



EMPLOYMENT TRIBUNALS

Claimant Ms Patricia Vaughan

Respondents Mr Mohammed Zakaria
Mr Monzur Rahman
Mr Mahmudur Rahman
Mr Mamuonur Rahman

Trading as A1 Taxi Service

Heard at: Exeter **On:** 12, 13 and 14 November 2018

Before: Employment Judge Goraj

Members Ms M Dale
Mrs S Richards

Representation

The Claimant: in person

The Respondents: Mr M Zakaria (on behalf of the other Respondents)

RESERVED JUDGMENT

THE UNANIMOUS JUDGMENT of the Tribunal is that: -

1. The claimant's complaints of disability discrimination are dismissed.
2. The claimant was unfairly dismissed by the respondents for the purposes of section 98 (4) of the Employment Act 1996.
3. Any Basic or Compensatory awards awarded to the claimant shall both be reduced by 25 per cent pursuant to sections 122 (2) and 123 (6) of the Employment Rights Act 1996.

REASONS

Background

1. By a claim form which was presented to the Tribunals on 8 January 2018, the claimant brought complaints of unfair dismissal and discrimination because of disability (including in respect of her dismissal). The claimant was employed by the respondents from 28 October 2012 until 23 August 2017.
2. The claimant's EC certificate records that the claimant's E C notification was received by ACAS on 21 November 2017 and that the EC Certificate was issued by email on 21 December 2017. Any alleged acts of disability discrimination allegedly occurring prior to 22 August 2017 (namely most if not all of the allegations apart from the claimant's dismissal) are therefore potentially out of time unless they form part of a course of conduct extending over a period or the Tribunal, in any event, considers that it is just and equitable to extend time to allow any proven acts to be pursued by the claimant.
3. The claimant contends that she is, and was at the relevant times, (a) a disabled person for the purposes of the Equality Act 2010 ("the 2010 Act") by reason of breast cancer and (b) that she experienced in particular bone pain and fatigue as a consequence of the chemotherapy treatment for her cancer.
4. The respondents accept that the claimant was at all relevant times a disabled person by reason of breast cancer including that they had the requisite knowledge of such disability and the effects thereof (save as referred to below). The respondents deny however that they discriminated against the claimant because of her disability and/or that she was unfairly dismissed. The respondents further deny that the claimant raised with them until August 2017/ that they were, in any event, aware that the use of the office chair caused the claimant any/ any significant discomfort because of her disability/ the effects of the related treatment. The respondents contend that the claimant was fairly and lawfully dismissed for conduct namely, alleged inappropriate comments of a racial nature towards one of the partners in the respondents, Mr Mamunur Rahman, who is hereinafter referred to in this Judgment as MR. MR did not attend the Hearing to give evidence. The respondents informed the Tribunal that MR did not wish to have any involvement in the Tribunal process.

The bundle

5. The Tribunal was provided with a bundle of documents which was prepared by the respondents. The Tribunal added to the bundle (a) at pages 99a – 99b of the bundle two further letters from the claimant to the respondents dated 21 August 2017 and (b) at pages 130 onwards of the bundle various statements/written representations provided by the claimant. The Tribunal explained to the claimant however that it would place limited weight upon such statements/written representations as the respondents would not have an opportunity to challenge the contents by cross examination.

The witnesses

6. The Tribunal received a written statement from the claimant. It was agreed that this statement would be considered with the further particulars of the claimant's claim at pages 33a – 33b of the bundle which, together, would be taken as the claimant's witness statement. The Tribunal also heard oral evidence from the claimant.
7. The Tribunal received witness statements and heard oral evidence from the following witnesses on behalf of the respondents: -
 - (1) Mr Mohammed Zakaria, who is a partner in the respondents. Mr Zakaria was the investigating officer in this case.
 - (2) Mr Monzur Rahman ("Mr Rahman"), who is a partner in the respondents. Mr Rahman was the dismissing officer in this case.
 - (3) Mrs Elizabeth Lewis, officer manager and taxi controller in the respondents.

The issues and related matters

8. The issues which the Tribunal is required to determine in this case are as identified in the Case Management Preliminary Order dated 24 August 2018 ("the CMPH Order"). It was agreed however that the Tribunal would limit its consideration at this stage to issues of liability together with the associated issues identified at paragraphs 6.5, 6.6 and 12 of the CMPH Order (relating to contribution, the effect of any procedural defects and any out of time issues).

FINDINGS OF FACT

The claimant

9. The claimant was employed by the respondents / their predecessors in title as a desk controller from 28 October 2012 until her dismissal by letter dated 23 August 2017 which latter date is the effective date of termination for the purposes of the Employment Rights act 1996 ("the Act"). The statement of terms and conditions which was issued to the claimant in February 2013 and the accompanying letter are at pages 39 – 46 of the bundle. The claimant's original contracted hours were for 37 hours a week. In practice however, the claimant worked for 35 hours per week because of the opening hours of the business. The claimant's contracted hours included an 11 hour (double shift) on Sundays from 1pm until 12 am and a 12 hour (double shift) from 7am until 7pm on Saturdays (page 45 of the bundle).
10. The respondents are the owner/ partners of the taxi business in which the claimant was employed. The respondents are brothers who acquired the business by way of a TUPE transfer on 30 November 2016. The respondents are of Asian origins. The claimant is white. Mr Mohammed Zakaria took on responsibility for the day to day management of the business following the TUPE transfer. The partner who was involved in the relevant incident on 6 August 2017, who as indicated above is referred to in this Judgment as MR, also worked in the respondents' taxi business as a driver. MR is the younger brother of the remaining partners. The two remaining partners Mr Monzur Rahman and Mr Mahmudur Rahman are responsible for the running of a further family business and have no day to day involvement in the respondents' business. The respondents have a close family relationship and dine together at their mother's house at least 3 times per week.
11. At the time of the events in question, the respondents employed six-part time staff and approximately 21 self-employed drivers. Mr Zakaria had worked in the business for a number of years as a self-employed taxi driver prior to the TUPE transfer during which time he had had a good working relationship with the claimant. The respondents have a diverse workforce from a range of cultural backgrounds. The respondents and their staff/ drivers engaged in discussions concerning a wide range of issues.
12. Mrs Lewis is employed by the respondents as office manager and was the claimant's line manager. Mrs Lewis had worked in the taxi business for over 20 years including as office manager for 18 years. A number of Mrs Lewis' previous management

responsibilities were taken over by Mr Zakaria following the acquisition of the business. Mrs Lewis recruited the claimant and had an overall good working relationship with her.

The Respondents' disciplinary policy and procedures

13. The respondents' disciplinary policy and procedure is at pages 48-49 of the bundle. The respondents relied on an external HR telephone help line service for HR advice. Mr Zakaria and Mr Rahman had no previous experience of dealing with investigatory/ disciplinary matters.

The Respondents' CCTV and other equipment

14. There was a dispute between the parties as to whether the respondents (a) had relevant CCTV footage (and associated audio recording) of the events of 6 August 2017 and associated events and (b) whether such footage continued to be available or had been overwritten.
15. The claimant contended that the respondents (a) had CCTV equipment (with audio recording) in operation in the office where she worked and (b) that the respondents also had audio recording facilities on the telephone system and (c) such recordings would have been available to the respondents at the time of the incidents in question/ could still be produced for the purposes of the Tribunal hearing. The Tribunal made an order at the CMPH for the respondents to provide the claimant with a copy of any relevant CCTV footage.
16. The respondents accepted/contended at the Hearing that (a) it had installed CCTV recording equipment following the acquisition of the business (b) whilst the CCTV equipment recorded events in the main office where the claimant worked there was no accompanying audio recording as the microphone had not been activated and (c) the CCTV recordings of any relevant alleged incidents (including the events of 6 August 2017) were no longer available as the pictures had been overwritten. Having given the matter careful consideration, the Tribunal is satisfied, on a balance of probabilities, that (a) at the time of the matters in issue the respondents had visual and audio recording in the main office including of the desk controller stations and (b) such recordings would have been available for review at the time of the incidents in question but would have been overwritten after a period of 15 days thereafter unless steps had been taken to preserve them. When reaching this conclusion, the Tribunal has taken into account in particular the contents of the respondents' letter to the claimant dated 12

January 2018 (which is at pages 108 – 109 of the bundle) in which Mr Zakaria of the respondents clearly states that there is visual and audio monitoring in the main public office and makes no suggestion that the audio recording was not operational for any reason.

Attendance of friends and family at work.

17. The respondents contended that (a) they operated a policy whereby desk controllers and other members of staff were prohibited from allowing members of their family/friends to stay with them in the respondents' office whilst they were working (b) Mr Zakaria had explained this to the claimant including when she had been visited by her partner and his dog and (c) Mrs Lewis had also made the position clear to staff.
18. The claimant contended that although she accepted that it had been explained to her that it was not acceptable for friends and family to spend time in the main office whilst the controller was working such practice was commonplace and was known about by the respondents.
19. Having weighed the evidence, the Tribunal is satisfied that (a) Mr Zakaria and Mrs Lewis operated the above policy and spoke to staff accordingly if they witnessed any such conduct and (b) such visits however continued from time to time when Mrs Lewis/ Mr Zakaria were not in attendance.

The claimant's medical condition

20. The claimant was diagnosed in 2016 with breast cancer for which she was treated with chemotherapy. The side effects of the chemotherapy included fatigue and significant bone pain for which the claimant continues to take medication.

The chair

21. The claimant used the Respondents' adjustable chair for the performance of her duties as a desk controller. The chair operated by way of a gas lift valve. In summary, the claimant contended that (a) she first discovered when she attended the respondents' premises on 18 December 2016 that the chair was not working properly as it would drop down suddenly (b) when she subsequently used the chair following her return to work it caused her to experience painful muscle spasms which sometimes lasted for 2- 3 hours because of her medical condition arising from her cancer / treatment and (c) that she raised the problem with Mrs Lewis and Mr Zakaria on a number

of unspecified occasions subsequently including that the last occasion upon which she raised the matter with Mr Zakaria was on or around 29 June 2017 when he informed the claimant that a new chair was on order.

22. Mrs Lewis accepted in her evidence that the claimant may have raised concerns regarding the chair and that she would have advised her to speak to Mr Zakaria about the matter. In summary, Mr Zakaria (a) denied that the claimant had raised any concerns with him regarding the chair including in respect of any effect on her back (b) contended that he was first informed of concerns regarding the chair in August 2017 by another employee Lena in response to which he ordered two new replacement chairs.
23. Having given careful consideration to the conflicting evidence and limited available documentary evidence the Tribunal is not satisfied on a balance of probabilities that (a) the claimant raised any concerns regarding the chair (including with regard to any effect on her back) with Mr Zakaria until August 2017 and (b) that the claimant raised any significant concerns with Mrs Lewis regarding the chair (including with regard to any effect on her back) or (c) that the chair, in any event, caused the claimant more than minor discomfort.
24. When reaching such conclusions the Tribunal has taken into account in particular that (a) the allegations are denied by the respondents save as accepted by Mrs Lewis as referred to above (b) although there are references to difficulties with the chair in the written representations which have been provided by the claimant there is no reference to any concerns regarding the chair or effect on the claimant's back in any correspondence passing between the parties or in any other documentation prior to the claimant's letter to the respondents dated 21 August 2017 (page 99a of the bundle) including in the GP's sick note dated 12 June 2017 (page 76), the claimant's letters to the respondents dated 24 and 27 June 2017 (pages 78 – 81 of the bundle), the respondents' notes of the return to work interview on 29 June 2017 (pages 82-83 of the bundle) and the claimant's letter to the Respondents dated 1 August 2017 (pages 86 – 87 of the bundle) and further notwithstanding that the claimant raised other concerns in such documentation.

Return to work and associated matters

25. The claimant was absent from work from June/ July 2016 until 31 December 2016 (because of breast cancer and the

associated treatment). The claimant agreed with Mr Zakaria on 18 December 2017 that she would return to work on reduced hours of 22 hours a week in recognition of the ongoing effects of fatigue and bone pain.

26. The claimant contended that shortly after her return namely, from in or around January 2017 she was pressurised by Mrs Lewis to return to her contracted hours. The claimant also contended however that she was reassured by Mr Zakaria at that time that there was no requirement for her to return to her contracted hours.
27. Mrs Lewis denied the allegations. Mrs Lewis contended in her oral evidence that the first time that she had spoken to the claimant about the possibility of the claimant extending her working hours was at the beginning of April 2017 prior to Mrs Lewis' impending absence on holiday for a month. Mrs Lewis further contended that (a) she had spoken to the claimant at that time as she was arranging for cover during her absence and wished to include the claimant in the discussions and (b) that the claimant informed her that she did not feel well enough to increase her hours at that time because she was experiencing bone pain and that she did not therefore pursue the matter further.
28. Having given careful consideration to the conflicting oral evidence and limited documentary evidence the Tribunal is not satisfied that Mrs Lewis / the respondents placed any pressure on the claimant to return to her contracted hours following her return to work in December 2017 (including that any pressure was placed upon her to do so by Mrs Lewis in or around January 2017 as contended by the claimant).
29. The Tribunal is however satisfied, on the balance of probabilities that (a) there was a discussion between Mrs Lewis and the claimant at the beginning of April 2017 regarding the claimant's working hours in the context of Mrs Lewis making arrangements for cover during her forthcoming leave (b) the claimant informed Mrs Lewis during such discussion that she did not feel able to increase her hours at that time because of fatigue and bone pain, that this was accepted by Mrs Lewis who did not pursue the matter further and that no pressure was therefore placed upon the claimant to increase her hours at the time.
30. When reaching such conclusions the Tribunal has taken into account in particular that (a) the claimant's evidence regarding

such allegations is unparticularised (b) the claimant acknowledged that she had a good working relationship with Mrs Lewis who was supportive to her following the claimant's return to work and (c) that there is no reference in any contemporaneous documentation to any proposals by the respondents for any increase in the claimant's working hours until June 2017 (page 73 of the bundle).

The events of late May 2017

31. The claimant contended that during her shift of on or around 30 May 2017, Mr Zakaria harassed the claimant by way of the following alleged conduct namely (a) by informing the claimant that he wanted to reduce the claimant's working hours to 10 hours a week and (b) that he repeatedly told the claimant that day that she was not the same person as she had been prior to her cancer/ chemotherapy. The claimant originally contended that this had occurred on 9 May 2017 but indicated during the course of the Hearing that the alleged conduct had taken place on or around 30 May 2017. The claimant also contended that Mr Zakaria had informed her during their discussions of a proposed meeting. The claimant relied in support of her allegations upon her written representations including the letter from her daughter (at page 136 of the bundle). The allegations are denied by Mr Zakaria.

32. The claimant further contended that on or around 31 May 2017 (a) she contacted Mrs Lewis on the telephone to discuss the above and (b) during the conversation Mrs Lewis informed her that concerns had been raised by customers and drivers regarding the claimant's performance which had not been discussed with the claimant because of her illness. Mrs Lewis accepted that she had received a telephone call from the claimant on 31 May 2017 during which the claimant had become upset. Mrs Lewis also contended in her evidence that by the end of May 2017 the respondents wished to discuss with the claimant the possibility of increasing her working hours because of concerns raised by staff who had been covering her hours including as they wished to know whether the arrangement would continue on a permanent basis.

33. Having considered the conflicting oral evidence and limited associated documentary evidence, the Tribunal is satisfied, on the balance of probabilities, that by the end of May 2017 the respondents wished to discuss with the claimant (a) concerns relating to her performance and (b) increasing her working hours in the light of concerns which had been raised by other staff and

(b) that there was a discussion between the claimant and Mrs Lewis on 31 May 2017 as referred to above.

34. The Tribunal is not however satisfied on the balance of probabilities that Mr Zakaria acted towards the claimant on 30 May 2017 as alleged by the claimant including (a) that he told the claimant that he wished to reduce her working hours or (b) that he told the claimant that she was not the same person that she had been prior to her diagnosis of cancer.
35. When reaching the above conclusions, the Tribunal has taken into account in particular (a) the conflicting oral evidence between the parties (b) that the claimant's allegation relating to the alleged proposed reduction in the claimant's working hours is inconsistent with the terms of Mr Zakaria's subsequent letter to the claimant dated 1 June 2017 (at page 79 of the bundle) in which one of the proposed matters raised for discussion was increasing the claimant's working hours towards her normal contractual hours (c) that the allegations regarding the conduct of Mr Zakaria are inconsistent with the contents of the letter of the claimant's daughter at page 136 of the bundle and (d) the contents of the respondents' letter dated 1 June 2017 (page 73 of the bundle).

The events of June 2017

36. Mr Zakaria wrote to the claimant by letter dated 1 June 2017 (page 73 of the bundle) inviting the claimant to attend a performance review meeting to discuss the matters referred to above.
37. The claimant was very distressed by the letter. The claimant was absent from work due to stress from 3 June 2016 to 26 June 2016 (sick note at page 75 - 76 of the bundle).
38. There was correspondence between the parties during June 2017 including the correspondence between the claimant and the respondents between 21 and 27 June 2017 concerning the claimant's return to work and increased working hours. In summary (a) Mr Zakaria wrote to the claimant on 21 June 2016 (page 77 of the bundle) seeking a solution regarding the claimant's return to her contractual hours (b) the claimant responded to Mr Zakaria by letter dated 24 June 2016 (pages 78 – 80 of the bundle) explaining her perspective on the situation including that Mrs Lewis had requested the claimant on a number of occasions to come back on full contracted hours, that she had been unable to do so because of the effects of her

chemotherapy and that she had felt harassed and victimised by such requests and (c) the claimant's letter to the respondents dated 27 June 2017 in which the claimant expressed her wish to increase her hours of work towards her full contracted hours (page 81 of the bundle).

Back to work meeting on 29 June 2017

39. Mr Zakaria and Mrs Lewis conducted a back to work meeting with the claimant on 29 June 2017. Mrs Lewis' brief notes of the meeting are at pages 82 – 84 of the bundle. These notes were not sent to the claimant at the time. There was disagreement between the parties regarding the matters discussed on 29 June 2017 and the accuracy of Mrs Lewis' notes of the meeting. The Tribunal is satisfied that (a) the principal matters discussed are as recorded in the respondents' subsequent letter to the claimant at pages 84 and 85 of the bundle and (b) that this included an agreed working pattern for the period between 1 and 25 July 2017 which was undertaken by the claimant without any notified difficulties.

The events of 23 July 2017

40. The claimant contended that around 23 July 2017 she was allegedly harassed by Mr Zakaria for allowing a son of a driver/friends to stay in the office. The claimant however (a) accepted in her evidence that she had agreed with Mr Zakaria on 23 July 2017 that it was inappropriate for the boy to remain in the office and that she would make sure that it did not happen again and (b) further accepted in her evidence that she did not contend that the incident was in any way related to her disability. The claimant confirmed that her complaint related to the fact that she had allegedly subsequently been informed that other controllers had been treated differently as they had not been prevented from having friends and family in the office and she relied upon her written representations in support of such contentions.

41. The respondents accepted that Mr Zakaria had instructed the claimant on 23 July 2017 that the driver's son should not be allowed to remain on the respondents' premises. The respondents however denied any disparate treatment including they had condoned any such conduct by other members of staff. The respondents contended that Mr Zakaria had raised the matter with the claimant on 23 July 2017 because he was concerned about the boy's attendance at the respondents' premises particularly in the light of the previous occasions upon which the claimant/her relatives (including their dog) had

been present at respondents' premises and (c) had also addressed any such unauthorised attendance in the respondents' office when they had become aware of it including that Mrs Lewis had instructed the boy concerned to leave the taxi office on other occasions.

42. Having weighed the available evidence the Tribunal is satisfied that (a) Mr Zakaria raised the matter with the claimant on 23 July 2017 for the reasons explained above and further that there is no evidence that such discussion was related in any way to the claimant's disability and (b) Mr Zakaria and Mrs Lewis adopted the above mentioned policy prohibiting the attendance of friends and family in the respondents' office including that the Tribunal is not satisfied on the basis of the available evidence that Mr Zakaria or Mrs Lewis operated a more lenient policy towards other staff. When reaching the above conclusions, the Tribunal has taken into account the oral evidence of the parties including the claimant's acknowledgment that she accepted at the time that it was inappropriate for the boy to remain in the office.

The meeting on 27 July 2017 and shift on 30 July 2017

43. There was a meeting between the parties on 27 July 2017 when the claimant agreed to undertake, on a trial basis, a double shift i.e. for 12 hours, on Sunday 30 July 2017 together with a further double shift 2 weeks later. The claimant worked the double shift on 30 July 2017 as agreed. The claimant was not allocated any formal breaks on 30 July 2017.

44. The claimant did not provide the Tribunal with any evidence of any pain or fatigue experienced in respect of her shift of 30 July 2017. Further, the Tribunal is satisfied that there is no evidence that the claimant raised any concerns regarding such shift (including with regard to the taking of breaks or that she had experienced any pain, fatigue or other discomfort by reason of the double shift) at that time or otherwise indicated to the respondents that she would be unable to undertake the 2nd proposed double shift in August 2017.

45. When reaching the above conclusions the Tribunal has had regard in particular to the claimant's oral evidence and to the contents of the claimant's letter to the respondents dated 1 August 2017 in which the claimant raised concerns regarding an unrelated matter (pages 86 – 87 of the bundle) but made no suggestion that she had experienced any difficulties the

previous day and/or was unable to continue with the proposed arrangement.

The events leading up to the claimant's dismissal

46. On the evening of Sunday 6 August 2017 Mr Zakaria received a telephone call from his brother MR during which MR alleged that the claimant had made racially discriminatory remarks about him. After taking HR advice Mr Zakaria advised his brother to record the allegations in writing. MR's signed statement dated 6 August 2017 is at page 54 of the bundle. In summary, the statement which is headed, "Inappropriate conversations at work", raised a complaint about the claimant including that she had stated that the culture to which MR belonged belittled women and that such views were bred into MR because he was from that culture.

47. Mr Zakaria was away from home at that time and did not return until the evening of 9 August 2017.

48. On his return on 9 August 2017, Mr Zakaria met with MR at their mother's house to discuss the statement which had been submitted by MR. MR told Mr Zakaria that he believed that the claimant had made the comments recorded in the statement deliberately to provoke him and that he was not prepared to work with the claimant any more.

49. Later that evening the four brothers had dinner at their mother's house. During the meal there was a discussion about the incident on 6 August 2017. It was agreed that Mr Zakaria would conduct an investigatory meeting with the claimant.

The investigatory meeting on 10 August 2017 and associated events

50. After taking HR telephone advice Mr Zakaria contacted the claimant on the morning of 10 August and asked her to attend a meeting that day. Mr Zakaria did not inform the claimant of the purpose of the meeting. The claimant believed that the purpose of the meeting was to discuss her future working arrangements. Mr Zakaria stated in his evidence to the Tribunal that he did not undertake any further investigations into the matter prior to the investigation meeting. Mr Zakaria also decided to raise with the claimant unrelated complaints which he had received from drivers concerning the claimant.

51. The investigatory meeting was conducted by Mr Zakaria with Mrs Lewis in attendance to take notes.

52. There is a dispute between the parties regarding the events of the investigatory meeting on 10 August 2017. The claimant's note of the meeting is at pages 56 – 57 of the bundle. The Respondents' note of the meeting is at pages 59 – 62 of the bundle.
53. Having considered the conflicting oral evidence and available documentary evidence the Tribunal is satisfied, in summary, as follows :-
- (1) It was a difficult meeting during which the claimant quickly became very agitated and distressed.
 - (2) When the claimant discovered that the meeting was being conducted as part of an investigatory process she objected to continuing without being given any prior notice but was advised by the respondents that notice was not required in such circumstances.
 - (3) Mr Zakaria advised the claimant that he had received a written complaint from MR regarding her conduct. There is a dispute between the parties as to whether Mr Zakaria read out the statement from MR dated 6 August 2017 to the claimant during the meeting. The claimant contended that Mr Zakaria held up a piece of paper in the air which he said was a statement from MR but that he did not read it out. Mr Zakaria and Mrs Lewis both contended that Mr Zakaria read the statement out at the meeting. The Tribunal prefers, on the balance of probabilities the evidence of the respondents on this issue. When reaching this conclusion the Tribunal has taken into account in particular that it is accepted that the claimant was agitated and distressed and is therefore satisfied in such circumstances that her recollection of such matter is likely on balance to be less reliable. The claimant was not however provided at the meeting with a copy of the statement from MR and the respondents did not contend that the claimant was offered an opportunity to read it for herself.
 - (4) There was a discussion regarding the appropriateness of the discussion which had taken place between the claimant and MR on 6 August 2017 during which (a) the claimant stated that the conversation between her and MR had arisen as a result of a complaint which she had received from an angry mother who had accused MR of

locking her daughter in his taxi and taking her phone off her to make a payment into his PayPal account for the taxi fare/who was threatening to involve the police (b) Mr Zakaria told the claimant that MR had felt unsupported by her during the telephone conversation with the mother (c) the claimant accepted after questioning by Mr Zakaria that the conversation which had taken place between her and MR was not an appropriate conversation for the workplace and admitted that she had not handled the telephone call from the mother well. The claimant did not however admit that she had made any racist comments about MR.

- (5) Mr Zakaria did not state during the meeting, as contended by the claimant, that he had viewed the CCTV footage which proved the allegations made by MR. When reaching this conclusion, the Tribunal has taken into account in particular that Mr Zakaria denied in evidence that he had viewed the CCTV footage (or undertaken any other investigations prior to the investigatory meeting) and further that there is no reference to the CCTV footage in the Respondents' notes of such meeting.
- (6) Mr Zakaria told the claimant about the complaints which had been received from other drivers.
- (7) Mr Zakaria explored with the claimant his concerns regarding the alleged conduct of the claimant on 6 August 2017 and asked her on two occasions whether she considered that her conduct had been inappropriate.
- (8) The claimant (as was accepted by her) became very upset and walked out of the meeting. The Tribunal is not satisfied however that Mr Zakaria behaved inappropriately including that he became very upset during the meeting as alleged by the claimant. When reaching this conclusion, the Tribunal has taken into account in particular the oral evidence of Mrs Lewis who was present at the meeting as a witness /notetaker (including her notes of the meeting) and that the claimant's admissions referred to above.

The disciplinary process

54. After taking further HR telephone advice, Mr Zakaria decided to initiate formal disciplinary proceedings for alleged gross misconduct in respect of the claimant's alleged conduct towards

MR on 6 August 2017. The respondents decided that the disciplinary hearing would be conducted by Mr Monzur Rahman as (a) he did not have any day to day involvement in the running of the respondents' taxi business and (b) in the light of the small size of the business and limited resources it was not appropriate to involve an external person in the matter.

The respondents' letter dated 11 August 2017 and subsequent correspondence

55. Mr Zakaria wrote the claimant by letter dated 11 August 2017 confirming/ informing the claimant that (a) it had been alleged that the claimant had raised and participated in an inappropriate, offensive and racially discriminatory conversation with MR on 6 August 2017 which was considered to constitute gross misconduct which could result in the claimant's summary dismissal (b) she was suspended on normal pay in view of the nature of the allegations (c) she was required to attend a disciplinary hearing on 16 August 2017 which would be conducted by Mr Monzur Rahman who would be accompanied by Mrs Lewis as a witness notetaker (d) that the claimant was entitled to be accompanied at the hearing and (e) the claimant would be provided with details of previous meetings and any evidence and the claimant was requested to provide any comments by 15 August 2017. This letter is pages 90 -91 of the bundle.
56. The claimant responded by letter dated 15 August 2017 requesting a delay in the proceedings as she had not received any documents from the respondents and had therefore been unable to seek any professional advice regarding the serious allegations against her or the discrimination which she had allegedly suffered as a result of her disability/ the effects thereof.
57. In the subsequent correspondence which passed between the parties (pages 93- 98 of the bundle) the respondents (a) re-arranged the disciplinary hearing/ venue as requested by the claimant (b) acknowledged that the claimant suffered from bouts of fatigue and that she was on post – chemotherapy medication but denied any knowledge of any disability related discrimination and (c) provided the claimant with a copy of the statement from MR dated 6 August 2017 and of Mrs Lewis' notes of the investigatory meeting on 10 August 2017. The claimant advised the respondents/ contended that (a) she disagreed with the allegations which had been raised during the investigatory meeting (b) the investigatory process had been unfair including as Mr Zakaria was the brother of the

complainant (c) the respondents were aware of the discrimination which she had experienced by reason of her disability and (c) further paperwork would follow.

The disciplinary hearing on 22 August 2017.

58. Mr Monzur Rahman conducted a disciplinary hearing on 22 August 2017. Mr Rahman had not previously conducted a disciplinary hearing. Mrs Lewis was in attendance as a witness and note taker. The claimant declined her right to be accompanied at the disciplinary hearing.

59. Mr Zakaria had provided Mr Rahman, with a copy of MR's statement dated 6 August 2017 together with a copy of the respondents' notes of the investigatory meeting. Mr Rahman did not however review (a) the respondents' recording of the telephone conversation which had taken place on 6 August 2017 between the claimant and the mother of the female passenger who had complained to the claimant about the conduct of MR or (b) the respondents' CCTV footage/ associated audio recording of the discussion between the claimant and MR on 6 August 2017, in preparation for the disciplinary hearing.

60. The respondents' notes of the disciplinary hearing (which were taken in manuscript by Mrs Lewis and subsequently typed up by Mr Rahman) are at pages 63-67 of the bundle. The Tribunal is satisfied that these notes are a broadly accurate account of the matters discussed.

61. At the commencement of the disciplinary hearing the claimant handed to Mr Rahman an envelope containing a number of letters addressed to the respondents (the letters at pages 88 -89 and 99 – 99b of the bundle) . Mr Rahman did not open the envelope during the disciplinary hearing.

The matters discussed at the Hearing on 22 August 2017

62. In brief summary the parties discussed the following matters at the disciplinary hearing: -

(1) The claimant confirmed in response to a question from Mr Rahman that she considered that she had been discriminated against by the respondents in respect of her cancer/the effects thereof as further explained in the letters which she had handed to Mr Rahman.

(2) The claimant stated that it was inappropriate for Mr Rahman to determine the allegations which had been made against the claimant by MR as the allegation had been made by his brother and Mr Rahman was a partner in the Respondents' taxi business. Mr Rahman rejected the claimant's objections on the basis that he was impartial and objective as he did not work or interact with any of the respondents' employees.

(3) The claimant confirmed that she had been provided with a copy of MR's statement dated 6 August 2017 and that she was aware that the respondents' handbook stated that racial discrimination in the workplace would be considered as gross misconduct.

(4) The claimant denied the allegations contained in MR's statement including that she had made racially inappropriate comments (including that she had accused MR of belonging to a culture which belittled women / it was bred into MR because of his culture). The claimant stated that Mr Rahman could view the CCTV footage of the incident on 6 August 2017 which would show what had taken place and that she had also given an explanation in the letters which she had handed to him.

(5) The claimant contended that the respondents' notes of the investigatory hearing were inaccurate and that she had only agreed to what Mr Zakaria had said at the investigatory hearing because he was being very aggressive and she felt very uncomfortable and was crying. The claimant explained to Mr Rahman that she had shared her views with MR as MR had asked why women behaved in such a manner as explained further in the letters which she had handed to Mr Rahman.

(6) The claimant rejected Mr Rahman's suggestion that MR was very offended by the claimant's comments and contended that she believed that MR was scared of getting the sack for his behaviour as he had previously been reprimanded by Mr Zakaria on several occasions including for demanding payment from customers. The claimant also denied that her comments could be perceived as racist and that MR had previously alleged that the people were only saying things because he was black and that he could do whatever he wanted. The claimant further stated that this had been mentioned to her by three different drivers on the rank who had been really offended by MR's comments.

(7) The claimant disputed that the incident on 6 August 2017 could be considered as gross misconduct as it was a discussion

about different cultures. The claimant concluded by stating that she had always tried to protect MR and that she felt completely betrayed that MR had lied about what had happened.

(8) Mr Rahman concluded the disciplinary hearing on the basis that the claimant would be provided with a formal letter confirming the outcome once the decision been made.

Subsequent events.

63. Following the disciplinary hearing, Mr Rahman read the letters which the claimant had handed in during the disciplinary hearing which in brief summary were as follows: -

(1) A letter relating to the claimant's diagnosis of cancer and related treatment in which the claimant contended that Mr Zakaria and Mrs Lewis were fully aware of the claimant's disability including (a) of the problems which the claimant had experienced with bone pain and the medication which the claimant was required to take to alleviate such pain and (b) that the broken work chair had caused the claimant to have back spasms for 2/3 hours after leaving work (page 99 a of the bundle).

(2) A statement of alleged events on 6 August 2017 relating to (a) the telephone call which she had received from a woman complaining about the treatment which her daughter had allegedly received from MR including that MR had allegedly locked her daughter in his car in order to secure the payment of his taxi fare and that the woman had threatened to report the matter to the police (b) the claimant's subsequent discussion with MR regarding the matter including that MR did not consider that he had done anything wrong and that MR felt that it had been inappropriate for the claimant to agree with the woman's concerns regarding MR's behaviour and (c) that MR had asked the claimant why women behaved in such a way in her culture and she had responded by explaining that their cultures were different and (as allegedly previously explained to her by Mr Zakaria) that in MR's culture men were regarded as superior to women and women were more respectful whereas in the claimant's culture men and women were brought up to be equal (page 89 of the bundle).

(3) A further letter disputing the allegations against her including that she was racist and contending that the

CCTV footage and audio recording of the incident would support the claimant's position. The claimant stated that Mr Zakaria had explained to her on more than one occasion that Muslim men were considered to be superior to women as demonstrated by an occasion when a female member of his family had been sent home to her family because she had shown a lack of respect for her husband (page 99b of the bundle).

(4) A further letter disputing unrelated allegations. (page 99 of the bundle).

64. Mr Rahman reviewed MR's statement dated 6 August 2017 together with the respondents' notes of the investigatory and disciplinary hearings.
65. Mr Rahman did not however review the respondents' CCTV footage/ any audio recording of the discussion between the claimant and MR on 6 August 2017 or listen to the recording of the telephone conversation between the claimant and the mother of the female involved in the incident with MR. Further, Mr Rahman did not speak to Mr Zakaria or to MR regarding the matters which had been raised by the claimant during the disciplinary hearing or in the letters which the claimant had handed to him during the disciplinary hearing.
66. Mr Rahman explained to the Tribunal that he did not speak to Mr Zakaria about the allegations which the claimant had made in her letter regarding the treatment of a member of the family as he understood it to be a reference to his own marriage which he knew to be untrue and further that he considered that it had been raised by the claimant in an attempt to create a rift between him and Mr Zakaria.
67. Mr Rahman did not provide the Tribunal with any explanation/ satisfactory explanation for his failure (a) to review (prior to and/or during the disciplinary process) the respondents' CCTV footage/ any audio recordings of the incident on 6 August 2017/ the conversation between the claimant and the mother of the passenger or (b) to speak to MR regarding the claimant's version of events on 6 August 2017 including the claimant's contention that MR had initiated the discussion regarding cultural differences/ that she had not made the alleged racist comments.

68. After taking further HR telephone advice Mr Rahman decided to dismiss the claimant for gross misconduct.

The letter of dismissal dated 23 August 2017

69. Mr Rahman wrote to the claimant by letter dated 23 August 2017 advising the claimant of his decision to dismiss her. This letter is at pages 100 – 102 of the bundle.

70. In brief summary, Mr Rahman: -

- (1) Summarised the allegations against the claimant namely, that on 6 August 2017 the claimant had made comments and statements of a racial nature to a driver (MR) of Asian descent including that she had stated (a) that men were regarded more highly than women who were kept down in his culture and (b) when the driver (MR) denied that these were his views and stated that he was offended by what the claimant had said the claimant had said that it did not matter as such views were bred into him because of his Asian culture.
- (2) Stated that the claimant had denied at the disciplinary hearing that she had made the alleged comments and contended that the statement of MR and that the contents of the respondents' investigation notes were inaccurate and accused the driver MR of telling lies.
- (3) Stated that it was clear from the notes of the investigation meeting that the conversation had taken place and that such discussion was not appropriate in the workplace.
- (4) Advised the claimant that he had spoken to the note taker / witness (Mrs Lewis) who had confirmed that the investigating officer had not been aggressive and that he had concluded that the claimant had changed her story when she had realised the seriousness of the matter.
- (5) The comments which the claimant had made regarding cultural differences including that it was not accepted in her culture as appropriate to lock/ trap a woman in a car inferred that it was acceptable in other cultures which was a negative statement when directed to a driver of Asian descent and thereby placing him in a bad light.
- (6) Culture should not have been raised by the claimant as it had no place in the workplace and had given rise to

perceived racist remarks regarding men of Asian descent including that they belittle women/Asian drivers have a tendency to lock women in cars because it was part of their culture to look down on women.

- (7) MR was very traumatised by his experience and had expressed a deeply held belief that he could not work with someone with such opinions and views.
- (8) That he believed that the claimant had intended to cause offence by her statements and that she had been racist towards a colleague. He had therefore decided summarily to dismiss the claimant without notice with effect from 23 August 2017.
- (9) Rejected the claimant's allegations of disability discrimination as raised in her letters dated 15 and 21 August 2017 relating to the increase in working hours and use of the office chair including on the grounds that (a) he had been provided with statements from the claimant dated 15 and 27 June 2017 stating that the claimant would like to increase her working hours to her contractual hours and (b) although the respondents were aware that the claimant needed to get out of the chair regularly (including to have cigarette) they were unaware of the fact that the claimant had been suffering from any back pain or spasms by reason of the faulty chair lift and had replaced the chair following concerns being raised by the claimant and other staff and (c) the respondents had supported the claimant through her recovery by facilitating reduced working hours since her return to work.

The claimant's appeal

71. The claimant wrote to the respondents by letter dated 30 August 2017 appealing against her dismissal. This letter is on page 103 of the bundle. In summary, the claimant stated that she wished to challenge the decision to dismiss her on the grounds that (a) the investigation and disciplinary meetings were conducted by MR's brothers who were emotionally involved and could not therefore be impartial and (b) it was obvious that the investigating and disciplinary officers had not undertaken such a process previously and did not conduct the meetings in a way that could be deemed appropriate or professional. The claimant stated that she looked forward to receiving details of an appeal

hearing whereby the matter could hopefully be resolved internally in order to avoid the need for legal action.

72. The claimant did not receive a response to her letter and wrote to the respondents again on 18 September 2017 enclosing a further copy of the letter of appeal in order that the matter could be concluded.
73. The respondents wrote to the claimant by letter dated 22 September 2017 in which they stated that the claimant's original letter of appeal had not been received. The respondents invited the claimant to attend a disciplinary appeal meeting on 10 October 2017 which would be conducted by Mr Mahmoudur Rahman who would be accompanied by a witness and notetaker. The respondents enclosed with the letter a copy of their notes of the disciplinary hearing and advised the claimant of her right to be accompanied at the appeal hearing.
74. The claimant wrote to Mr Zakaria by letter dated 9 October 2017 advising him that (a) her original letter of appeal has been hand-delivered to the respondents' office on the morning of 31 August 2017 and (b) she felt emotionally unable to attend the proposed appeal hearing as it would be conducted by another member of his family.
75. The Tribunal has not been provided with a copy of any response to the claimant's letter.

Other matters

76. The claimant contacted her local CAB office in June 2017 for advice following her absence from work for stress. The claimant did not contact the CAB again for advice until December 2017/ January 2018. The claimant informed Macmillan Cancer care about her dismissal who advised the claimant to speak to ACAS. Prior to her discussion with ACAS the claimant had understood that she had three months from the date of an appeal to pursue a claim to the Tribunals. ACAS however informed the claimant that the relevant period ran from the date of dismissal. The claimant did not pursue a claim to the Tribunal until November 2017 because of her continuing health issues and also because her partner suffered a heart attack in October 2017.

Findings for the purposes of any award of remedy only (if relevant)

77. the Tribunal has made, for the purposes of remedy only (if relevant), the following findings concerning the events of 6 August 2017.

The conversation between the claimant and the mother of the female passenger of MR.

78. The Tribunal has not been able to listen to the recording of the telephone conversation between the claimant and the mother of the female passenger of MR on night of 6 August 2017. Having however given careful consideration to the oral evidence of the claimant and Mrs Lewis (who listened to the recording) the Tribunal is satisfied on the balance of probabilities that the mother of the passenger (a) was very upset and the conversation went on for a while (b) explained that her daughter had arrived late home on her own (c) told the claimant that the driver (MR) had refused to let her daughter out of his taxi until she had paid the fare and (d) threatened to involve the police. The Tribunal is further satisfied that the claimant dealt with the complaint in an empathetic manner in order to defuse the situation including that she expressed the view that the driver should not have acted in the manner alleged and informed the mother that she would ask the owner of the company to investigate the matter. MR was present in the office during the conversation between the claimant and the mother and heard what was said by the claimant.

The subsequent discussion between the claimant and MR

79. Again, for the purposes of remedy only (if relevant) the Tribunal is satisfied, on the balance of probabilities, that in summary the following discussion occurred between the claimant and MR on 6 August 2017. When reaching its conclusions the Tribunal has had regard to the oral evidence of the claimant and also to the available documentary evidence including the respective written statements of events from the claimant and MR (at pages 54 and 88- 89 of the bundle) and the respondents' notes of the investigatory and disciplinary hearings. When reaching its conclusions the Tribunal has also taken into account that MR elected not to attend the Tribunal to give oral evidence regarding such conversation and further that the Tribunal has not been able to review any CCTV footage/ associated audio recording as this was not retained by the respondents as referred to previously above.

80. In summary the Tribunal is satisfied as follows: -

(1) The claimant received and dealt with the conversation from the mother of the passenger of MR referred to above in the presence of MR.

(2) Upon the conclusion of the telephone conversation MR asked the claimant what the mother had said and gave the claimant his version of events including that (a) the passenger did not have enough money to pay her fare and said that she would get it from the house (b) he did not however believe that the passenger would return from the house with the money and asked her for her telephone so that she could make a PayPal payment into his account.

(3) MR told the claimant that he was unhappy about the way in which she had agreed with the mother that he had acted inappropriately and that he did not consider that he had done anything wrong.

(4) The claimant explained to MR that the mother had wanted to contact the police and that she had tried to avoid this happening. The claimant also advised MR that she believed that he had been wrong to prevent the passenger from leaving his taxi and that he should have contacted the police.

(5) MR then asked the claimant why women / girls in her culture behaved in such a manner.

(6) The claimant responded by explaining (including by the use of her hands to demonstrate what she was saying) that she understood from what she had been told, that in MR's culture men were considered to be superior to women whereas in her culture they were brought up to be equal however both cultures needed to be respected.

(7) MR denied that he held any such view or that such views applied to the culture to which he belonged and raised concerns that the claimant was generalising about everybody who came from his culture.

(8) MR contended that the claimant dismissed MR's concerns by saying that it did not matter because it was bred into him because he was from that culture. The claimant denied making any such comment. The Tribunal is not satisfied in the light of the conflicting evidence (including the absence of any supporting evidence from MR) that the claimant made any such comment.

(9) It was further contended by MR that the claimant made the above comments in order to provoke a reaction from him. This is denied by the claimant. The Tribunal is not satisfied on the available evidence that the claimant was trying to provoke MR as alleged. Further, the Tribunal is satisfied that the claimant's comments regarding cultural differences were made by her in response to MR's comments referred to at (5) above.

(10) The discussion between the claimant and MR concluded on the basis that the claimant told MR not to worry about the matter and that she would pass it on to Mrs Lewis to deal with to which MR replied that he did not want the claimant to do this and that he would raise it with Mr Zakaria.

THE CLOSING SUBMISSIONS

81. The Tribunal has had regard to the oral closing submissions of the parties.

THE LAW AND CONCLUSIONS OF THE TRIBUNAL THE ALLEGATIONS OF DISABILITY DISCRIMINATION

82. The Tribunal has considered first the allegations of disability discrimination. The Tribunal has considered such issues in the order adopted at paragraphs 7-12 of the CMPH Order unless otherwise indicated below. The Tribunal has had regard in particular to the statutory and associated provisions/ authorities referred to further below in respect of the relevant allegations.

83. The Tribunal has reminded itself that (a) it is for the claimant to establish the factual basis of her claims including facts from which the Tribunal could decide, in the absence of any other explanation, that she had been treated less favourably on the prohibited grounds, namely her disability, including that she has been subject to harassment/ a detriment and (b) the claimant's protected characteristic of disability needs to be an effective cause of the unlawful treatment, but does not need to be the only or main cause thereof.

84. The majority of the claimant's complaints of disability discrimination were presented to the Tribunal outside the statutory time limits. The Tribunal must therefore consider in respect of such allegations whether, having regard to the provisions of section 123 of the 2010 Act and the guidance contained in **Hendricks v Commissioner of Police of the Metropolis [2003] ICR 530 (CA)**, the alleged acts, if established, constituted conduct extending over a period. Further, if the Tribunal is not satisfied that such acts constituted

conduct extending over a period it is required to consider whether applying the principles identified in **British Coal Corporation v Keeble and others [1997] IRLR 336 EAT** (including the balance of prejudice) the claimant has satisfied the Tribunal that it is, in any event, just and equitable to extend time to allow such claims to be considered.

Disability

85. As stated above, it is accepted by the respondents that the claimant was a disabled person at all relevant times for the purposes of the 2010 Act by reason of the diagnosis of breast cancer. It is further accepted by the respondents that it had the relevant knowledge of such disability/the effects thereof at all relevant times save that the respondents denied that (a) they had the requisite knowledge that the claimant was placed at any substantial disadvantage in respect of the use of the office chair by reason of her disability/the effects thereof or (b) in any event, that the claimant was as a matter of fact placed at any substantial disadvantage by reason of such use. These matters are considered further as part of the individual allegations referred to below.

The allegations of harassment related to disability contrary to section 26 of the 2010 Act (paragraph 8 of the CMPH Order)

86. When considering these allegations the Tribunal has had regard in particular to the following statutory and associated provisions:-

- (1) Sections 6, 26, 39 and 136 of the 2010 Act.
- (2) The guidance contained at Chapter 7 of Equality and Human Rights Commission: Code of Practice on Employment (2011) ("the Code").

Allegation 8.1.1 of the CMPH Order

“In or around mid-2017 the Claimant was allegedly harassed by her line manager Mrs Elizabeth Lewis who put pressure on her to return to her full contracted hours notwithstanding that the Claimant advised her that she was suffering chronic bone pain as an after effect of chemotherapy”.

87. In evidence to the Tribunal the claimant amended this allegation to contend that the alleged harassment by Mrs Lewis occurred from January 2017. The allegation is denied by the respondents.

88. Having given the matter careful consideration, the Tribunal is not satisfied that the claimant has established the factual basis of the claim that (a) Mrs Lewis had any such discussions with the claimant in January 2017 or, for the avoidance of doubt, that (b) Mrs Lewis placed any pressure on the claimant to increase her contracted hours during the subsequent discussions in early April 2017 for the purposes of section 26 of the 2010 Act.

89. When reaching such conclusions, the Tribunal has taken account in particular its findings of fact at paragraphs 25 to 30 above.

90. This allegation is therefore dismissed.

Allegation 8.1.2 of the CMPH Order

“On or around 9 May 2017 the Claimant was allegedly harassed by Mr Zakaria who kept questioning the Claimant’s health and that she did not seem to be the same person since her illness”.

91. In her evidence to the Tribunal the claimant amended this allegation to contend that the alleged harassment by Mr Zakaria occurred on 30 May 2017 rather than on 9 May 2017 as recorded in the CMPH Order.

92. Having given the matter careful consideration, the Tribunal is not satisfied that the claimant has established the factual basis of the claim namely (a) that Mr Zakaria acted towards the claimant as alleged on 30 May 2017 or (b) that the discussions which Mr Zakaria had with the claimant on 30 May 2017, could, in any event, be considered to constitute harassment related to the claimant’s disability (including that the conduct of Mr Zakaria could reasonably have been perceived by the claimant as violating the claimant’s dignity or creating an inappropriate environment) for the purposes of section 26 of the 2010 Act.

93. When reaching the above conclusions, the Tribunal had regard in particular to its findings at paragraphs 31-35 above.

94. This allegation is therefore dismissed.

Allegation 8.1.3 of the CMPH Order

“On or around 23 July 2017 the claimant was allegedly harassed by Mr Zakaria for allowing a son of the driver to stay in the office”

95. The claimant has established that Mr Zakaria told her on 23 July 2017 that it was inappropriate for the son of a driver to remain in the office.

96. The Tribunal is not however satisfied on the facts that the claimant has established that such conduct could amount to harassment related to the claimant’s disability (including that it could reasonably have perceived by the claimant as violating the claimant’s dignity or creating an inappropriate environment) for the purposes of section 26 of the 2010 Act.

97. When reaching this conclusion, the Tribunal has taken into account in particular (a) the claimant’s own contentions regarding such matters as referred to at paragraph 40 above (including that she accepted that she had agreed with Mr Zakaria on 23 July 2017 that it was inappropriate for the boy to remain in the office and further that she did not contend that their discussion was in anyway related to her disability) and (b) that there was not, in any event, any evidence that such discussion could amount to harassment related to the claimant’s disability for the purposes of section 26 of the Act.

98. This allegation is therefore dismissed.

Allegation 8.1.4 of the CMPH Order

“On or around 30 July 2017 being pressurised by Mr Zakaria and Mrs Lewis into working a 12-hour shift without a break”.

99. The claimant has established on the facts, by way of background, that (a) there were discussions between the parties during in particular June 2017 concerning the respondents’ request to the claimant to increase her working hours (b) that the claimant raised concerns at that time including that she felt unable to do so because of the effects of chemotherapy and that she felt victimised by such requests and (c) the claimant was not allocated a formal break during the shift on 30 July 2017 (paragraphs 38 and 43 above).

100. The Tribunal is not however satisfied, on the facts, that the claimant has established that she was pressurised by Mr Zakaria and/or Mrs Lewis into working a 12-hour shift on 30 July

2017. When reaching this conclusion the Tribunal has taken into account in particular the following matters (a) the claimant's letter to the respondents dated 27 June 2017 in which the claimant expressed a wish to work towards contractual hours (paragraph 38 above and page 81 of the bundle) (b) following the back to work meeting on 29 June 2017 the claimant agreed, and worked an revised working pattern between 1 and 25 July 2017 (paragraph 39 above) (c) during a subsequent meeting on 27 July 2017 the claimant agreed to undertake two double shifts on a trial basis, one on 30 July 2017 and a further shift two weeks later (paragraph 43 above). Further, there was no evidence that (a) the claimant expressed any reluctance to undertake such shift (including that she felt under any pressure to do so) or (b) that the claimant raised any concerns with the respondents at that time regarding the shift on 30 July 2017 including that it had caused her fatigue and/or any pain or that she would be unable to continue with the arrangement (paragraphs 43 – 45 above).

101. In all the circumstances, the Tribunal is not satisfied that the claimant has established the factual basis of her alleged complaint of harassment for the purposes of section 26 of the 2010 Act.

102. This allegation is therefore dismissed.

Allegation 8.1.5 of the CMPH Order

“On 10 August 2017 Mr Zakaria became very upset during a meeting concerning alleged inappropriate comments by the Claimant”.

103. The claimant has established on the facts that (a) she was required to attend an investigatory meeting on 10 August 2017 (without any prior warning including that it was an investigatory meeting) (b) Mr Zakaria put questions to the claimant about the events of 6 August 2017 including regarding the appropriateness of her discussions with MR and (c) the claimant became agitated and distressed during the meeting.

104. The Tribunal is not however satisfied that the claimant has established on the facts that (a) Mr Zakaria became upset, or acted inappropriately towards the claimant during the investigatory meeting as alleged by the claimant (including that it could reasonably have been perceived by the claimant that Mr Zakaria had violated the claimant's dignity or created an inappropriate environment for the purposes of section 26 of the

2010 Act or) (b) the conduct of the investigatory meeting by Mr Zakaria was in any event, related in any way to the claimant's disability. The Tribunal is satisfied that it was the claimant, rather than Mr Zakaria, who became agitated and distressed (as admitted by the claimant) during her evidence including that she walked out of the meeting (paragraph 53 above).

105. In all the circumstances, the Tribunal is not satisfied that the claimant has established the factual basis of her complaint for the purposes of section 26 of the 2010 Act.

106. This allegation is therefore dismissed.

The allegations of direct discrimination because of disability contrary to section 13 of the 2010 Act (paragraph 9 of the CMPH Order)

107. When considering these allegations, the Tribunal has had regard in particular to the following statutory and associated provisions/ authorities.

(1) Sections 6, 13, 23 (1), 39 and 136 of the 2010 Act.

(2) The guidance contained at Chapter 3 of the Code.

(3) The authorities of **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** and **Shamoon V Chief Constable of the Royal Ulster Constabulary [2002] ICR 337 HL**.

Allegation 9.1.1 of the CMPH Order

“The Claimant’s dismissal. The Claimant contends that she was dismissed because she had become a liability because of her disability”

108. The dismissing officer was Mr Rahman who contended that the reason for the claimant's dismissal was that she had made inappropriate racist comments towards MR on 6 August 2017.

109. The claimant has not identified an actual comparator. The claimant relied on a hypothetical comparator namely a person who does not have the claimant's disability of cancer/ the associated effects thereof who was not dismissed in respect of similar allegations of inappropriate conduct.

110. The claimant has established on the facts that at the time of the claimant's dismissal Mr Rahman was aware of (a) the claimant's condition of cancer including the ongoing effects of fatigue and bone pain and (b) that the claimant had not returned to her full contractual hours of work and (c) the concerns which the claimant had raised in one of her letters dated 21 August 2017 (paragraph 63 (1) above) concerning her alleged treatment in respect of her disability including with regard to the broken chair.

111. The claimant has not however, provided the Tribunal with any evidence in support of her contention that a person who did not have the claimant's disability (namely cancer and the associated effects thereof) would have been treated more favourably in similar circumstances.

112. Having given the matter careful consideration, the Tribunal is not satisfied that the claimant has established such facts from which the Tribunal could decide in the absence of any other explanation by the respondents that she was dismissed because of her disability. When reaching this conclusion, the Tribunal has reminded itself that for such purposes the claimant's disability has to be an effective cause but does not have to be the main or only reason for the claimant's dismissal.

113. The Tribunal is satisfied on the facts that the effective cause of the claimant's dismissal was that Mr Rahman believed (a) that the claimant had made inappropriate comments of a racial nature towards his younger brother and partner in the business MR on 6 August 2017 (b) that his brother MR had been distressed and traumatised by the comments and had indicated that he could no longer work with the claimant (c) the claimant had originally admitted at the investigatory meeting that she had made inappropriate comments but had subsequently sought to change her position at the disciplinary hearing when she had realised the seriousness of the allegations and (d) that in the above circumstances the claimant's conduct constituted gross misconduct justifying dismissal.

114. When reaching such conclusions the Tribunal has taken into account in particular (a) the findings at paragraphs 59, 60, 64 and 70 above (including in particular 70 (1), (5) and (6)) (b) the respondents were a close family who meet together on a regular basis (including on the night/ shortly after the incident on 6 August 2017) during which MR had expressed separately to Mr Zakaria and Mr Rahman that the claimant's comments had caused him distress and offence and that he could no longer

continue to work with her (paragraphs 48 and 70 (7) above) and (c) at the time of the events leading up to the claimant's dismissal the claimant had, by agreement, increased her hours of work with no difficulties having been reported in respect of the shift on 30 July 2017 (paragraphs 43 and 44 above).

115. In all the circumstances this allegation is therefore dismissed.

Allegation 9.1. 2 of the CMPH Order

“Any of the treatment not found to have been harassment.”

116. For the reasons previously explained above in respect of the allegations at paragraph 8 of the CMPH Order the Tribunal is satisfied that the claimant has failed to establish a prima facie case of direct disability discrimination in respect of such matters and this allegation is therefore dismissed.

The allegations of discrimination arising from disability contrary to section 15 of the 2010 Act-paragraph 10 of the CMPH Order.

117. When determining these allegations, the Tribunal has had regard to the following statutory and associated provisions/authorities namely: -

(1) Sections 6, 15, 39 and 136 of the 2010 Act.

(2) The guidance contained at Chapter 5 of the Code.

(3) The guidance contained in the judgment of **Pnaiser v NHS England [2016] IRLR 170** and **R (Elias v Secretary of State for Defence [2006] IRLR 934 CA.**

Allegation 10.1 (1) of the CMPH Order - the claimant's dismissal

118. The claimant was dismissed by Mr Rahman of the respondents which constitutes unfavourable treatment for the purposes of section 15 of the 2010 Act.

119. As stated previously above, the Tribunal is satisfied that the effective cause of the claimant's dismissal was what Mr Rahman considered to be the claimant's alleged inappropriate racist conduct towards MR on 6 August 2017 including that it did not arise or was not the consequence of the claimant's cancer or effects thereof. When reaching such conclusions, the Tribunal has taken into account its findings at paragraphs 113-114 above and the associated findings of fact.

120. This allegation is therefore dismissed.

Allegation 10.1 (2) – being fatigued/ experiencing pain because of the requirement to work 12 hours shifts.

121. The Tribunal is satisfied that causing the claimant to feel fatigued/experience pain could constitute unfavourable treatment for the purposes of section 15 of the 2010 Act.

122. The claimant has however failed to establish the factual basis of such claim. When reaching this conclusion the Tribunal has taken into account in particular (a) its findings at paragraphs 99- 100 above together with the associated findings of fact at paragraphs 43-45 above.

123. This allegation is therefore dismissed.

Allegation 10.1 (3) - experiencing chronic back pain because of being required to use a broken chair from 31 December 2016 onwards.

124. The Tribunal is satisfied that causing the claimant to experience chronic back pain could constitute unfavourable treatment for the purposes of section 15 of the 2010 Act.

125. The claimant has however failed to establish the factual basis of such claim including (a) that she suffered more than minor discomfort by reason of the use of such chair from December 2016 onwards and/or (b) that the respondents had the requisite knowledge of the alleged chronic back pain. When reaching these conclusions the Tribunal has had regard in particular to its findings at paragraphs 23 and 24 above.

126. This allegation is therefore dismissed.

The allegations that the Respondents failed to make reasonable adjustments contrary to sections 20 and 21 of the 2010 Act - paragraph 11 of the CMPH Order.

127. When considering these allegations, the Tribunal has had regard in particular to the following statutory and associated provisions authorities namely: -

- (1) Sections 6, 20, 21, 39, 212 (1) and 136, and paragraph 20 (1) of Schedule 8 to the 2010 Act.

(2) Chapter 6 of the Code.

(3) The guidance contained in **the Environment Agency v Rowan [2008] ICR 218 EAT.**

Allegation 11.1.1 Requiring the Claimant to use a broken chair from 31 December 2016 onwards

128. The Tribunal is satisfied that the claimant has established on the facts that she was required to use the office chair during the period from December 2016 to August 2017 and that the respondents therefore applied a provision criterion or practice (“ a PCP”) for the purposes of section 20 of the 2010 Act. The Tribunal is further satisfied on the facts that the office chair in question had a faulty gas valve lift during the period between December 2016 (when the claimant returned to work) and August 2017 at which time the chair was replaced by Mr Zakaria following a complaint by another employee (paragraphs 21- 23 above).

129. The Tribunal is not however satisfied on the facts that (a) such PCP placed the claimant at a substantial disadvantage because of her disability / the effects thereof for the purposes of section 20 of the 2010 Act and/or that (b) the respondents had, in any event, the requisite knowledge of any such substantial disadvantage for such purposes.

130. When reaching such conclusions, the Tribunal has taken into account that for such purposes “substantial” means more than minor or trivial (section 212 (1) of the 2010 Act and paragraph 6.15 of the Code). The Tribunal has also taken into account however its findings of fact at paragraphs 22- 24 above including in particular that the claimant has not established on the facts that (a) she experienced more than minor discomfort by reason of the use of the office chair (b) that the respondents had the requisite knowledge of any such alleged discomfort. Further the Tribunal is satisfied on the facts that Mr Zakaria took steps to replace the office chair when he became aware of the problem.

131. This allegation is therefore dismissed.

Allegation 11.1.2 Requiring the Claimant to work 12 – hour shifts from 30 July 2017.

132. The claimant has established on the facts that (a) the respondents had expressed a wish for the claimant to work towards a return to her contracted hours (b) that the claimant agreed on 27 July 2017 to undertake 2 trial double (12 hour) shifts on 30 July 2017 with a further shift two weeks later (which was not worked by the claimant because of the intervening events on 6 August 2017 relating to MR) (paragraphs 38 and 43- 45 above). The claimant has therefore established on the facts, albeit to a limited extent, that the respondents applied a PCP requiring the claimant to undertake two trial double shifts with the first one commencing on 30 July 2017.

133. The Tribunal is not however satisfied on the facts that (a) such PCP placed the claimant at a substantial disadvantage because of her disability/the effects thereof (including that it caused the claimant to be fatigued and suffer chronic back pain as alleged) for the purposes of section 20 of the 2010 Act and/ or (b) the respondents had, in any event, the requisite knowledge of any substantial disadvantage for such purposes.

134. When reaching such conclusions the Tribunal has had regard to the meaning of substantial for such purposes as referred to in paragraph 131 above. The Tribunal has also taken into account however, its findings of fact above including in particular that (a) the claimant expressed a wish in her letter to the respondents dated 27 June 2017 to work towards her contracted hours (paragraph 38 above) (b) the claimant agreed at a meeting on 27 July 2017 to work two trial double (12 hour) shifts on 30 July 2017 together with a further shift two weeks later and (c) the claimant did not provide any evidence to the Tribunal to indicate that she had experienced fatigue or chronic back pain as alleged by reason of the trial shift on 30 July 2017 and/or that she had notified the respondents of any fatigue or back pain following such shift (paragraphs 43 – 45 above).

135. This allegation is therefore dismissed.

136. The claimant's complaints of disability discrimination are therefore dismissed.

THE ALLEGATIONS OF UNFAIR DISMISSAL

137. The Tribunal has had regard to the allegations of unfair dismissal contained at paragraph 6 of the CMPH Order.

138. The Tribunal has had regard in particular to the following statutory and associated provisions/ authorities in respect of the claimant's claim of unfair dismissal: -

- (1) Sections 98, 122, and 123 of the Employment Rights Act 1996 (“the Act”) and section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULCRA”).
- (2) The ACAS Code of Practice: Disciplinary and grievance procedures (2015) (“the ACAS Code”) and accompanying guide (the ACAS Guide: Discipline and Grievances at Work (2017) (“the ACAS Guide”).
- (3) The following authorities: -

Abernethy v Mott Hay and Anderson [1974] ICR 323 CA.

British Home Stores Limited v Burchell [1980] ICR 303 EAT.

Nelson v BBC (no. 2) 1980 ICR, 110 CA.

J Sainsbury plc V Hitt [2003] ICR 111 CA.

139. The Tribunal has reminded itself in particular of the following matters: -

- (1) The starting point is section 98 (1) of the Act. It is for the respondents to establish the reason for dismissal or, if more than one, the principal reason for the claimant's dismissal, including that they had a genuine belief in such reason and that it was for one of the potentially fair reasons permitted by section 98 (1) and (2) of the Act.
- (2) A reason for dismissal is a set of facts known to an employer or the beliefs held by him which cause him to dismiss the employee.
- (3) If the respondents are able to establish the reason for the claimant's dismissal, the Tribunal has to determine whether dismissal for such reason was, in all the circumstances of the case, fair or unfair having regard to the matters set out in section 98 (4) of the Act. This includes whether the respondents' belief that the claimant was guilty of the alleged misconduct was based on reasonable grounds and after undertaking reasonable investigations.
- (4) The Tribunal also has to consider whether having regard to the further matters set out in section 98 (4) of the Act the respondents acted fairly or unfairly in all the circumstances in treating the reason for dismissal as sufficient for dismissal.

- (5) The Tribunal has to consider the position at the time of the claimant's dismissal in the light of the information which was available and/or should reasonably have been available to the respondents at that time.
- (6) The Tribunal has to determine whether the overall procedure adopted by the respondents and also the decision to dismiss the claimant both fell within the range of responses of a reasonable employer and that it is not entitled to substitute its own decision. When determining the fairness of the procedure adopted by the respondents the Tribunal has to have regard to the overall procedure including the size and resources of the respondents and whether they adhered to their own policies and the provisions of the ACAS Code.
- (7) Dismissal for a first offence may be justified where the act of misconduct is so serious that dismissal is a reasonable sanction notwithstanding the lack of any previous misconduct and/or where the rules make it clear that a particular conduct will lead to dismissal and/or where the employee has made it clear that he/she is not prepared to alter their attitude so that a warning is unlikely to lead to any improvement.
- (8) A finding of gross misconduct does not automatically justify dismissal and it is important to consider any mitigating factors which might justify a lesser sanction for reasons specific to the employee or the incident in question.
- (9) If the Tribunal considers that there were procedural defects which were sufficiently serious to render the claimant's dismissal unfair, the Tribunal is required to consider for the purposes of any award of compensation (if it is possible to do so on the evidence available), what is likely to have happened if a fair procedure had been followed including the percentage chance that the claimant would thereafter have been fairly dismissed for the purposes of any compensatory award pursuant to section 123 (1) of the Act. The Tribunal cannot however be expected to engage on a sea of speculation.
- (10) If the Tribunal finds that the claimant has been unfairly dismissed, the Tribunal is also required to determine whether there should be any reduction/further reduction in any basic and/or compensatory award

pursuant to sections 122 (2) and/or 123 (6) of the Act by reason of the claimant's contributory fault. The Tribunal has reminded itself that contributory fault covers a wide range of conduct and can include culpable, blameworthy, foolish or otherwise unreasonable behaviour. The Tribunal has also reminded itself however, that for the purposes of determining contributory fault for the purposes of section 123 (6) of the Act it has to be satisfied that the claimant was, on the balance of probabilities, guilty of any such conduct, that it caused or contributed to the dismissal and that it is just and equitable to reduce any award.

Paragraph 6.1 of the CMPH Order

“6.1 What was the reason for dismissal? The Respondents assert that it was a reason relating to conduct namely alleged inappropriate comments of a racial nature by the Claimant which is a potentially fair reason for dismissal under section 98 (2) of the Act”.

140. As indicated previously the claimant contended that the real reason for her dismissal was that she had become a liability to the respondents because of her disability (paragraph 9.1.1 of the CMPH Order).

141. The Tribunal has reminded itself that it is for the respondents to establish the reason, or if more than one the principal reason, for the claimant's dismissal including that it was a potentially fair reason for the purposes of section 98 (1) and (2) of the Act.

142. The Tribunal is satisfied, having had regard to its findings at paragraphs 113-114 above, that the Respondents have established for the purposes of section 98 (1) of the Act that the reason/principal reason for the claimant's dismissal was conduct namely Mr Rahman's belief that the claimant had made inappropriate comments of a racial nature towards MR on 6 August 2017 which constituted gross misconduct.

Issues 6.2 – 6.4 of the CMPH Order relating to the fairness of the claimant's dismissal for the purposes of section 98 (4) of the Act namely in summary (a) whether the Respondents had a genuine belief in the claimant's misconduct on reasonable grounds following as reasonable an investigation as was warranted in the circumstances including whether the Respondents adopted a fair procedure and (b) whether the decision to dismiss the claimant

was a fair sanction which was within the range of responses of a reasonable employer faced with the relevant facts .

143. When considering such matters, the Tribunal has reminded itself in particular that (a) the burden of proof is neutral at this stage. It is for the Tribunal to decide whether the claimant's dismissal for the above-mentioned reasons was fair or unfair for the purposes of section 98 (4) of the Act and (b) the Tribunal is not permitted to substitute its own decision but is required to consider whether both the procedure adopted and the decision to dismiss the claimant were within the range of responses of a reasonable employer having regard to the matters identified in section 98 (4) of the Act including the respondents' size and administrative resources and further the respondents' adherence to the principles contained in the ACAS Code.

144. In summary, the respondents contended that it had a genuine belief in the claimant's misconduct on reasonable grounds following a reasonable investigation and further that the decision to dismiss the claimant was within the range of responses of a reasonable employer in the light in particular of:- (a) the nature of the claimant's comments to MR on 6 August 2017 and the consequential distress caused to MR (b) the admissions which were made by the claimant at the investigatory meeting regarding the inappropriate nature of her comments and (c) the limited size and resources of the respondents including that in such circumstances it was reasonable for the disciplinary process to have been conducted by Mr Rahman who had no day-to-day involvement in the respondents' taxi business.

145. In summary, the claimant contended that the procedure adopted by the respondents and the decision to dismiss her were both unfair including on the grounds that: -

- (1) The disciplinary process was not impartial as it was conducted by members of MR's family and that it should have been conducted by someone outside the family.
- (2) There was an inadequate investigation into the allegations including that (a) Mr Rahman (the dismissing officer) did not review the available CCTV footage or associated audio recording of the conversation between the claimant and MR on 6 August 2017 or the audio recording of the conversation between the claimant and the passenger's mother relating to the alleged conduct of

MR (b) Mr Rahman did not investigate/give proper consideration to the matters raised by the claimant during the disciplinary hearing or in the letters dated 21 August 2017 (which were handed to Mr Rahman during the course of the disciplinary hearing) including the claimant's statement of alleged events on 6 August 2017/ the claimant's contentions regarding her previous discussions with Mr Zakaria regarding cultural issues.

- (3) The sanction of dismissal was disproportionate in the circumstances including that Mr Rahman failed to consider any comments made by the claimant during the conversation with MR on 6 August 2017 in the context of (a) MR's inappropriate behaviour towards the female passenger and (b) the comments which were made by MR regarding cultural matters during their conversation.

Allegation 6.4. of the CMPH Order – relating to the alleged unfairness of the disciplinary process and associated investigations

146. The Tribunal is not satisfied that the disciplinary process was unfair for the purposes of section 98 (4) of the Act as contended by the claimant because the process (the investigatory and disciplinary hearings) was conducted by members of MR's family (Allegation 6.4.1).

147. When reaching this conclusion the Tribunal has taken into account in particular the following matters:-

- (1) The size and resources of the respondents which is a small family business with limited HR support. (paragraphs 10 and 13 above).
- (2) That there is no requirement in the respondents' disciplinary procedure or in the ACAS Code for such processes to be dealt with externally in such circumstances.
- (3) The initial investigation was undertaken by Mr Zakaria who had had no involvement in the incident on 6 August 2017.
- (4) The disciplinary hearing was conducted by Mr Rahman who had no involvement in the day-to-day running of the Respondents' taxi business (paragraph 10 above).

148. The Tribunal is however satisfied on the facts of this case that the respondents failed to carry out reasonable and proper investigations regarding the central issues in dispute before reaching the decision to dismiss the claimant and that the respondents did not

therefore have reasonable grounds to conclude that the claimant had committed the alleged misconduct (save to the extent indicated below) for the purposes of section 98 (4) of the Act.

149. When reaching this conclusion, the Tribunal was taken into account in particular that: -

- (1) The claimant had (a) admitted during the investigatory meeting that the discussion which had taken place between her and MR on 6 August 2017 regarding cultural matters was not an appropriate discussion for the workplace (paragraph 53) and (b) acknowledged during the disciplinary hearing that she was aware that the respondent's handbook stated that racial discrimination in the workplace would be considered as gross misconduct (paragraph 62 (3)).
- (2) The claimant however (a) denied during the investigatory/ disciplinary hearings/ in her letters which she submitted during the disciplinary hearing on 22 August 2017 that she had made the alleged racist comments to/about MR (b) contended that the discussion regarding cultural issues had been initiated by MR / that MR had also made inappropriate comments to drivers on the rank/ that she had had previous discussions with Mr Zakaria regarding cultural issues and (c) contended that her discussions with MR should be considered in the context of MR's reactions to the complaint by the passenger's mother including that MR did not consider that he had done anything wrong and that MR was aggrieved that the claimant had agreed with the mother's concerns regarding MR's alleged conduct towards the passenger (paragraphs 53, 62 and 63 above).
- (3) Mr Zakaria did not view the CCTV footage/listen to the associated audio recording of the conversation between the claimant and MR on 6 August 2017 as part of the investigatory process notwithstanding that the Tribunal is satisfied that such information would have been available to him at that time (paragraph 16 above).
- (4) Further notwithstanding the issues raised by the claimant during the investigatory / disciplinary process, Mr Rahman (the dismissing officer) (a) failed to review the available CCTV footage/ audio recording prior to/ during the disciplinary process (paragraphs 59, 65 and 67 above) including notwithstanding that the claimant made it clear to him during the disciplinary hearing that she denied the allegations contained in MR's statement and requested Mr Rahman to review the CCTV footage/audio recording of the conversation between the

claimant and MR (b) did not otherwise investigate further (including with MR or Mr Zakaria) the matters raised by the claimant in her letters submitted during the disciplinary hearing on 22 August 2017 relating to the events of 6 August 2017 including in respect of her alleged conduct/ challenges to MR's statement, the claimant's alleged previous discussions with Mr Zakaria regarding cultural matters and/or the claimant's challenges to the respondents' notes of the investigatory meeting/ the respondents' alleged conduct of such meeting.

150. The Tribunal is satisfied that in the light of the nature of the matters in dispute relating to the events of 6 August 2017 a reasonable employer (and in particular the dismissing officer Mr Rahman) acting within the range of reasonable responses of a reasonable employer would have investigated such matters further before determining whether the claimant was guilty of the alleged misconduct (including whether any such conduct was sufficient in all the circumstances to justify dismissal).

151. When reaching this conclusion the Tribunal has also had regard to the provisions of paragraphs 5 of the ACAS Code which recognises the importance of an employer carrying out the necessary investigations to establish the facts of the case, The Tribunal has also had regard to (a) paragraph 12 of the ACAS Code which recognises the importance of allowing an employee to raise any challenges to the evidence at a disciplinary hearing together with (b) the accompanying provisions of the ACAS Guide which recognise that if new matters arise during a disciplinary hearing it may be necessary to adjourn the hearing to allow them to be investigated.

152. Further, the Tribunal is not satisfied that the limited admission which the claimant made regarding the inappropriate nature of her discussions with MR on 6 August 2017 (paragraphs 53 (4) above) was sufficient, having regard to the range of responses of a reasonable employer, to justify the claimant's dismissal for the purposes of section 98 (4) of the Act having regard in particular to (a) the fact that the claimant denied making racist comments to MR and (b) the alleged context of the discussions on 6 August 2017 including the alleged comments of MR during the discussion between the claimant and his alleged related conduct – none of which were investigated properly by the respondents prior to the claimant's dismissal.

153. In all the circumstances, the Tribunal is satisfied that the claimant's dismissal was unfair for the purposes of section 98 (4) of the Act.

Allegation 6.5 of the CMPH Order

If the Respondents did not use a fair procedure would the Claimant have been fairly dismissed in any event and/or to what extent and when.

154. The Tribunal has gone on to consider whether for the purposes of section 123 (1) of the Act it would be just and equitable to make any reduction to any compensatory award awarded to the claimant including whether it is possible on the available evidence to determine what is likely to have happened if a fair procedure had been followed by the respondents.

155. Having given the matter careful consideration, the Tribunal is not satisfied in the light of the above findings that there is sufficient evidence before the Tribunal from which it could properly determine the likelihood that the claimant would have been fairly dismissed in any event if a fair procedure had been followed.

156. When reaching this conclusion, the Tribunal has taken into account in particular the following matters: -

- (1) The respondents have not produced the CCTV footage/ audio recording of the discussion between the claimant and MR on 6 August 2017.
- (2) the Tribunal has not heard any oral evidence from MR regarding his discussion with the claimant on 6 August 2017 including in respect of (a) the alleged racist comments by the claimant (b) the allegations which the claimant made regarding MR's alleged inappropriate comments during such discussion and/or regarding MR's associated alleged conduct. Further, the respondents have given no good reason for MR's non-attendance at the Tribunal to give such evidence.
- (3) The findings of fact which the Tribunal has made at paragraphs 78-80 above regarding such matters in the absence, in particular, of any evidence from MR.

Allegation 6.6 of the CMPH Order

If the dismissal was unfair did the Claimant contribute to the dismissal by culpable conduct?

157. The Tribunal has gone on to consider whether it is appropriate to make any reduction to any basic and/or compensatory awards awarded to the claimant pursuant to sections 122 (2) and /or 123 (6) of

the Act on the grounds that the claimant was guilty of culpable conduct which contributed to her dismissal.

158. When considering this issue, the Tribunal has reminded itself in particular that in respect of section 123 (6) of the Act (a) it is necessary for the respondents to prove on the balance of probabilities that the claimant was guilty of culpable or blameworthy conduct (b) that such conduct caused or contributed to the dismissal and (c) that it is in any event just and equitable to make a reduction in any award by the proportion specified.

159. Having given the matter careful consideration including in particular the findings at paragraphs 53(4) and 78 – 80 above the Tribunal is satisfied that the respondents have established that the claimant was guilty of culpable conduct as acknowledged by the claimant in respect of the inappropriateness of the discussion between the claimant and MR on 6 August 2017 (at paragraph 53 (4) above). The Tribunal is also satisfied that such conduct contributed in part to the claimant's dismissal (paragraph 70 above).

160. The Tribunal is further satisfied that it is just and equitable to reduce any basic and/or compensatory award awarded to the claimant by 25 per cent in respect of such conduct. When reaching this conclusion, the Tribunal has taken into account in particular that whilst the claimant accepted that it was inappropriate to have had a discussion in the workplace with MR on 6 August 2017 regarding such matters, it is however appropriate in all the circumstances to view such comments in the context of the findings at paragraphs 78 – 80. The Tribunal has taken into account in particular (a) that the respondents have failed to establish that the claimant made the alleged racist comments towards MR and (b) its findings concerning the initiation of such discussions by MR and his associated conduct on 6 August 2017.

161. When reaching its conclusions regarding the Basic Award the Tribunal appreciates that the provisions of sections 122 (2) and 123(6) of the Act are not identical. Similar considerations however apply to both statutory provisions and the Tribunal is satisfied, on the facts, that it is therefore appropriate in all the circumstances to make the same reduction of 25 per cent to any basic and compensatory awards awarded to the claimant.

Employment Judge Goraj

Date: 22 January 2019