the lupus in occupational health reports and FitNotes, it was not apparent to the Tribunal that at any time the Respondent had sat down with the Claimant and addressed her lupus directly with her or considered whether anything, and if so what, could be done within her work environment to help her or whether any sort of reasonable adjustments might have been appropriate. The Claimant made no suggestions about this. Ms Palmer's evidence was that after she joined the Respondent (July 2014) she became aware of the lupus when she received the HML OH report of April 2015 [174-6], which mentioned lupus and said that "the terms of the Equality Act 2010 are likely to apply". She said she had made it her business to investigate this and spoke to OH in order to make herself aware of what lupus was and how it manifested itself. She said that from this point onwards, the business treated the Claimant as if she were disabled. She said she would have discussed the lupus with the Claimant, but the Claimant was off sick at the time and never returned to work, so the opportunity did not arise. A further OH examination was undertaken in September [234-236], which indicated that the Claimant was likely to be covered by disability legislation.

18. The Claimant's ill health, particularly but not exclusively the lupus, meant that she experienced long periods when she was unable to work and was signed off as not fit to work. From 24 March 2015 until her dismissal on 31 March 2016, the Claimant was signed off sick.

<u>The Claimant's perception of her contractual situation</u>

19. The Claimant started her employment with the Respondent in 2000. She said that she had been employed on the same contractual terms and conditions throughout (there was a suggestion of at least one new contract, in 2007, after a previous dispute was settled). Before the Tribunal, the Respondent's evidence was that the Claimant's terms and conditions were governed by a July 2014 Handbook [105],

which was available on the "intracom" (an online electronic employment resource of all relevant contractual and non contractual documents and policies). Ms Palmer's evidence was that that Handbook provided all the current terms and conditions and had implemented changes that applied to everyone, and that everyone was allocated time to access the intranet for changes and updates. The Handbook also included disciplinary and grievance policies and the Respondent's Equal Opportunities and Anti-harassment and Bullying policy [136]. Ms Palmer's evidence was that the Claimant was employed on salary level 5, (although confusingly there was a letter referring to the Pay and Rewards review which could have been taken as suggesting the Claimant was on level 4 [422]) which was the highest level for a customer assistant. The Claimant said she had never been told that her terms and conditions had been changed, and she maintained that her contractual situation was governed by a much older set of terms and conditions – possibly dating back to 2001 – she also referred to a 2005 Handbook. She referred during her oral evidence for example to the fact that she was the only member of staff left on the "old" terms and conditions, and said she had never seen the 2014 Handbook until after her dismissal when it had been sent to her. This became a source of contention in March 2015, when the Respondent wanted to conduct an appraisal with the Claimant, and the Claimant refused to sign her appraisal documents, and subsequently in early 2016, when the Respondent was looking to implement its Pay And Rewards Review across the business.

Factual matters pertaining to the claims

20. In March 2015, the Respondent wanted to hold an appraisal with the Claimant. The Claimant was anxious as to whether this would impact on her pay. She asked questions about this and became anxious when these were not answered to her satisfaction. Following a meeting to discuss the appraisal, she suffered what has been described as a "panic attack", which resulted in an ambulance being called. The Claimant was sent to hospital and was subsequently signed off sick from 24th March and, other than for some meetings, never returned to work.

21. An SSP1 is a form an employer sends an employee whose entitlement to statutory sick pay (SSP) has come to an end. The employee can then use it to prove to the Department for Work and Pensions that they are no longer receiving any income and can therefore use it to support a claim for benefits. Where appropriate, the Respondent's central payroll team sends out SSP1 forms. On 5 September 2015, [227-8] Ms Palmer wrote to the Claimant to inform her that she had received 23 weeks of SSP and so would shortly exceed the 26 week period of absence in respect of which the Respondent paid SSP (the Claimant maintains that the "old" terms and conditions she was employed on provided for 28 weeks of contractual sick pay, but there was no evidence presented to us to prove that contention) and that accordingly, with effect from 20 September, her Statutory Sick Pay would cease. Unfortunately, that letter refers to 19 August when it should have referred to 19 September, so its import may not have been as clear as was intended.

22. We were told by Ms Natalie Bertelsen-Macey (a Payroll Manager with the Respondent), that in the normal course of events, "hitting" the 23 week time limit would trigger a reminder on the internal Payroll system that a Form SSP1 needed to be sent out (to allow the person off sick to claim their SSP) unless the person

was due, or had returned, to work. In this instance however, no SSP1 was sent out. For various reasons (payment rectification from previous months, tax credits, bonus payments) this situation did not manifest itself in the Claimant's pay until March 2016, when her pay slip was blank and no money of any description was paid into her bank account. Although a close examination of each month's payslip over this period might have caused the Claimant to realise that her contractual company sick pay had ceased, the payslips were complicated by various payment rectifications and tax credits, such that it was not easy to spot what was happening, until March, when the payslip was blank and she received no pay.

23. This triggered the Claimant to telephone and write to Ms Palmer to ask why her payslip was blank. On 4 March 2016, Ms Palmer emailed a internal generic pay help email address to ask what had happened to the Claimant's SSP1 [425-426]. The inquiry was picked up by the payroll team who, on checking their system, discovered that their records showed that the Claimant had returned to work on 25 September. Ms Palmer confirmed to payroll that that state of affairs was incorrect, whereupon an SSP1 was sent out in the post on 7 March [423-424]. Ms Palmer wrote to the Claimant on 8 March, apologised for the delay, explained it was an error on the system and that a SSP1 had now been sent out [422].

24. On 24 September 2015, the Claimant prepared and submitted a long grievance, covering many of the matters referenced at paragraph 14 and 15 above [245-321]. The Claimant was signed off sick at the time she presented this. The grievance ran to some 77 pages and covered a time scale going back to the early 2000s.

25. The grievance was referred, in early October, to a manager from another store, Adam Whitehouse, who had no prior knowledge of the Claimant and was therefore regarded as an independent assessor. Mr Whitehouse was the manager at the Respondent's Roneo Corner store in Romford, Essex. Mr Whitehouse was assisted by an HR Administrator from his store. He reviewed the grievance and noted what he regarded as the key areas of the complaints, including that a number of them related to being asked to complete appraisal forms [275-280, 297-303, 307-309, 311-312], which the Claimant felt were an attempt to change her contractual terms. He made a number of inquiries. He said he did his best to investigate the matters raised by the Claimant, although as some went back a long time, he was not always able to speak to relevant staff. He met with the Claimant on two occasions (25 November 2015 and 11 February 2016) to discuss her case [337,342-357, 381-388]. On both occasions, her sister accompanied her. (The Claimant said on at least one occasion when she attended a meeting she was greeted with hostility by other staff members). At the end of the first meeting, the Claimant confirmed she was happy with how Mr Whitehouse had conducted it [357]. He also obtained all the Claimant's personnel files as well as those relating to the member of staff that she did not get on with, who he met and interviewed in early February 2016. The Claimant maintains she should have been shown the interview with this member of staff and been given the chance to challenge it.

26. On 15 January 2016, [366] Mr Whitehouse wrote to the Claimant and updated her on progress and looked to schedule a further meeting in February. Mr. Whitehouse further interviewed, in early February, a number of current members of staff who were based at the West Norwood store [389-402].

27. At the meeting with the Claimant on 11 February, [381-388], Mr Whitehouse updated the Claimant about the progress of his investigation. He said that it was clear that the Claimant was a valued member of staff and he wanted to try and focus on how to get her back to work. In particular, Mr Whitehouse suggested that there should be mediation between the Claimant and the member of staff who she did not get on with [384]. He also tried to reassure her about the appraisal system, as it appeared to him that she did not understand its purpose or intent. The meeting concluded with Mr Whitehouse saying his investigation was continuing but with the emphasis on the mediation.

28. Mr Whitehouse interviewed some further ex-West Norwood members of staff [409-416].

29. On 12 March, the Claimant wrote to Mr Whitehouse and said she was willing to try mediation [428], as long as it was by an independent mediator. She suggested the grievance be put on hold. At the same time the Claimant sent in a subject access request, which Mr Whitehouse passed on to the Respondent's legal team to deal with.

30. Mr. Whitehouse's investigation overlapped with the Respondent's Pay and Rewards review, which was taking place in early 2016 across the whole of its business. The Respondent believed that its pay and rewards system was over complicated, lacked transparency and had inconsistencies within it. It also needed to review it in the light of the national living wage legislation which was due to become effective on 1 April 2016. A new structure was proposed, which included reducing the existing 5 levels of Customer Adviser to one level, having a consistent rate of pay, replacing geographical allowances, standardising bank holiday pay and removing the Summer and Winter bonus schemes. The Claimant, who was a beneficiary of the Summer and Winter bonus scheme, and was on the highest CA level, felt that the changes being proposed were aimed at cutting her pay. (The Respondent's evidence was that her hourly rate of pay would not have been affected). Further, a one-off buy out fee was offered in respect of the loss of the Summer/Winter bonus. The evidence was [see for example, Ms. Palmer at §25, 26, ET3 paras 11-16, [72-3]] this was an across the board set of changes to all employees' pay and conditions. Staff were asked whether they would sign a new contract. Those who did not, including the Claimant, were dismissed and offered re-enagement on the new terms. The Claimant did not accept the offer of re-engagement. The decision to dismiss was upheld on appeal.

31. The proposed mediation did not take place. It was not clear whether it was overtaken by the Claimant's dismissal but there was no evidence that it had been pursued by the Respondent by the time of her dismissal. Mr. Whitehouse continued to investigate and met with another member of staff on 1 April 2016 [444-441]. His evidence [§ 47] was that by this time the Claimant had been dismissed, and mediation had lost its relevance. Mr. Whitehouse therefore decided to confirm his findings on the grievance in writing. His evidence, supported by a call log [449], is that the letter containing his findings was finalised on 5 April 2016, when he says he would have signed it. Mr Whitehouse left the Respondent's employment at the end of April 2016, and says he had definitely signed the letter

before he left. As far as he was aware the letter was then sent out. However, this does not appear to be the case. There is a letter, signed by Mr. Whitehouse, which sets out his findings on the Claimant's dismissal, but it is dated 18 March 2016 [432-4]. Although the letter says it was sent by Recorded Delivery, the Claimant said, and this has not been disputed, that she did not receive it until she was sent documents in June in response to her subject access request. It is this clearly erroneous date that has led the Claimant, understandably, to challenge when the letter was written and to question what the motivation was for sending it to her so late.

32. The letter dated 18 March says that Mr Whitehouse is 'writing to confirm his findings". It sets these out under a number of headings, including the specific bullying and harassment claim made against the other member of staff. It acknowledges that this relationship had become fractious, but says no-one had confirmed or substantiated any of the allegations. It confirms that following an incident in 2009, disciplinary action was taken against both parties. It responds to a number of the matters that the Claimant raised in her grievance. It also sets out that a number of individuals had been seen and spoken to by Mr Whitehouse. It explained the purpose of the appraisal process. The letter ends with a sentence that says "As I am aware that you have now left the business as a result of the Pay and Reward changes, I am unable to implement any recommendations that I had to support your return to work and help rebuild your relationship with [X], which would have included mediation. I would wish you well for the future".

33. With effect from 31 March, the Claimant having not agreed to the proposed changes to her terms and conditions, was dismissed on the grounds of "some other substantial reason". The vast majority of the Respondent's workforce signed the new contracts. The Claimant was the only member of staff at West Norwood who had not signed the new terms and conditions [448]. She was offered re-engagement on the new terms but declined. Her appeal against her dismissal was unsuccessful.

Submissions

34. Both Ms Richardson and Mr Piddington made short oral submissions. Ms Richardson emphasized her position, which was that on occasions throughout her employment at B & Q she had been harassed and bullied by her colleagues and was the subject of verbal abuse and physical intimidation. She laid blame for this at the Respondent's door, for what she said was their failure to prevent what she maintained was systematic and continued bullying and harassment of her by other staff, and which she said was responsible for her poor health.

35. Mr Piddington said by way of general opening that (i) while no distress was intended to the Claimant by his remarks, many of the matters raised by the Claimant were not relevant, were historic and had not been subjected to any evidential testing; (ii) it was an unfortunate coincidence of timing, but nothing more, that the Pay and Rewards review overlapped with the investigation of the Claimant's grievance; and (iii) even if there were additional disabilities beyond the lupus, nothing turned on this given the way the Claimant had put her case, but in

any event the Respondent's position was that none of the other matters put forward by the Claimant met the statutory test of disability.

36. As far as the two matters that the tribunal had to determine were concerned, Mr Piddington submitted that the tribunal had evidence from two witnesses about the SSP1 situation. Moreover the SSP1 form had been sent out very quickly once the problem became apparent. Further, there was no obvious "provision, criterion or practice" here. The closest analogy is as in *Nottingham City Council v Harvey*, where the court said a one off act could not be a PCP: this aspect of the SSP1 complaint must, he said, fail. Alternatively, it could be asked was the Claimant at a disadvantage when compared to a non-disabled employee? There was, Mr Piddington said, no evidence of this. Any employee in this situation would have been caught in the same way as the Claimant. Finally, what happened could not have been anticipated, so there was no opportunity to consider or make adjustments, nor were any adjustments available. Therefore, he said, this allegation does not meet the requirements of the reasonable adjustment test. Further, in terms of the allegation of harassment, there was no "unwanted conduct" which could be said to be related to any of the protected characteristics raised. There was no evidence of any purpose or intent to violate the Claimant's dignity or indeed of any such effect having occurred.

37. As far as the second matter was concerned, Mr Piddington said that the Claimant's case was inconsistent: was she saying the letter was fabricated on 18 March or was she saying it was predicting her dismissal? She couldn't have it both ways. Further, the Claimant was wrong to say the grievance had not been concluded: there was clearly a resolution and an outcome. Whatever date the letter was sent and received, the grievance had been determined by Mr Whitehouse and the letter provided the outcome. Further, there is independent documentary evidence to support the fact that the letter was incorrectly dated 18 March and should have been dated in early April. In any event, to amount to discrimination, the tribunal would have to conclude that the letter was not posted to the Claimant *because of* one of the protected characteristics relied upon. As far as as the failure to provide documents to the Claimant was concerned, Mr Whitehouse said he had provided an explanation. Even if there had been a company policy of providing such statements, there was a very tricky factual background in this case, and there were many practical benefits of not disclosing such specific material to the Claimant. In any event, there was no evidence that the decision not to disclose amounted to less favourable treatment or was motivated because of any protected characteristic. Mr Whitehouse was very clear here that no protected characteristic impacted on his decision. He was very proud of the Respondent's record on diversity. His whole approach was to get the Claimant back to work, therefore Mr Piddington submitted, his actions did not amount to less favourable treatment. Finally, Mr Whitehouse had dealt with the grievance as a whole as fairly and well as he could, bearing in mind the breadth and length of the allegations made.

Law

38. The Equality Act 2010 prohibits discrimination against people with the protected characteristics that are specified in section 4 of the Act. Disability (s 6), age (s 5) and race (s 9) are amongst the specified protected characteristics. Many of the

characteristics of prohibited conduct, including direct and indirect discrimination, harassment and victimisation are common to all the protected characteristics, although age and disability discrimination follow slightly different regimes.

39. Age is defined in section 5 of the Act, and refers to persons belonging to a particular age group. Race is defined in section 9 to include colour, nationality and ethnic or national origins. Section 13 of the Equality Act deals with direct discrimination. It states that a person discriminates against another if, because of a protected characteristic, they treat them less favourably than they would treat others. Section 27 of the Equality Act defines victimisation and states that a person victimises another person if they subject them to a detriment because that person does a protected act or is believed to have done a protected act. Protected acts include making discrimination allegations or bringing proceedings under the Equality Act. Section 39 of the Act makes it unlawful for an employer to discriminate against or victimise employees. It applies in respect of anything done in the course of a person's employment. It also imposes the reasonable adjustments duty set out in section 20 of the Act on employers in respect of disabled employees. Section 40 of the Act provides that an employer must not harass its employees.

40. The Equality Act 2010 generally defines a disabled person as a person with a disability. A person has a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities (s 6). This means that, in general:

    i. the person must have an impairment that is either physical or mental;
    ii. the impairment must have adverse effects which are substantial (which is an effect that is more than minor or trivial (s 212(1));
    iii. the substantial adverse effects must be long term; and
    iv. the long-term substantial adverse effects must be effects on normal day-to-day activities.

41. These are four different and cumulative conditions. There is no definition in the Equality Act of either physical or mental impairment. Substantial means more than minor or trivial. The Office for Disability Issues has issued non-binding "Guidance on matters to be taken into account in determining questions relating to the definition of disability". This guidance has been issued under section 6(5) Equality Act 2010. Sch 1, para 12 of the Equality Act requires that a tribunal, which is determining whether a person is a disabled person, must take into account any aspect of the Guidance which appears to be relevant. The Guidance provides that the cumulative effect of more than one impairment should be taken into account when determining whether an effect is substantial (para B6) and long term (para C2). There is a non-exhaustive list of potential day-to-day activities in the Equality and Human Rights Commission Code of Practice on Employment, Appendix 1. These include mobility; manual dexterity; ability to lift, carry or otherwise move everyday objects; memory or ability to concentrate.

42. Sch.1, para. 2(1) of the Equality Act states that the effect of an impairment is long-term if-

(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

43. The EAT in *Cruickshank v VAW Motorcast Ltd* [2002] IRLR 24, held that a tribunal must assess, on the basis of the evidence available at that time, whether the claimant had a disability at the time of the allegedly discriminatory act, rather than at the time of the hearing.

44. Sections 20 and 21 of the Act relate to the duty to make reasonable adjustments and provide that an employer discriminates against a disabled person, where a provision, criterion or practice of theirs puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, and fails to take such steps as it is reasonable to have to take to avoid the disadvantage.

45. In *Nottingham City Transport Limited v Harvey* UKEAT 0032/12, it was held that a one-off disciplinary procedure was not a "provision, criterion or practice" ("PCP") for the purposes of the definition of harassment in section 26 Equality Act. In that case, the employee, who had depression that amounted to a disability, complained that the employer had failed to make reasonable adjustments to its disciplinary process, to accommodate his disability. The employment tribunal upheld the claim, finding that the employer had a practice of not investigating cases properly or considering mitigating circumstances. The employer appealed. The EAT said that the employment tribunal had wrongly identified the PCP as the employer's disciplinary procedures. It was conceded in the appeal that there was no evidence that it was the employer's practice to ignore mitigation or to fail to carry out a reasonable investigation. The tribunal had therefore wrongly identified the "practice" and had not addressed the relevant questions in *Environment Agency v Rowan* [2008] ICR 218. Langstaff J stated that a one-off application of the Respondent's disciplinary process could not, in the circumstances of the case, reasonably be regarded as a practice; there would have to be evidence of some more general repetition.

Conclusion

46. The matters set out at paragraphs 14 and 15 above were a defining and repetitive part of the Claimant's evidence and narrative during this hearing. We did not doubt the sincerity of the Claimant's evidence to us, or the fact that her physical and mental ailments had caused her considerable pain, suffering and distress over the years. The evidence that we were presented with was by its nature limited and restricted to the matters within the time period that we had to determine. Nonetheless, we did feel that the Claimant's continuing relationship with and sense of the events of the past had created within her such a strong sense of isolation and disappointment, that she had lost her sense of perspective and had, unfairly in our judgment, influenced her assessment of the matters that are the subject of this hearing.

Disabilities

47. The Claimant submitted that a number of the other ailments and incapacities she suffered from were also disabilities for the purposes of the Equality Act. These included back pain, alopecia, angina, arthritis and gallstones.

48. The way the Claimant put her case was by way of a generic allegation that she was mistreated because she was disabled in a general sense. She made no allegation that the Respondent's actions were motivated by any particular ailment, incapacity or condition. Given the Respondent's acceptance that her lupus met the statutory definition at the relevant time, it was not clear that we in fact needed to make findings on whether these other matters were also, separately, covered by the statutory definition of disability; nonetheless given that the Claimant said they were all disabilities, we did go on to consider whether these other matters met the statutory definition of disability. The Claimant did not herself present any specific evidence about these matters, and the evidence we had consisted of various FitNotes, OH reports and medical and GPs notes.

49. It is not possible to simply list a range of conditions, eg arthritis, diabetes, depression, back impairment, and to say these will always be covered. Each case will depend on the effects of the impairment and their severity. Every individual experiences his/her disability very differently. Some people will experience little effect on their day-to- day activities and will manage at work quite easily. Others will have severe effects. To gain the protection of the Equality Act, a worker must prove s/he meets the legal definition of disability in the Act, so the burden of proving that she was a disabled person in regards other than the lupus lies on the Claimant.

50. The alopecia appeared to us to be part of the symptoms of the lupus. We make no other findings about it.

51. Lower back disk bulge. There was considerable evidence that the Claimant suffered from back pain. She said this was exacerbated by (1) an occasion in the 2003 when she said a manager removed her chair when at the till, forcing her to stand for long hours; and (2) when the main store entrance door was left open in early 2015, causing the chill to penetrate into her back. Issues with back pain were identified as early as August 2004 in FitNotes produced by the Claimant at the hearing, (it was not clear whether these Fit Notes had been provided to the Respondent at the time). There were a number of other instances in her Fit Notes and other medical notes (see for example [463] February 2007; [493] letter September 2010; [567] January 2105). The medical records of the back pain suggest it was sporadic. There were further FitNotes from September 2016 [624, 630, 633] referring to back pain, but these post date the relevant period of the matters that we are to determine, and relate to a period when the Claimant was no longer employed by the Respondent. It was suggested in a letter of November 2016 [630] that the Claimant's spine pain had "persisted for many years"". Ms Palmer told us that when she started she was told specifically that an adjustment had been made for the Claimant's back problems, such that, unlike other workers when at the till, who stood, she was permitted to have a chair. It was also apparent that the Claimant unlike most customer assistants did not work on the aisles or in the store, as opposed to normally working on the tills. While it appeared to us, on the medical evidence that this was a long-term condition, it did appear to be

sporadic. There was some evidence that it caused pain. Further, the fact that the Respondent felt it necessary to make some adjustments, does evidence that there was some substantial adverse affect on the Claimant's normal day-to-day activities. On balance, we find that the back pain was a disability for the purposes of the statutory definition of disability, although as indicated above, we do not believe anything particular turns on this.

52. As far as the angina is concerned, there was a period between October 2012 and early 2013 [525-556] where the Claimant was experiencing chest pains. She had an angiogram in October 2012 [528] and underwent a procedure on her right radial artery in December 2012 [533-542] and suffered from some post operative complications from this [157, 554]. There was no evidence that this condition was affecting the Claimant at the material time, namely between August 2015 and April 2016. There was no evidence presented to us to enable us to conclude that this was a long-term condition that had a substantial adverse effect on the Claimant's normal day-to-day activities. We did not find that this met the statutory definition of disability.

53. As far as the gallstones are concerned, there are references to the possibility of these in a diagnostic report dated October 2010 [499] and in FitNotes dated August and September 2015 [209, 237]). There does not appear to have been any firm diagnosis of this. The Claimant's evidence was that she was told it was too dangerous to remove these because of her lupus. There was insufficient evidence presented to us to enable us to conclude that this was a long-term condition that would have a substantial adverse effect on the Claimant's normal day-to-day activities. We did not find that this met the statutory definition of disability.

54. Stress can be a mental impairment. The Claimant says in her Disability Impact Statement [96] that she had been stressed by work since 2002 and that this caused itching and hair loss (which we note can also be symptoms of lupus). Stress was first referenced in documents in late 2003, in FitNotes produced by the Claimant at the hearing (it was not clear whether these FitNotes had been provided to the Respondent at the time), and in a FitNote dated July 2006. There was a reference in an Occupational Health Report of August 2010 [150]) to "complains of work related stress in relation to relationship issues with colleagues" and in an Occupational Health Report dated April 2015. There are a number of further references to stress in conjunction with lupus in FitNotes dated between June and August 2015 [189, 193, 196, 209] and other general references to stress (September 2015 [236]; February 2016, [407]; FitNotes dated February and March 2017 [633, 636]). So there was considerable but intermittent evidence of stress over a long period. However, there was a body of evidence suggesting that the Claimant's stress was a symptom of the lupus, rather than being a separate stand-alone impairment. In our judgment, based on the evidence available to us, while stress was diagnosed from time to time over many years, it was an intermittent rather than a long-term condition. In the case of *Henry v Dudley Metropolitan Council* (UKEAT/0100/16) the EAT drew a distinction between a mental impairment, such as clinical depression or anxiety (which could be a disability), and stress caused by adverse life events (including difficulties at work), which will not be a disability without 'something more'. There was no evidence presented to us that the Claimant's stress had a substantial adverse effect on the Claimant's

normal day-to-day activities. On balance, we did not find that the Claimant's stress was covered by the statutory definition of disability.

55. Arthritis. There is a reference to "lower back pain?arthritis" in correspondence in early 2015 [567] and to "osteoarthritis in lower back" in a FitNote dated August 2016 [621]. There were a number of other references to "joint aches and swelling" and also to "lumbar spine pain" [630]. We were not convinced that there was sufficient evidence to support a finding that this was at the relevant time, a long-term physical impairment having a substantial adverse effect on normal day-to-day activities.

56. As far as the Claimant's other ailments were concerned, therefore, we were not convinced that any of these, other than the back pain, amount to a disability for the purposes of the statutory definition set out in the Equality Act at the relevant times. They appeared to be intermittent, some seemed to be linked to the symptoms of the lupus and while they undoubtedly caused the Claimant pain and distress and resulted in time away from work, we were satisfied that there was insufficient evidence for us to conclude that they had any long-term or substantial impact on the Claimant's ability to carry out day-to-day activities.

57. <u>The delay in sending out the SSP1</u> The issue here was whether the Respondent's delay in sending the Claimant an SSP1 form was disability discrimination on the grounds that there was a failure to make reasonable adjustments under s 39(5) Equality Act and / or harassment on the grounds of disability under s 40(1)(a) Equality Act. As set out above, it was conceded by the Respondent that the Claimant's lupus was a disability. We have also found that her back pain amounted separately to a disability, although as we have said nothing turns on this.

58. The Claimant in her oral evidence said that the whole of the delay with the SSP1 was deliberately targeted at her due to her disability. She said she was due a bonus in November and B & Q targeted her, she was she said segregated and was owed holiday pay and then was pushed out by B & Q.

59. As set out above, there was no dispute that the SSP1 form was not sent out when it should have been. Ms Bertelsen-Macey explained to us that while she could not say for sure how the erroneous information that the Claimant had returned to work had entered the system, she suggested it was an unfortunate combination of the fact that an existing FitNote expired on 25 September, and the entry of a further FitNotice indicating that the Claimant was still off sick, [237-238] coincided with the monthly payroll report run, such that the system missed being updated. Further, as soon as Ms Palmer was made aware of the problem, she spoke to payroll and the matter was rectified, indeed within 2 days of the Claimant raising it, on 7 March 2016.

60. We found Ms Bertelsen-Macey to be a cogent and thoughtful witness. There was nothing that either she or Ms Palmer said to cause us to believe that the failure to send the SSP1 when it was due was anything other than an error. There was no evidence that this was a deliberate act, nor that it was one in any way motivated by the Claimant's disabilities. Further, there was nothing in what had happened to make us believe that the Respondent had applied a "provision, criterion or

practice" in relation to SSP1 forms that would have put the Claimant as a disabled person at a disadvantage in comparison to non-disabled employees. These forms are sent out on a monthly basis to all employees who are about to run out of SSP, and there was no evidence that if this was a policy, it disadvantaged disabled employees. Further, this appeared to us to be a technical error. Any employee in the same situation would have been caught in the same way as the Claimant.

61. We accepted Mr Piddingtons' submission that what happened could not have been anticipated, so there was no opportunity to consider or make adjustments, nor were any adjustments available.

62. Further, in terms of the allegation of harassment, we found no evidence of any "unwanted conduct" which could be said to be related to any of the protected characteristics raised by the Claimant. There was further no evidence of any purpose or intent to violate the Claimant's dignity or indeed of any such effect.

63. Accordingly, we did not find that the Respondent's delay in sending the Claimant an SSP1 form was disability discrimination on the grounds that there was a failure to make reasonable adjustments under s 39(5) Equality Act and / or harassment on the grounds of disability under s 40(1)(a) Equality Act.

Age and race discrimination

64. In terms of age discrimination, the only evidence that the Claimant gave on age discrimination, of any sort, was an unparticularised allegation that someone had said she should retire. There was no evidence that Mr. Whitehouse, or anyone involved in the grievance investigation, or Ms Palmer had made this remark. In terms of race discrimination, the Claimant alleged that the reason for her colleague not getting on with her, and for what she alleged was that colleague's unfair treatment of her was because they were of different racial and national origins. We found no evidence that Mr. Whitehouse or anyone involved in the grievance investigation, or Ms Palmer were motivated in any way by the Claimant's race or ethnic or national origins, nor that their behaviour was tainted by these factors. We did not find any evidence that raised any inference that any of the matters raised by the Claimant that we are determining were motivated or tainted by race or age discrimination. In so far as the Claimant sought to allege that age or race discrimination motivated or tainted the aspects of the Respondent's treatment of her that we are considering, we dismissed such claims. There was simply no evidence to support those claims. In terms of the discrimination allegations we focused therefore on the Claimant's disabilities.

65. The error in the date of the outcome of grievance letter (18 March 2016) The Claimant maintains that the error in the date of the letter setting out the outcome of the Respondent's investigation into her September 2015 grievance was a deliberate fabrication or backdating; and / or was motivated or tainted by disability, race or age discrimination. As indicated above, we did not find any evidence of age or race discrimination. As also set out above, it was conceded by the Respondent that the Claimant's lupus was a disability. We have also found that her back pain amounted separately to a disability, although as we have said nothing turns on this.

66. The Claimant says the letter was deliberately backdated or fabricated. We were satisfied that the error in the date of the letter setting out the outcome of the Respondent's investigation into the Claimant's September 2015 grievance (18 March 2016) was not a deliberate fabrication or backdating. That there was an error was not in doubt. Nor was the fact that the letter was never received by the Claimant, until it was disclosed to her as part of a subject access request that she made. Mr. Whitehouse's evidence was that the letter had been drafted for him by his HR assistant, had been overtaken by events and delayed, and had then been updated after the Claimant's dismissal. He recalled signing it. The Respondent presented no evidence as to whether the letter had actually been sent. The letter stated it was sent by recorded delivery but no evidence of this was produced. It would appear that the date on the letter was not updated when it was sent out.

67. We were satisfied that the letter could not have been sent on 18 March as it refers to matters which had not been determined at that time (for example the reference to the fact of the Claimant's dismissal and the reference to the meeting on 1 April). These are persuasive that the letter was wrongly dated and must have been prepared later than 18 March. Further, there is evidence in the log [449] that the letter was prepared on 5 April, which is consistent with the other two events. This is supported by Mr. Whitehouse's oral evidence.

68. We were satisfied that there was no evidence that the error in the dating and the failure to send the outcome letter was anything other than a genuine error and there was no evidence that this was in anyway motivated or tainted by the Claimant's disability.

69. <u>The investigation into the grievance</u> The Claimant maintains that the Respondent's investigation of her September 2015 grievance was motivated or tainted by disability, race or age discrimination under s 39(2)(b) Equality Act. As indicated above, we did not find any evidence of age or race discrimination. As also set out above, it was conceded by the Respondent that the Claimant's lupus was a disability. We have also found that her back pain amounted separately to a disability, although as we have said nothing turns on this.

70. In our judgment, Mr Whitehouse was clearly independent and had no axe to grind. We found him to be a cogent and persuasive witness. He was calm, patient and assured during the Claimant's cross examination of him.

71. The Claimant's complaint about the investigation of her grievance centered around two main matters: (1) that she should have been shown the interview with the member of staff she had fallen out with and other documents and been given the chance to challenge them; and (2) there was a failure to provide her with an outcome to the grievance.

72. As far as the first matter is concerned, we did not accept that when investigating a grievance, there is a *requirement* for an employer to show the employee all the evidence that has been considered. Nor was there evidence that it was the Respondent's normal policy to do this. We did not believe that by not doing this, the investigation was flawed. Mr. Whitehouse's evidence was that while he did not give the Claimant copies of his notes, he did explain to her what he had been

doing. Even if there had been a policy of providing such statements, which we did not find, there was no evidence that the decision not to disclose amounted to less favourable treatment or was motivated because of any protected characteristic. Mr Whitehouse was very clear that none of the Claimant's protected characteristics impacted on his decision. He was very proud of the Respondent's record on diversity. His whole aim was to try and resolve the differences between the Claimant and her colleague and get the Claimant back to work.

73. Further, in our judgment the grievance had been concluded. As we have indicated, we found nothing to suggest that the date on the letter had been deliberately fabricated. We accept this was an error. We do not believe that the error was motivated by anything connected with the Claimant's disability, race and / or age. As stated above, we found Mr. Whitehouse to be a persuasive witness. His evidence was clear that he had signed the letter and his intention and understanding was that the letter would be sent out to the Claimant. It is not clear why it wasn't, but the contents of that letter, which clearly represented Mr. Whitehouse's state of mind at the relevant time, indicate that he had reached an outcome and come to various conclusions about the matters set out in the September grievance: the letter dated 18 March says that Mr Whitehouse is 'writing to confirm his findings". It was clear to us that Mr Whitehouse had reached a conclusion and the letter provided the outcome. It was doubly unfortunate that the letter had the wrong date and that it appears not to have been sent, but we did not find that amounted to or was because of any sort of discrimination: there was a great deal going on at this time, the Claimant had been dismissed, and it is easy to see how it could have been overlooked.

74. Finally, in our judgment, Mr Whitehouse had in any event conducted a reasonable investigation, particularly taking into account the passage of time and the period over which the Claimant's grievance had ranged. He told us that even if the investigation was flawed, which he did not believe it was, he could say categorically that neither the Claimant's age, or race or disability in any way influenced the approach he took either to the investigation, or to the outcome. We heard nothing and were referred to nothing in the documents that made us believe that there was any suggestion that the way the investigation was conducted, to the extent that it could possibly be said to amount to less favourable treatment, was influenced by the Claimant's age, or race or disability.

75. We therefore found both of the Claimant's claims to be unfounded and we dismissed her claims of disability, race and / or age discrimination.

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Employment Judge Phillips
24 January 2018