



EMPLOYMENT TRIBUNALS

Claimant: Miss M Little

Respondents: 1. ACAS National
2. ACAS

Heard at: Manchester

On: 26-29 June 2018

Before: Employment Judge Slater
Mr R W Harrison
Ms B Hillon

REPRESENTATION:

Claimant: In person
Respondent: Mr A Weiss of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The first respondent is dismissed as a respondent.
2. The complaints of race discrimination and disability discrimination are not well-founded.

REASONS

Introduction

1. The claimant brought complaints of direct race discrimination, discrimination arising from disability and failure to make reasonable adjustments. The issues were set out in a list of issues drafted by the respondent. The claimant agreed at the start of the hearing that this accurately set out the issues. A copy of this list is set out in the Annex to these reasons.

2. At the start of closing submissions, the respondent conceded disability by reason of a mental impairment, being depression, so this no longer remained in issue. The claimant had produced at this hearing a letter from her GP dated 4 May

2018, containing information which she had not previously supplied to the respondent. The claimant was also questioned on matters relevant to the issue of disability during cross examination.

Adjustments to procedure

3. The claimant made applications to reduce her contact with the respondent's witnesses, on the basis that having them all present at once would be detrimental to her mental health. The claimant did not bring any medical evidence to support her application. The claimant also objected to the identity of the intended notetaker for the respondent on the first day of the hearing.

4. We were able to make arrangements and agree with the respondent arrangements which the claimant confirmed met her concerns so it was not necessary for the tribunal to rule on the claimant's applications. The claimant was given the use of a claimant's waiting room on a different floor to the waiting room used by the respondents. The respondent's witnesses only came into the hearing room to give their evidence or, in the case of Mrs Grimshaw and Ms Farrell, to hear the claimant's evidence (Ms Farrell only being present during part of the claimant's evidence). Ms Sam Clarke, area director, who was not a witness, was present during the hearing to support witnesses and, on the first day of the hearing, took notes in place of the intended notetaker. Other notetakers, to whom the claimant had no objection, attended on other days of the hearing when required.

Application to amend claim

5. The claimant made an application at the start of the hearing to amend the claim to include a complaint in relation to her dismissal, but that application was refused for the following reasons, which were given orally at the time.

6. In considering the application we have applied the principles in the case of *Selkent Bus Co Ltd v Moore [1996] ICR 836*. We have taken into account all relevant circumstances and considered whether the hardship and injustice to the respondent of allowing the amendment outweighs the hardship and injustice to the claimant of not allowing the amendment.

7. The claim form contains no hint that the claimant would wish to complain that dismissal was an act of disability discrimination. The last factual act described in that claim is the suspension.

8. The claimant agreed that, at the preliminary hearing on 19 December 2017, Employment Judge Horne took considerable time and care seeking to understand her complaints and apply the correct legal labels to her complaints. He recorded these in the notes which were sent to the parties on the 5 January 2018. At order number 11, Employment Judge Horne wrote:

"The Tribunal will consider the claim on the basis that is set out in the following discussion. If the claimant considers that the discussion does not properly set out the entirety of her claim she must by 4.00 p.m. on 9th January 2018 inform the respondent and the Tribunal what alternations need to be made to it. This is not an opportunity for the claimant to introduce new

allegations. Any proposed alterations to include an existing allegation must indicate where in the claim form or further and better particulars the allegation appears”.

9. At paragraph 13, in the “Discussion” section, under the heading “Dismissal”, Employment Judge Horne wrote *“During today’s discussion, the claimant did not identify her dismissal itself as a separate act of discrimination, although she did allege that steps preparatory to dismissal (in particular the gathering of witness statements) was motivated by race. The parties may wish to reflect on the significance of this omission”.*

10. The respondent presented an amended response which deleted parts dealing with dismissal, on the basis of the understanding which had been recorded in the preliminary hearing notes that dismissal was not complained of as an act of discrimination. The list of issues sent to the claimant by the respondent prior to the hearing did not include dismissal. At no time prior to this hearing did the claimant tell the Tribunal or the respondent that she wished to bring a complaint of discrimination about her dismissal. The respondent prepared for the hearing on this basis.

11. The respondent would need, at the very least, the dismissing officer, Francesca Dean, to give evidence in addition to the existing witnesses if the amendment were allowed and would possibly need to call other new witnesses.

12. This complaint is considerably out of time as at the date of this application to amend. The Tribunal would only have jurisdiction to consider this complaint if it considered it just and equitable in all the circumstances to do so. We do not decide, at this stage, whether it would be just and equitable to consider the complaint out of time. The claimant has arguments to put and evidence which would need to be heard and tested relevant to the question of whether it was just and equitable to consider the complaint out of time, if the amendment was allowed. She has referred us to difficulties she says she has had in dealing with matters due to illness. It is possible that the Tribunal would, after hearing all the evidence, consider it just and equitable to allow that complaint to proceed out of time but, equally, this may not be the case.

13. If the amendment is refused, the claimant is denied the opportunity to pursue a complaint which is, on the face of it, arguable. However, she would still be able to proceed with her other complaints if the amendment is not allowed. She has explained how, potentially, loss of earnings could flow from the alleged discriminatory acts which are already part of her claim if she is successful with those.

14. If the amendment is allowed, the respondent would be put to additional costs and time in preparing for a postponed hearing calling additional witness evidence. The respondent’s witnesses who have come this week expecting to have their evidence heard and a decision made will have this hanging over them for probably months more to come.

15. In all the circumstances, we consider the balance of injustice and hardship to weigh against allowing the amendment and so we refuse it.

The Facts

16. We do not make findings of fact on every matter referred to in these proceedings but we make findings of fact on matters which we consider relevant to the issues we need to consider.

17. The claimant identifies herself as being of Pakistani ethnic origin. At the preliminary hearing on 19 December 2017, the claimant identified her relevant protected characteristic for the purposes of the complaints of direct race discrimination as being “BAME”.

18. The claimant joined the respondent with effect from 1 February 2007 as a helpline adviser in a helpline team. The claimant and two other helpline advisers began at the same time. The two other starters were Samantha Throup and an employee who has been referred to as colleague A in these proceedings. All of the new starters were to join Julia Grimshaw’s team. There were two teams on the helpline: one headed up by Julia Grimshaw and one headed up by Richard Knox.

19. There was nothing in the claimant’s application form or diversity monitoring form to alert the respondent to the fact that the claimant had a disability. Indeed, the claimant ticked the box on the diversity form to say that she did not consider herself to have a disability or a health condition. In accordance with the proper practice for dealing with the diversity monitoring forms, these forms were not shown to the claimant’s managers. We consider what the claimant wrote on the diversity monitoring form to be indicative of how the claimant was feeling at the start of her employment.

20. The respondent had apparently ceased asking employees to complete a health declaration form, this having previously been their practice, so the claimant’s condition was not discovered by this means. The claimant did not choose, after being offered the job, to make a voluntary disclosure of her condition, and did not inform the respondent that she considered she needed any reasonable adjustments because of her condition.

21. The claimant and the other new starters had six weeks’ intensive training preparing them to take calls on the helpline.

22. The claimant was allocated to a desk on the banks of desks comprising the helpline at the other end of the room from her manager, Julia Grimshaw, and the other starters. The claimant found herself sitting close to the only two other women of a BAME background. However, she was also sitting close to white employees. There were two BAME men on the helpline, seated on other desks, not close to the claimant or next to each other.

23. The allocation of the new starters to vacant desks was done by Julia Grimshaw. There was no suggestion that Mrs Grimshaw was unaware of the ethnicity of the claimant and the other new starters at the time she carried out the allocation. The two BAME women had been in their positions since before Julia Grimshaw became a helpline manager. Mrs Grimshaw placed the other two new starters, who were both white, in vacant seats close to her. Samantha Throup could

see Julia Grimshaw from her desk and could speak to her. Colleague A was not as close to Ms Grimshaw as Samantha Throup. He could see whether Julia Grimshaw was busy from where he sat, but would have to move to ask Julia Grimshaw a question. The claimant could not see whether Julia Grimshaw was busy from where she was sitting and would have to walk to Julia Grimshaw to ask a question if Julia Grimshaw was at her desk.

24. At least part of the time, Julia Grimshaw would floor walk and would come to see the claimant. The claimant was unhappy about Julia Grimshaw standing over her at times.

25. The claimant found it odd that she was seated so far from her manager and seated by the only other women of a BAME background while the other new starters (who are white) were near their manager. The claimant made a comment to Julia Grimshaw about her seating position but Julia Grimshaw took this as a joke. Samantha Throup gave unchallenged evidence, which we accept, that the claimant complained to Samantha Throup and colleague A about where she was sitting and that she was feeling disadvantaged. Samantha Throup and colleague A offered to swap with her but the claimant did not take them up on their offer.

26. On the first day, coffee was provided to the new starters. After that, they were expected to provide their own coffee. It appears that the claimant did not hear or recall being told this so she asked Julia Grimshaw on her second day where the coffee was. Julia Grimshaw thought the claimant rude in the way she raised this. However, she put this down to nerves of being a new starter and did not consider it an issue.

27. The claimant's found Julia Grimshaw's behaviour cold. She considered Julia Grimshaw to be rude, dismissive and suspicious, complaining in evidence about the times Julia Grimshaw stood over her. She did not, at the time, link the behaviour to race. After her dismissal, she searched the internet and found Facebook postings done by Julia Grimshaw's husband which led her, she says, to the conclusion that Julia Grimshaw's behaviour towards her was motivated by race. We return to these Facebook postings later.

28. The claimant gave evidence that she did not know whether Julia Grimshaw's manner was the same to all staff. She said she barely saw Julia Grimshaw. The claimant said she did not witness Julia Grimshaw speaking to others as she did to her. The only specific example given of the alleged rudeness of Julia Grimshaw is an incident which is now agreed to have taken place on 3 February 2017. That was the claimant's third day of employment. The claimant accuses Julia Grimshaw of being rude to her when the claimant asked her a question about the flexi process. Julia Grimshaw says she was dealing with a query from a member of staff on a call who wanted to speak to a manager. We accept that the claimant was not aware that Julia Grimshaw was trying to help someone else at the time. Helen Robinson had to take over from Julia Grimshaw, and Julia Grimshaw took the claimant to have a conversation with her in a meeting room. Richard Knox also attended this meeting at the claimant's request.

29. The claimant and Julia Grimshaw had a conversation about what had happened. Julia Grimshaw took notes of this and various other matters as is her

practice in relation to employees she manages. The claimant said that she felt like every time she had asked Julia Grimshaw something she looked flustered or angry. Julia Grimshaw explained that, on this occasion, she was dealing with a member of her team who had a customer on the phone who was not happy and wanted to speak with a manager. Julia Grimshaw said that the query the claimant was raising was not urgent at the time and she would arrange training with one of the IT champions. The claimant then started crying and raised an issue about the references and why the respondent had not sought them prior to her starting employment. The claimant said she was unsure whether she had a job. Julia Grimshaw checked with her that she had received a letter of confirmation from HR and the claimant calmed down. Julia Grimshaw says this was the first time she saw the claimant cry. She said she did not see the claimant cry again until after the burglary. We accept Julia Grimshaw's evidence on these points. Julia Grimshaw thought the claimant was crying because she was a bit frustrated as Mrs Grimshaw had not dealt with her query about flexitime when the claimant had expected her to. Richard Knox thought she was crying about the references since she began crying when she was talking about this.

30. The claimant told Samantha Throup and colleague A a number of times that she thought Mrs Grimshaw treated her differently. We accept Samantha Throup's evidence that Samantha Throup and colleague A did not agree with this. They did not notice any difference in treatment. Samantha Throup thought that the claimant's perception was because she found Mrs Grimshaw's manner to be cold. The claimant put it to Samantha Throup in cross examination that Samantha Throup had said she could sense a difference and there may be a personality clash. The claimant had asserted, in further and better particulars, that Samantha Throup had noted that Mrs Grimshaw seemed to treat the claimant differently but did not understand why. However, the claimant said nothing about this in her witness statement. When it was put to the claimant in cross examination that she perceived other starters to be in the same boat she did not volunteer the evidence about what Samantha Throup had said about this in relation to this point.

31. The claimant accepted in cross examination that other starters were in the same boat to the extent that Julia Grimshaw was slightly abrasive, but said that her experience was different in that they were sat near Julia Grimshaw and did not have the same communication difficulties as the claimant, who had to walk over to her to ask a question. The claimant said Julia Grimshaw was more abrasive with her than other new starters.

32. We find that the claimant has not proved on a balance of probabilities that Julia Grimshaw treated her differently and less favourably to other new starters.

33. Some time in her early employment, the claimant applied for a mid-monthly advance of pay and this request was approved by Julia Grimshaw. When the claimant contacted Mrs Grimshaw to say that she had not been able to pay a bill because the advance had not gone in on the date the pay team had advised Mrs Grimshaw it would be paid, Mrs Grimshaw took urgent action to try to expedite the payment to the claimant.

34. On 28 February 2017, Mrs Grimshaw had a conversation with the claimant about the claimant being late for work. The claimant did not mention a mental health

condition as affecting her ability to get to work on time. She spoke of issues with her long commute, train cancellations and roadworks. The claimant also spoke of personal issues about home, family and her finances. We find she did not mention depression or anything which reasonably could be understood as being a mental health condition. Mrs Grimshaw wrote in her notes:

“Miriam expressed she was tired. She had not worked for over a year and was finding it difficult to manage everything, and with the disruptions last week with the storm and training in Nottingham. Miriam got quite upset. She is finding it difficult to juggle everything as well as the issues she is having at home. I said that she was doing well with the training and she had passed her modules, but as advised she would need to look at alternative ways to get into work on time. She is also on probation and these are the things we will be looking at.”

35. On 8 March 2017 the claimant was burgled. The claimant discovered this when she returned home in the evening after having been away on a training course in Nottingham. The claimant was off work on 9 March. She sent texts to her manager and her text said that she should be OK for work the following day. Mrs Grimshaw arranged emergency annual leave for the claimant for 9 March.

36. On 10 March 2017, at 51 minutes past midnight, the claimant texted Mrs Grimshaw. She requested leave for 10 March. She wrote in that text:

“Hi. I’ve got a potential suspect and need to wait for a call from police tomorrow morning. It’s rather complicated unfortunately. Things looked straightforward earlier on but they aren’t now. Very likely to need another day off as I can’t sort this out from Manchester. Also very tired and in a very paranoid headspace following the break in. I’m quite emotionally raw but will try to call you early tomorrow. If I could take another day of leave please that would really help. Thanks. M.”

37. The claimant sent a further text at 2.37am requesting the number for employee assistance. At 9.28am, when Mrs Grimshaw had not received a telephone call from the claimant, Mrs Grimshaw rang the claimant and left a voicemail. The claimant then rang her back. Mrs Grimshaw made notes about this conversation, however, the claimant says that Mrs Grimshaw omitted from her note that there was a long pause and Mrs Grimshaw asked why the claimant needed another day, and said “I thought you had spoken to the police”.

38. From the claimant's answers in cross examination, it appears that the claimant thought she should not be asked any questions about why she needed to take leave since she was asking for annual leave rather than any other sort of leave, even though the request was only being made on the day the leave was to be taken.

39. The claimant told Mrs Grimshaw she needed leave because she needed to speak to the police about suspicions that colleague A may have been involved in the burglary of her house. We find that the claimant was evidently upset. She told Mrs Grimshaw she was feeling very anxious and emotional. The claimant in cross examination, although not in her witness statement, said she was hyperventilating. We find that Mrs Grimshaw was aware that the claimant was upset, but there was nothing said or done by the claimant to suggest to Mrs Grimshaw that this was other

than in reaction to what was obviously a very distressing experience of being burgled. Mrs Grimshaw granted management approved leave after speaking to Suzanne Farrell.

40. On 13 March, the claimant returned to work. She had a meeting with Mrs Grimshaw. They spoke about various matters in this meeting. The claimant said that she was very nervous and tired. Mrs Grimshaw asked her about the allegation she had made about colleague A in their previous conversation. The claimant said it was not an allegation, it was a suspicion. She then explained the basis for this suspicion but said that, after speaking with the police, they had alleviated her suspicions regarding colleague A.

41. The claimant made an allegation that, when they were away on a training course, colleague A had made a remark about hoping that a new housing estate being built in Runcorn would not be filled with foreigners.

42. Mrs Grimshaw updated the claimant on what she had missed although she said she had not missed any training and only a presentation from herself and Richard Knox that they could easily reschedule. She told the claimant that colleague A and Samantha Throup had taken a few calls the previous week and that they had a couple of sessions where they listened to the calls and wrote down some questions to ask the adviser and she would arrange that for the claimant later.

43. The claimant says that Mrs Grimshaw told her that the other starters were making good progress. Whether or not these were the exact words used, and the claimant made no contemporaneous notes of the conversation, we accept this was the impression conveyed by Julia Grimshaw. However, we find there was no comparison made with the claimant and that Mrs Grimshaw spoke of steps to help the claimant catch up.

44. We find the claimant did not tell Mrs Grimshaw in this conversation that she suffered from depression. We do not consider the claimant's witness statement can be properly read as asserting that she told this to Mrs Grimshaw at the time. We find that the claimant's evidence under cross examination that she told Julia Grimshaw in this conversation that she suffered from depression was a change to how the claimant's case had been put at the preliminary hearing, which was that managers ought to have known from her behaviour about her mental health condition. The claim form and the further and better particulars did not give any specific instances of the claimant telling her managers she suffered from depression. In the appeal hearing, for reasons we give later, we find that the claimant was asked specifically if she had told managers that she had longstanding clinical depression, and she said no, she could not remember.

45. After the meeting on 13 March, the claimant did some reading with Mr Knox's agreement. Mrs Grimshaw then asked her to listen into calls with a helpline adviser, Anne, as the claimant was due to be on the phones soon. Mrs Grimshaw recorded:

"I said that I would like her to listen to calls with Anne as I had arranged it. Anne advised her that morning that's what I would like her to do. She is scheduled on the phone on Monday and I would like her to get some time on the phones this week."

46. Henry O'Carroll, another employee, had overheard the conversation and approached Mrs Grimshaw after this, commenting on Mrs Grimshaw's patience in speaking to the claimant.

47. The claimant then listened in to calls with Anne that afternoon. Anne sent an email with some feedback to Julia Grimshaw the following day. She wrote in this that the claimant had said she felt she was being treated unfairly and being pressurised by Mrs Grimshaw. She had told Anne that she had taken two days off work as her house had been broken into. Anne commented that the claimant was clearly unhappy throughout the session.

48. On 13 March, the claimant sent an email to Mrs Grimshaw, copied to Suzanne Farrell, asking for allowances to be made for the time she had missed. She wrote that she felt she was a little behind on things. She said that the concern of being expected to be on the same level as her colleagues despite missing two days of work was giving her a sense of added pressure. She said she felt she needed the time that the others had had to get up to speed and she was effectively two days behind. She asked for allowances to be made for the time that she had missed so that she could feel she was on a level playing field, and she said that there had been very little reading time that day. She asked whether they could look at her training plan again for next week.

49. The claimant also sent an email to Suzanne Farrell that day asking if she could speak to her. Suzanne Farrell replied, saying she had tried to find the claimant but the claimant had left by then. She wrote that she would leave the claimant to discuss the matters raised in the claimant's other email with Julia Grimshaw.

50. On 14 March, Julia Grimshaw acknowledged the claimant's email and said they would meet the following day to catch up.

51. Julia Grimshaw had a discussion with Suzanne Farrell. Mrs Grimshaw informed Suzanne Farrell about the remarks alleged to have been made by colleague A. They agreed that the respondent should investigate these comments. The claimant had not made a complaint about this but Mrs Grimshaw felt she should seek advice once the matter had been raised.

52. On 15 March, Mrs Grimshaw had a meeting with the claimant. Mrs Grimshaw invited Richard Knox in part way through the meeting for the conversation about an allegation about discriminatory statements made by colleague A. Mrs Grimshaw had a script prepared for this conversation. The claimant did not dispute that Mrs Grimshaw spoke from this script. The conversation covered a number of topics. Mrs Grimshaw told the claimant that she was not expecting her to be on the same level as her colleagues, that she had looked at the training plan and rearranged it slightly for the rest of the week to help her. She spoke about the various adjustments she had made to the programme which gave a number of opportunities for the claimant to catch up on reading. She also said that the claimant had been scheduled to attend an event on Friday afternoon but they would arrange for her to attend another event at a later date which would enable her to get up to speed and be in the same position as her colleagues in terms of listening in and calls. Mrs Grimshaw said she would like the claimant, on Friday, to take a call in preparation for Monday. She said:

“On Monday I have arranged with National Ops to take you off the phones in the afternoon for a couple of hours so Richard and I can give you a presentation on the early conciliation role and Employment Tribunal process. From Thursday this week and all of next you will have a buddy who will sit with you and who will be on hand to assist and support you.”

53. It was clear from this conversation that it was intended that the claimant should be taking calls from Monday and was scheduled to do so.

54. Mrs Grimshaw then spoke about their conversation when the claimant had disclosed to her details of a conversation she had had with colleague A where the claimant had alleged discriminatory statements were made to the claimant. Mrs Grimshaw said that the conduct of their staff was something they took very seriously and she felt it was something they must investigate further. She told the claimant that an investigation officer would be appointed by the Area HR Business Partner and they would be in touch with the claimant to arrange a meeting to investigate the matter thoroughly. Mrs Grimshaw said:

“You may feel like this is something you don’t want to raise formally but I have a responsibility to act once serious matters are disclosed to me.”

55. On 16 March 2017, Helen Robinson delivered training to the new starters on referrals. The claimant raised that she was feeling nervous about going on the phone and taking calls from members of the public. The claimant referred to being under pressure to go on the phones. Helen Robinson has considerable experience in training starters. Her evidence, which we accept, is that the sort of comments the claimant was making were not unusual for new starters.

56. The claimant successfully completed and passed all her training modules.

57. The claimant was allocated a buddy, Stacey Caine. On 16 March, Stacey Caine sent an email to Mrs Grimshaw giving feedback. The claimant accepts that it is normal during training for feedback to be given to managers. The claimant did not suggest to Stacey Caine when they sat together that she was at any disadvantage because of her mental health. Stacey Caine records that the claimant said she had missed a few things because she had been absent a few days and had a lot going on. She said the claimant also said that Julia was pressuring her and would be stood over her making sure that she did it, meaning making her first calls. The claimant accepted in cross examination that there was nothing racially motivated in Stacey Caine giving this feedback.

58. On 17 March, the claimant took two calls sitting with her buddy, Stacey Caine. The claimant agreed that she had said she felt happier after taking a call.

59. Stacey Caine wrote a further feedback email on 17 March. Stacey Caine said in the email that the claimant had been expected to take a call by 12 noon as they were moving on to taking calls from her desk in the afternoon and that the claimant had said to her “why has she told you the plan (meaning Julia Grimshaw) but hasn’t told me what’s happening”. Stacey Caine wrote that she felt this came across inappropriately due to her tone and the way she said it. She recorded that they went over to the claimant’s desk to set up her phone and zip wire and Mrs Grimshaw

came over to check if the claimant had all the documents to set up the system. She recorded that the claimant seemed very confrontational and did not try to look for what Mrs Grimshaw had asked for. The claimant says that this part of Stacy Caine's note is a lie. The claimant gave an account in evidence that she had needed to get something from the drawer to look something up but Stacey Caine was blocking the drawers so she asked her to move, and that this was what had happened rather than what Stacey Caine recorded.

60. The claimant said in cross examination that she could not answer whether the lie was racially motivated because she did not know what motivated Stacey Caine to tell lies. The claimant's evidence is that Stacey Caine decided to tell deliberate lies for reasons which the claimant does not know. There is no need for the tribunal to decide what happened on that day. However, we note that no motive has been suggested for Stacey Caine to write something which was not her genuine perception at the time.

61. On 20 March, Helen Robinson sent an email with feedback to Mrs Grimshaw. She wrote that the claimant repeatedly referred during the training on 16 March to the pressure she was under to take her first call although she did, on a number of occasions, state that she "understood why Julia was making her do it". Helen Robinson wrote that she had had a conversation with the claimant about the fact that everyone is nervous before they take their first call but it is something that needs to be done.

62. In relation to the emails from staff up to and including 20 March, we find that these constituted standard feedback of a type Mrs Grimshaw would expect from anyone involved in training a new starter. If the claimant makes a complaint about these, and her complaint appears to be about statements gathered when she was off sick which may not include these, the claimant has not proved on the balance of probabilities that the statements or emails were gathered for the purpose of dismissing her.

63. On 20 March, the claimant was due to start taking calls. New starters had known from as early as an email of 9 February of this intended date, and it should have been clear to the claimant from what was said by Mrs Grimshaw in the meeting on 15 March that she was to be taking calls herself from 20 March. The claimant says that her understanding was that they would start with Stacey Caine taking calls and, at some time during the day, the claimant would take over. We accept that this was the claimant's belief. However, no one had said or written anything to the claimant which could reasonably have given rise to this belief. We find that the claimant had been scheduled to take calls from 9.00am on Monday 20 March and had not been given permission not to take calls from this time.

64. The claimant was thrown when Stacey Caine said that Stacey was not taking the calls but the claimant was going to be taking the calls. The claimant then went to Richard Knox and said she was not ready to start taking calls. The claimant and Richard Knox both agreed that the claimant said she could not do this. The claimant asserted that it was not her understanding that she was to take calls from 9.00am. Mr Knox checked the rota and confirmed the claimant was to take calls. When Mrs Grimshaw arrived, they went into a conference room and the claimant had a meeting, initially with Mrs Grimshaw and Richard Knox. Suzanne Farrell was later

brought into the meeting. Richard Knox took notes of this meeting up to the point when Suzanne Farrell came in. There is some dispute about the accuracy of Mr Knox's account in his notes and his witness statement, the claimant alleging discrepancies. We accept there may be things said which were not recorded in the notes because their significance was not appreciated at the time. We accepted that Mr Knox's evidence was an honest attempt to recollect further detail. We note that the claimant made no contemporaneous notes of the meeting; however, she disputes some of Mr Knox's account. Memory is fallible. Inaccuracy in recall does not necessarily mean someone is deliberately lying. We consider what is recorded in Mr Knox's notes to be the most reliable evidence we have as to what happened in that meeting up to the point Suzanne Farrell entered the room, when he ceased to take notes. We, therefore, rely on what is recorded in those notes. He records as follows:

"Julia G began then to explain that she had confirmed to all three starters that today was the day that they all went live on the phones and that they were to be taking calls from 9.00am with the support of buddies. Miriam was upset that her personal situation had not been taken more into account and that she had missed two days due to being burgled. Julia G explained that she had rearranged several things on Miriam's training plan and that Julia had been confident after Friday when Miriam had taken two calls that Miriam was ready to go live on the phones. Miriam continued to be upset because she felt that her personal issues had not been taken into account. I explained without breaching confidences that several staff had personal things going on at home but on the assumption that they were able to come to work they were still expected to stick to their rosters. Miriam became belligerent at this point and accused me of not taking her situation, the fact that she had been burgled and was stressed, seriously because she did not have the same issues as others in the office, and again complained that we were not supporting her enough. At this point Julia G left the room to get Suzie F."

The notes then cease.

65. We find that the claimant did not tell Mrs Grimshaw and Mr Knox during this meeting that she was suffering from depression.

66. Mr Knox was saying that, if somebody is at work, they are expected to take calls. He made a reference to people caring for terminally ill relatives but being at work. We find that Mrs Grimshaw said that that was her. Mrs Grimshaw accepted in evidence that she may have identified that it was her father she was caring for.

67. Suzanne Farrell came into the meeting at Mrs Grimshaw's request, because Mrs Grimshaw thought Suzanne Farrell might have a calming effect. The claimant told her that she was unwell. We find that she did not refer to having depression or a mental health condition. There are disputes about what was said, in particular, what was said by whom about the absence or attendance policy and whether Suzanne Farrell offered the claimant additional time before going on the phones. We have no notes taken by anybody to assist us in making findings of fact as to what happened.

68. We find that Suzanne Farrell mentioned the policy, but this was in response to the claimant asking what would happen if she went home; Suzanne Farrell was explaining that she would be treated under the attendance policy in the usual way.

We consider Suzanne Farrell made an honest mistake in believing that the claimant mentioned the policy first. We find that Suzanne Farrell did offer the claimant more time but the claimant may not have heard this offer given her emotional state. We consider it more likely than not that such an offer would have been made since the claimant was saying she was having a problem because of missing two days. Suzanne Farrell, Mrs Grimshaw and Richard Knox left the claimant alone to decide what to do.

69. The claimant subsequently went and took calls that afternoon. Suzanne Farrell said thank you to her when she saw that the claimant was staying at work. The claimant took calls with her buddy, Stacy Caine, there to assist her. She successfully took calls that afternoon.

70. On the following day, 21 March, the claimant took calls again with her buddy at hand for assistance. At some point, there was an incident between the claimant and Stacy Caine. It is not necessary for us to make findings about what occurred and we do not do so. However, we note that the claimant later, in the disciplinary hearing, described herself during this incident as “holding her own,” which suggests some level of disagreement.

71. On 21 March, Stacey Caine approached Mrs Grimshaw about an incident where she considered the claimant had been aggressive and confrontational. She accused the claimant of shouting in her face and throwing things. Mrs Grimshaw asked Stacey Caine to put this in writing to her and HR, and asked other members of the team if anyone else had witnessed it and, if so, to email her.

72. The claimant was on sick leave 22 and 23 March.

73. On 21 March, Henry O’Carroll wrote an email to Mrs Grimshaw regarding the conversation the claimant had had with Mrs Grimshaw on 13 March. The claimant accepted there was nothing racially motivated in him sending this email. Mr O’Carroll wrote that, although he could not hear the full content of the conversation, he did become aware of the conversation becoming heated and the claimant’s attitude becoming argumentative towards Mrs Grimshaw. We note that the email appears to have been sent to an incorrect email address for Mrs Grimshaw, so we do not know whether it was received at the time.

74. On 22 March 2017, the claimant rang to report that she was unfit for work. She spoke to Richard Knox. She told him she had developed a migraine on the way to work. The claimant put to Mr Knox that she had told him the migraine was stress-related. Mr Knox disagreed. The claimant, in her witness statement did not say that she had told Mr Knox that the migraine was stress-related. There is no documentary record of the claimant reporting her absence as stress related. We note that a text the claimant sent to Julia Grimshaw the next day made no mention of stress, referring only to her head, eyes and neck being in pain. Migraines are not necessarily a result of stress. The burden is on the claimant to satisfy the tribunal that facts she rely on occurred as asserted by her. The claimant has failed to satisfy the tribunal that she told Mr Knox that her migraine was stress related. Even if the claimant had referred to stress, this would not have been sufficient to indicate that she was suffering from depression.

75. Stacey Caine made a statement on 23 March regarding the incident on 21 March. On the same day, Mr O'Carroll also made a statement about the incident on 21 March. The claimant alleges that Mr O'Carroll made a false statement, noting that people who sat closer to her did not give any statements about the alleged incident.

76. Anne Wallace sent a feedback email to Mrs Grimshaw on 23 March regarding the time when the claimant had listened in to calls with her. She wrote that it appeared the claimant had a lack of confidence.

77. We find that the emails and statements, leaving aside the email of Mr O'Carroll relating to 13 March, were either in relation to the complaint made by Stacey Caine about what happened on 21 March or were standard feedback which would be expected during training. We have not heard evidence as to why Mr O'Carroll's email concerning the incident of 13 March was written. However, it appears likely that it was in response to a request. We note that the matter was one about which Mr O'Carroll had approached Julia Grimshaw on 13 March. As previously noted, the claimant accepted in cross examination that there was nothing racially motivated in Mr O'Carroll providing this.

78. The claimant understood that it was normal for feedback to be given during training. However, in cross examination, she said it was inappropriate how the feedback was used during the probationary hearing. There is no complaint before this Tribunal about the probationary hearing so we made no findings of fact about this.

79. The claimant did not form the view prior to her dismissal that feedback emails and statements were gathered because of race. The claimant formed this view retrospectively after seeing the Facebook comments of Mrs Grimshaw's husband.

80. Mrs Grimshaw had discussions with the HR Business Partner, Mark Quinn, and possibly the Area Director, Samantha Clark, about the claimant's behaviour to get guidance on how to deal with this.

81. On 23 March, the claimant texted Mrs Grimshaw to say she was still not well enough to come in.

82. The claimant was suspended on 23 March 2017. The decision to suspend the claimant appears to have been made by someone in HR; it was not the decision of Mrs Grimshaw, Mr Knox or Suzanne Farrell.

83. Richard Knox, although he was not told the reason for the suspension, was asked to notify the claimant by telephone of her suspension. He rang the claimant to tell her that she was suspended and to say that she would receive a letter in the next few days giving the reasons for this and what was to happen.

84. We find that the claimant did not, at any time prior to her suspension, tell any of the managers that she suffered from depression. We find that the claimant did not say that her concentration and memory were affected by depression or a mental health condition.

85. On 10 April 2017, the claimant attended a disciplinary hearing with Fran Dean. Minutes were taken by Mark Quinn. The minutes were sent to the claimant who provided amendments. The claimant has commented that she considered the minutes to be very inaccurate. The minutes, as amended by the claimant, show that the claimant, at the disciplinary hearing, was linking her mental condition to the burglary; she is not recorded as saying that she had a longer standing condition.

86. The claimant was dismissed on 20 April 2017. No complaint about the claimant's dismissal forms part of her claim to this Tribunal so it is not necessary for us to make any findings of fact relating to her dismissal and we do not do so. The dismissing officer was Francesca Dean.

87. After the claimant's dismissal, she searched online and found Facebook comments by Mrs Grimshaw's husband. Since there was no mention of these comments in the disciplinary or appeal hearings but they are referred to in the claim form, then we assume that the claimant did her search after the appeal but prior to the claim to this Tribunal.

88. The Tribunal found some of the comments made by Mr Grimshaw on Facebook to be grossly offensive, displaying racist and, in particular, Islamophobic attitudes. Mrs Grimshaw gave evidence that these were not her views and she was surprised and unhappy that her husband had posted such things.

89. Mrs Grimshaw's daughter also worked on the helpline. The claimant gave evidence for the first time in cross examination that Mrs Grimshaw's daughter called another employee "Mojo" despite that employee saying that he did not like this. The employee's computer user name was Mojo because of his initial of his first name (Michael) and his surname (Ojo). Mrs Grimshaw's evidence was that Michael Ojo referred to himself as Mojo and she was not aware that her daughter referred to him by this name. The claimant has not satisfied us, on the balance of probabilities, that Mrs Grimshaw's daughter used the term, "Mojo" in referring to Michael Ojo and that he found this to be offensive.

90. By a letter dated 2 May 2017, the claimant appealed against her dismissal. Under the heading of "Mitigating Factors" the claimant wrote:

"The duty of care towards me by management was not upheld in relation to my health. I have taken medication for clinical depression for a number of years and have been well for much of this time."

91. The claimant did not say in this letter that she had told the respondent she had suffered from depression. She suggested that she had spoken of stress and anxiety after the break in but did not say she had said anything about a pre-existing condition of depression. The claimant accepts that, when she wrote about depression under the heading "Mitigating Factors" in this letter, this may have been the first time she mentioned depression in writing to the respondent.

92. The appeal hearing took place on 19 April 2017, conducted by Sam Clark. Since no complaint is made about the dismissal, it is not necessary for us to make findings of fact about the appeal, other than in relation to a question put to the

claimant which is relevant to the respondent's knowledge of disability. The minutes record Sam Clark asking the claimant:

"I understand that you are saying that you felt stressed and anxious as a result of the burglary and your accommodation issues. Did you inform your managers that you have a much more longstanding clinical depression?"

The claimant replied:

"Well no, honestly I can't remember, but I expect managers to ask how they can help and refer to Occupational Health."

93. Under cross examination, the claimant made a generalised allegation of inaccuracy in the minutes of the appeal hearing because these minutes were taken by the same notetaker as the disciplinary hearing, which she considered to have been very inaccurate, and because the notes of the appeal hearing were not sent to her at the time to correct. However, the claimant had the minutes as part of the respondent's disclosure in these Tribunal proceedings and she did not, in her witness statement, take issue with this part of the notes. Even in cross examination she did not identify any parts of the notes specifically that she took issue with. She said in cross examination that she was not going to make any comments on the minutes because they were not sent to her to check at the time. The claimant's generalised allegation of inaccuracy is insufficient to cause us to find that the minutes of the appeal hearing are not accurate in relation to the question and answer quoted above. We find that the question was put and the claimant did answer as recorded in the minutes. The claimant did not, at the appeal, assert that she had told her managers about her long standing mental health condition.

94. The claimant's appeal was unsuccessful and she was notified of the outcome of the appeal on 24 May.

95. The claimant notified ACAS under the early conciliation process of the potential claim on 17 June. The ACAS early conciliation certificate was issued on 21 July.

96. The claimant presented her claim to the Tribunal on 16 August 2017.

Submissions

97. Mr Weiss, for the respondent, made oral submissions in addition to producing a written skeleton argument. In summary, the respondent's principal submissions were as follows.

98. Mr Weiss submitted that the claimant was not a credible witness and invited the tribunal to prefer the evidence of the respondent's witnesses where there were disputes of fact.

99. Mr Weiss submitted that the complaints of disability discrimination should fail because, on the facts, the respondent did not have the requisite knowledge of disability. He also submitted, in relation to the complaints of discrimination arising from disability, that there was no unfavourable treatment and that, in relation to the first two allegations, the treatment was not because of something arising from

disability. In relation to the complaints of failure to make reasonable adjustments, he submitted that the claimant was not subjected to substantial disadvantage by application of the PCPs and that reasonable adjustments had been made.

100. In relation to the complaints of direct race discrimination, Mr Weiss submitted that the facts were not sufficient to reverse the burden of proof and, if the burden did shift, it was discharged.

101. The claimant made oral submissions. At times, during the claimant's submissions, she referred to matters about which the tribunal had not heard evidence. The judge informed the claimant that the tribunal could not take account of new evidence given in submissions. The claimant's principal submissions relevant to the issues were as follows.

102. In relation to the complaints of race discrimination, the claimant submitted that Mrs Grimshaw had not distanced herself adequately from her husband's Facebook posts and referred to being seated in the same small area as the other BAME women. The claimant said Mrs Grimshaw had met her at interview and, therefore, knew her ethnicity.

103. In relation to the complaints of disability discrimination, the claimant said that she had tried to talk about her illness a number of times and did use the word "depression" with Mrs Grimshaw. The claimant submitted that Mrs Grimshaw had disregarded warning signs of depression.

104. The claimant then went through the evidence of each of the respondent's witnesses, suggesting the witnesses were not credible.

105. The claimant also commented on what she suggested was an almost complete lack of training for managers at the respondent on mental health.

The Law

106. Section 13(1) of the Equality Act 2010 (EqA) provides: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". Section 4 lists protected characteristics which include race. "Race" is defined by section 9(1) as including colour, nationality, ethnic or national origins.

107. Section 23(1) EqA provides that "on a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

108. Section 15 EqA provides:

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

- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

109. Section 39(2) provides, amongst other things, that an employer must not discriminate against an employee by subjecting that employee to a detriment. In *Ministry of Defence v Jeremiah [1980] ICR 13*, Lord Justice Brandon, in the Court of Appeal, thought “any other detriment” meant “putting under a disadvantage”. The House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337*, said a sense of grievance which is not justified is not sufficient to constitute a detriment.

110. Section 20 EqA and Schedule 8 contain the relevant provisions relating to the duty to make adjustments. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising “a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

111. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

112. Section 136 provides:

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

113. The tribunal makes findings of fact, having regard to the normal standard of proof in civil proceedings, which is on a balance of probabilities. A party must prove the facts on which they rely. A claimant must prove they suffered the treatment alleged, not merely assert it. Once the relevant facts are established, the tribunal must apply section 136 in deciding whether there is unlawful discrimination.

114. The Court of Appeal in *Ayodele v CityLink Ltd and another [2017] EWCA Civ 1913*, has reaffirmed that there is an initial burden of proof on the claimant; the claimant must show that there is a prima facie case of discrimination which needs to be answered. The Court of Appeal concluded that previous decisions of the Court of Appeal, such as *Igen Ltd v Wong [2005] IRLR 258*, remained good law and should continue to be followed by courts and tribunals. The interpretation placed on section 136 EqA by the EAT in *Efobi v Royal Mail Group Limited (UKEAT/0203/16)* was wrong and should not be followed.

115. The effect of the authorities is that the tribunal must consider, at the first stage, all the evidence, from whatever source it has come, in deciding whether the

claimant has shown that there is a prima facie case of discrimination which needs to be answered.

116. A finding of bad treatment, will not be enough to satisfy the tribunal that a claimant has suffered less favourable treatment: *Essex County Council v Jarrett EAT 0045/15*. A finding of less favourable treatment, without more, is not a sufficient basis for drawing an inference of discrimination at the first stage: *Madarassy v Nomura International plc [2007] ICR 867, CA*. In *Dedman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1279 CA*, Lord Justice Sedley said that “the ‘more’ which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.”

117. The fact that a claimant has been subjected to unreasonable treatment is not, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift: *Glasgow City Council v Zafar [1998] ICR 120 HL*. In that case, the House of Lords held that a tribunal had not been entitled to infer less favourable treatment on the ground of race from the fact that the employer had acted unreasonably in dismissing the employee.

118. If the claimant establishes facts from which the tribunal could conclude there was unlawful discrimination, the burden passes to the respondent to provide an explanation for its actions. The tribunal must find that there was unlawful discrimination unless the respondent provides an adequate, in the sense of non-discriminatory, explanation for the difference in treatment.

119. Less favourable treatment will be because of the protected characteristic if the characteristic is an “effective cause” of the treatment; it does not need to be the only or even the main cause. The motivation may be conscious or unconscious: *Nagarajan v London Regional Transport [1999] IRLR 572 HL*.

120. In some cases, particularly those involving a hypothetical comparator, it may be appropriate for the tribunal to proceed straight to the second stage, considering the reason why the respondent acted as it did. In *Laing v Manchester City Council [2006] ICR 1519 EAT*, Mr Justice Elias commented: “it might be sensible for a tribunal to go straight to the second stage...where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment.”

121. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

122. Time limits are extended to take account of time spent in the early conciliation process with ACAS, if notification to ACAS is made within the normal time limit.

Conclusions

Jurisdiction

123. There are time limit issues in relation to some of the complaints, if they are found not to form part of a continuing act of discrimination, ending with a matter in respect of which the complaint is presented in time. This jurisdictional issue cannot properly be determined without considering the merits of the complaints, so we set out our conclusions in relation to the merits of the case, on the assumption that we would have jurisdiction.

Race discrimination

124. These are complaints of direct race discrimination.

Allegation 1 – That from the first day of her employment (1 February 2017) with the respondent, the claimant and other BAME colleagues were segregated from white employees

125. The allegation is that the respondent treated the claimant less favourably than they treated others by segregating her from white employees because of her race. A comparison is made with the other new starters. Although the claimant has referred to segregation, which means complete separation, we do not take this literally as segregation in reaching our conclusions but consider the complaint in a wider sense of meaning clustering her together with the other women from a BAME background.

126. We conclude that the claimant was treated less favourably by the seating arrangements. Her opportunity to interact with her manager was made more difficult by the distance she was sitting from her manager. She was subjected to a detriment by this treatment, in that she suffered the disadvantage of her opportunity to interact with her manager being made more difficult by the distance between them. However, she could potentially have ceased to suffer this disadvantage by accepting the offer of Samantha Throup and colleague A to swap seats; she chose not to do so.

127. We consider whether the claimant has proved facts from which we could conclude that the reason she was allocated to her particular seat was because of her race. We are aware that it is rare that there is explicit evidence of discrimination and that we may need to draw inferences as to whether there may have been discrimination.

128. It was the decision of Mrs Grimshaw as to which seats to allocate to the claimant and the other new starters. The claimant referred to Mr Grimshaw's Facebook postings, the fact that she was sat near the only other BAME women on the helpline comments and the allegation that Mrs Grimshaw's daughter called another BAME employee "Mojo," which she says that employee found offensive, as matters in support of this complaint. In our findings of fact, we found that the claimant had not proved that Mrs Grimshaw's daughter did use that name to the employee and that the employee found it offensive. We cannot, therefore, rely on that matter as a fact from which we could draw an inference of discrimination. We also considered, which had not been suggested by the claimant, whether we could draw an inference of discrimination from the failure on the respondent's part to identify in

the witness statements that it was the decision of Mrs Grimshaw to allocate the claimant and the new starters to the seats available, describing this rather as having been a random allocation without saying that it had been done by Mrs Grimshaw. We did not consider that there were any other facts which could potentially give rise to an inference of less favourable treatment because of race in relation to the seating arrangements.

129. We look first at the Facebook postings. Use of the Facebook postings as a possible means of drawing inferences of discrimination on the part of Mrs Grimshaw would have to rely on an assumption that Mrs Grimshaw shares the views of her husband as expressed in these postings. We do not feel that we can make this assumption, particularly given Mrs Grimshaw's evidence to the contrary and lack of any other evidence to support racial motivation. The fact that Mrs Grimshaw took action on the allegation of discriminatory comments by colleague A, when the claimant was not making a formal complaint about this, also tends to suggest, at the least, that Mrs Grimshaw is sensitive to issues to do with race discrimination and is prepared to take action when appropriate.

130. Looking at the matter of the seating with the other BAME women, there were only three seats available, one of which was close to these other employees. The other women had been in those seats prior to Mrs Grimshaw managing the helpline section so their seating arrangements had nothing to do with Mrs Grimshaw.

131. We find the way the allocation of seating was dealt with in the respondent's witness statements to be unfortunate in its failure to identify Mrs Grimshaw as the decision maker, but do not consider this to be enough, by itself or together with the decision to sit the claimant in the vacant seat near to the other BAME women, to shift the burden of proof.

132. We conclude, therefore, that the claimant has not proved facts from which we could conclude that the reason she was allocated to that particular seat was because of her race. This complaint of race discrimination is therefore not well-founded.

133. If we had found that the burden of proof had passed, we would not have been satisfied with the explanation that the allocation of seating was random and, therefore, non-discriminatory. It was not random in any objective sense. It was the decision of Mrs Grimshaw. There is no evidence of any conscious intention to discriminate by Mrs Grimshaw but the possibility remains of subconscious motivation.

Allegation 2 – That the claimant's line manager, Mrs Grimshaw, was rude to her.

134. The claimant complains that the respondent treated her less favourably than it would have treated others by Mrs Grimshaw being rude to her and that this was because of her race. The only specific incident relied upon is the incident of 3 February, where the claimant had asked Mrs Grimshaw a question about flexitime whilst Mrs Grimshaw was busy. This is a situation where we consider it appropriate to go straight to the reason for Mrs Grimshaw's treatment of the claimant: we find that it was because Mrs Grimshaw was busy dealing with another query and, therefore, had nothing to do with the claimant's race. In any event, we would not have found facts from which we could conclude either less favourable treatment or

that this was because of race, so the burden of proof would not have passed to the respondent.

135. We conclude that this complaint of direct race discrimination is not well founded.

Allegation 3 – That the respondent gathered witness statements whilst the claimant was on sick leave that were designed to fulfil their objective of dismissing her.

136. The claimant complains that the respondent treated the claimant less favourably than it would treat others, because of her race, by gathering witness statements whilst the claimant was on sick leave that were designed to fulfil the objective of dismissing her. The claimant has not suggested to us what material she thinks there is that we might draw inferences from of less favourable treatment or that such treatment was because of race. We find no facts from which we could draw such inferences. The material was gathered either as part of the normal feedback process during training or because of incidents which had arisen because of the claimant's conduct. We conclude that the claimant has not proved facts from which we could conclude that the gathering of statements was less favourable treatment and that the treatment was because of race.

137. Had the burden of proof passed to the respondent, the respondent would have satisfied us that they had a non-discriminatory reason for the gathering of statements. The material was gathered either as part of the normal feedback process during training or because of incidents which had arisen because of the claimant's conduct.

138. We conclude that this complaint of direct race discrimination is not well founded.

Disability discrimination

Knowledge of disability and disadvantage

139. Disability in relation to a mental impairment at relevant times was conceded prior to closing submissions. We, therefore, move on to address the issue of knowledge which is significant for the complaints of discrimination arising from disability and failure to make reasonable adjustments. There is no discrimination arising from disability if the respondent can show that it did not know, and could not reasonably have been expected to know, that the claimant had the disability. Similarly, an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

140. The claimant presented herself to the respondent in such a way that any signs of anxiety, stress and distress were consistent with being a new starter, suffering a burglary and other personal issues which were not expressed to be related to a mental health condition, but which she had disclosed to the respondent. There was nothing in what the claimant said or did, prior to the appeal against her dismissal, which should have alerted the managers to a potential disability.

141. We have found that the claimant did not tell the respondent she had a mental health condition of depression prior to the appeal, which was after the treatment she complains about. We conclude that the respondent could not reasonably have been expected to know that the claimant had this disability.

142. In relation to the reasonable adjustments complaints, we also find that the respondent did not know, and could not reasonably have been expected to know, that the claimant was likely to be placed at a disadvantage by the provisions, criteria and practices relied upon.

143. Because of the lack of actual and constructive knowledge of the claimant's disability, the complaints of discrimination arising from disability and failure to make reasonable adjustments must fail. In addition, in relation to the complaint of failure to make reasonable adjustments, a further reason for that complaint to fail is because of the lack of actual or constructive knowledge of likely disadvantage caused by the provisions, criteria and practices relied upon.

144. Although the complaints of disability discrimination fail because of lack of the requisite actual or constructive knowledge on the part of the respondent, we go on to say what we would have found in relation to the complaints had we found that the respondent had the requisite knowledge.

Discrimination arising from disability

Allegation 1 - That Mrs Grimshaw voiced suspicion of the claimant's reasons for not being at work during a telephone call between Mrs Grimshaw and the claimant on the second day following the claimant's absence from work for two days following the burglary of her home

145. We conclude that all Mrs Grimshaw was doing was asking why the claimant needed another day's leave. This was not unfavourable treatment in the circumstances. It was also not something arising in consequence of disability. The claimant wanted time off to speak to the police and to deal with things after the burglary; it was not because of depression. For these additional reasons this complaint would have failed on its merits even if the respondent had had the requisite knowledge.

Allegation 2 – On the claimant's return to work, did Mrs Grimshaw make an unfavourable comparison between the claimant and two colleagues during a meeting between the claimant and Mrs Grimshaw as alleged?

146. We conclude that Mrs Grimshaw did not make an unfavourable comparison. She told the claimant what the colleagues had done in her absence. She did not make an unfavourable comparison between them. It was not unfavourable treatment to tell the claimant what her colleagues had done in her absence. We also conclude that speaking to the claimant about her colleagues in this way was not something arising in consequence of the claimant's disability; it was because the claimant had had time off and the time off was not because of depression but because the claimant wanted to speak to the police and deal with things after the burglary. This complaint fails for these additional reasons to that of not having the requisite knowledge.

Allegation 3 - At a meeting attended by the claimant Mrs Grimshaw, Mr Knox and Ms Farrell, Mr Knox said that if the claimant left work the respondent would take action under its absence policy and/or that a colleague was able to attend work despite having a terminally ill relative, and so should the claimant.

147. This relates to a meeting on 20 March 2017 when the claimant got upset at the prospect of starting to take calls from 9 a.m. that day. The allegation about saying that the respondent would take action under its absence policy, in fact, appeared to be an allegation about Ms Farrell rather than Mr Knox. We found that no-one said that action would be taken. Ms Farrell said that any absence would be taken account of under the attendance policy in the usual way. This was standard practice and could not, therefore, constitute unfavourable treatment. Mr Knox, in his comments about people attending work when caring for terminally ill relatives was making a point that, if somebody was in work, then they were expected to work. We conclude that this was not unfavourable treatment. For these further reasons, this complaint of discrimination arising from disability fails in addition to the respondent not having the requisite knowledge.

Failure to make reasonable adjustments

148. As previously noted, these complaints fail because the respondent did not have the requisite actual or constructive knowledge of the claimant's disability and also did not have the requisite actual or constructive knowledge of likely disadvantage the claimant would suffer by application of the provisions, criteria or practices relied upon. We consider also the other elements of a complaint of failure to make reasonable adjustments.

Allegation 1 – Provision, criterion or practice of requiring new employees to start taking telephone calls from a set date

149. This provision, criterion or practice was applied. However, we are not satisfied on the evidence that the claimant was put at a substantial disadvantage by this condition. The claimant successfully took calls, some on 17 March and others on 20 and 21 March. We have no evidence which suggests to us that she was put at a substantial disadvantage by application of this provision, criterion or practice. The complaint in relation to that provision, criterion or practice, therefore, fails for this additional reason as well as the respondent not having the requisite knowledge.

Allegation 2 - Provision, criterion or practice of requiring new employees, as part of their preparation for taking calls, to listen in to calls handled by more experienced employees

150. The claimant alleges that this puts her at a disadvantage because having to listen to calls with someone reduced her reading time. We are not satisfied on the evidence that the claimant was put at a substantial disadvantage by this condition. She did have further opportunities for reading which were arranged for her by Mrs Grimshaw rearranging her programme for the rest of the week ending 17 March. In addition to reading time, the claimant needed the experience of listening in to calls and, indeed, would have been disadvantaged if she had not had this experience. We also found that an offer of further time was given to prepare to take calls, so, had there been a disadvantage, the respondent was proposing a reasonable adjustment.

We conclude, for these additional reasons, that this complaint of failure to make reasonable adjustments is not well-founded.

The respondent's witnesses

151. The claimant, during the hearing, made serious allegations that various of the respondent's witnesses were lying and suggested that she wanted to take action about this. We have heard no evidence which suggests to us that the respondent's witnesses were deliberately lying. They may have made errors in seeking to recollect events, due to fallibility of memory, but we are satisfied that they sought to give an honest account of relevant events.

Employment Judge Slater

Date: 12 July 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 July 2018

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

ANNEX

IN THE EMPLOYMENT TRIBUNAL
MANCHESTER

CASE NO.2403963/2017

B E T W E E N :

MISS M LITTLE

Claimant

- and -

ACAS

Respondent

**LIST OF ISSUES FOR DETERMINATION BY THE TRIBUNAL AT THE FINAL
HEARING ON 26-29 JUNE 2018**

Abbreviations: Claimant (C)

Respondent (R)

Jurisdiction

1. Are any/all of the C's discrimination claims (as set out in Case Management Discussion of the Case Management Order dated 19 December 2017) out of time, in particular:
 - (a) Direct race discrimination allegation 1: allegation that from the first day of her employment (1 February 2017) with R, the C and other BAME colleagues were segregated from white employees;
 - (b) Direct race discrimination allegation 2: allegation that the C's line manager Ms Julia Grimshaw was rude to her. C's paragraph 2(i) of her Further and Better Particulars (undated) refers to an incident on 2 February 2017, otherwise dates are not provided;
 - (c) Direct race discrimination allegation 3: allegation that the R gathered witness statements whilst the C was on sick leave that were designed to fulfil their objective of dismissing her. Dates not provided by C;

- (d) Discrimination arising from disability allegation 1: allegation that following the burglary of the C's home, the C was absent from work for two days. C alleges that the second's day's absence was caused by the burglary triggering symptoms of depression. C further alleges that the unfavourable treatment was that Ms Grimshaw was suspicious of the C's reasons for not being at work during a telephone call on the second day of absence. Dates not provided by C;
- (e) Discrimination arising from disability allegation 2: allegation that upon the C's return to work, Ms Grimshaw met with the C and compared the C unfavourably to colleagues. Dates not provided by C;
- (f) Discrimination arising from disability allegation 3: allegation that at meeting attended by the C, Ms Grimshaw, Mr Richard Knox and Ms Suzanne Farrell, the Claimant was treated unfavourably because Mr Knox told the C if she left work, the R would take action under its absence policy and that he said something along the lines of a colleague was able to attend work despite having a terminally-ill relative, and so should the C. Dates not provided by C;
- (g) Failure to make reasonable adjustments allegation 1: allegation that the R had a practice of requiring new employees to start taking telephone calls from a set date and that this put C at a substantial disadvantage when compared with non-disabled employees. Dates not provided by C; and
- (h) Failure to make reasonable adjustments allegation 2: allegation that the R had a practice of requiring new employees, as part of their preparation for taking calls, to listen in to calls handled by more experienced employees. C alleges this put C at a substantial disadvantage as it deprived the C of the opportunity to read the written material which she needed to understand in order to deal with telephone calls effectively. Dates not provided by C.

Disability discrimination

Disability

2. Did the C (at all material times) have a disability with the meaning of section 6 of the Equality Act 2010.
3. Did the R have knowledge of the C's disability, if so, from what date?

Discrimination arising from disability

Allegation 1

4.

- (a) Did Ms Grimshaw voice suspicion of the C's reasons for not being at work during a telephone call between Ms Grimshaw and C on the second day following the C's absence from work for two days following the burglary of her home?
- (b) Was C's absence from work something arising in consequence of her disability?
- (c) In so far as C can establish that suspicion was voiced, was the suspicion unfavourable treatment because of something arising in consequence of C's disability, namely her absence?
- (d) If so, was the suspicion voiced a proportionate means of achieving a legitimate aim?

Allegation 2

5.

- (a) On the C's return to work, did, Ms Grimshaw make an unfavourable comparison between the C and two colleagues during a meeting between C and Ms Grimshaw, as alleged?
- (b) Was the C's absence from work something arising in consequence of her disability?
- (c) If so, was the unfavourable comparison unfavourable treatment because of something arising in consequence of C's disability, namely her absence?
- (d) If so, was the unfavourable comparison a proportionate means of achieving a legitimate aim?

Allegation 3

6.

- (a) At a meeting attended by C, Ms Grimshaw, Mr Knox and Ms Farrell, did Mr Knox say that if the C left work the R would take action under its Absence Policy and/or that a colleague was able to attend work despite having a terminally-ill relative, and so should the C.
- (b) Was the Claimant unwell because of her disability?
- (c) If so, was the comment(s) made by Mr Knox unfavourable treatment because of something arising in consequence of C's disability, namely the C's disability-related symptoms making the C too unwell to stay at work?

Duty to make reasonable adjustments

Allegation 1

7.

- (a) Was the C placed at a substantial disadvantage (in respect of the R's practice of requiring new employees to start taking telephone calls from a set date).
- (b) If so, what was the substantial disadvantage?
- (c) Did the Respondent have knowledge of the substantial disadvantage?
- (d) In so far as the duty to make reasonable adjustments applied to the R, did the R fail to make reasonable adjustments? In particular were they reasonable adjustments (and if so did the R fail) to provide the C with reading time, provide the C with time off work and postpone the start date for the C to start talking calls?

Allegation 2

8.

- (a) Was the C placed at a substantial disadvantage (in respect of the R's practice of requiring new employees, as part of their preparation for taking calls, to listen in to calls handled by more experienced employees) in comparison with persons who are not disabled?
- (b) If so, what was the substantial disadvantage?
- (c) Did the R have knowledge of the substantial disadvantage?
- (d) In so far as the duty to make reasonable adjustments applied to the R, did the R fail to make reasonable adjustments? In particular were they reasonable adjustments (and if so did the R fail) to provide the C with reading time, provide the C with time off work and postpone the start date for the C to start talking calls?

Race discrimination

Direct race discrimination

Allegation 1

9. Did the R treat the C less favourably than it would treat others by segregating her from white employees because of her race?

Allegation 2

10. Did the R treat the C less favourably than it would treat others by Ms Grimshaw being rude to her because of her race?

Allegation 3

11. Did the R treat the C less favourably than it would treat others by gathering witness statements whilst the C was on sick leave (that were designed to fulfil the objective of dismissing her) because of her race?