



# EMPLOYMENT TRIBUNALS

**Claimant:**

Ms H Rodgers

v

**Respondent:**

A2 Dominion Housing Group  
Limited

**Heard at:**

Reading

**On:** 1, 2 and 3 April 2019

**Before:**

Employment Judge S Jenkins

Members: Miss L Farrell and Mr N Singh

**Appearances**

**For the Claimant:** Ms S Wookey of Counsel

**For the Respondent:** Ms S Keogh of Counsel

## RESERVED JUDGMENT

1. The Claimant's claims of unfair dismissal and discrimination arising from disability fail and are dismissed.

## REASONS

### Background

1. The claims before us were for unfair dismissal and for disability discrimination, specifically a claim under section 15 of the Equality Act 2010 ("EqA") of unfavourable treatment because of something arising in consequence of the Claimant's disability.
2. We heard evidence from the Claimant on her own behalf, and from Mr Richard Bampton, the disciplinary decision maker, and Ms Dawn Wightman, the appeal officer, on behalf of the Respondent. We also considered the written witness statement of Ms Jackie Connor, the Claimant's manager and the investigating officer, although as Ms Connor was not present to be cross-examined, we gave limited weight to that evidence, which was in any event relatively peripheral to the claims.

### Preliminary Issue

3. On the afternoon of Friday 29 March 2019, i.e. the last working day before the hearing, the Respondent made a request for postponement of the

hearing on two grounds. The first was the inability of one of its witnesses, Ms Connor, to attend due to ongoing medical treatment, whilst the second was that some of the contents of the Claimant's witness statement and the contents of the statements of two supporting witnesses, two former colleagues, contained evidence which was not relevant to the Claimant's claims and had not been previously pleaded or particularised. That application was rejected on the basis that it was in the interests of justice that any such application should be considered by the Tribunal hearing the case.

4. At the commencement of the hearing, we explored with the Respondent's representative whether that application was being pursued. We were informed that the application to postpone was not being pursued, but that the second element of the application made on 29 March 2019, i.e. that the content of parts of the Claimant's statement and the entirety of the evidence from the other two witnesses should be excluded, was being maintained.
5. We heard submissions from the parties' representatives, with the Respondent's position being that the claims being dealt with, as identified at a case management hearing held on 16 October 2017, were for unfair dismissal and for disability discrimination under section 15 EqA. The unfair dismissal claim related to the actual dismissal of the Claimant in relation to an incident which occurred on 1 February 2017. The discrimination claim also arose primarily from that incident, although there was an allegation of discrimination in the form of a failure to take into account the Claimant's stress and anxiety during her prior phased return to work, which the Respondent contended was, in any event, out of time.
6. The Respondent submitted that the content of the witness statements of the other two witnesses, and the sections complained of in the Claimant's witness statement, related to historic allegations of bullying by the Claimant's manager, which were irrelevant and prejudicial.
7. The Claimant's representative noted that the application had been made very late in the day, that the initial claim form had raised allegations of bullying and harassment, that it was appropriate to hear all the evidence, and it was then for the Tribunal to make a decision at the end on all the evidence it heard.
8. We adjourned to consider this matter and then returned to confirm that we were going to exclude the evidence of the two supporting witnesses and were going to exclude certain paragraphs, although not all paragraphs sought to be excluded by the Respondent, from the Claimant's witness statement.
9. We noted that, as a Tribunal, we only wanted to consider matters relevant to the claims and to the issues identified at the case management hearing. With regard to the witness statements of the Claimant's former colleagues, they did not contain any material which was relevant to the Claimant's claims, instead containing allegations of bullying of them by their manager

which were personal to them and were quite historic; indeed, one of them appeared to have left the Respondent's employment in 2015. We were not dealing with a claim of harassment on the ground of disability or a claim of constructive unfair dismissal arising from allegations of bullying, when such matters might have been relevant, and therefore we considered that it would be appropriate to exclude this evidence.

10. For similar reasons, we thought it appropriate to exclude certain paragraphs, namely 31 – 39 inclusive, 41 – 46 inclusive and 109 – 111 inclusive, from the Claimant's statement on the basis that they contained allegations of historic bullying of the Claimant by her manager, going back several years. In our view, they did not contain material relevant to the claims before us. We did however consider that certain of the paragraphs sought to be excluded by the Respondent, namely paragraphs 40, 47, 50, 51, 86, 87 and 118, should remain, on the basis that they could be considered to provide background to the claims as pleaded and the issues as clarified in the case management summary.

#### **Issues and Law**

11. The issues were identified by Employment Judge Lang at the case management hearing on 16 October 2017 as follows:

#### **4 Unfair dismissal claim**

- 4.1 *What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.*
- 4.2 *Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds following a reasonable investigation? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified in the particulars of claim at paragraph 31 a. to i.*
- 4.3 *Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?*
- 4.4 *If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.*
- 4.5 *Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?*

4.6 *Was there an unreasonable failure to comply with the ACAS Code of Practice and if so, should any award be increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992)?*

**6 Section 15: Discrimination arising from disability**

6.1 *The allegations of unfavourable treatment because of “something arising in consequence of the Claimant’s disability” falling within section 39 Equality Act are:*

6.1.1 *Criticising her for failing to press the button of her Identicom;*

6.1.2 *Failing to consider the impact of the Claimant being unable to press the button on her Identicom when deciding to dismiss her;*

6.1.3 *Failing to take into account the Claimant’s stress and anxiety during her phased return to work; and*

6.1.4 *Failing to take into account the Claimant’s stress and anxiety during the investigation and disciplinary procedure.*

6.2 *The Claimant is required to clarify the allegations of unfavourable treatment. In respect of each allegation set out at 6.1.1 to 6.1.4 above, the Claimant is to provide further particulars of:-*

6.2.1 *The alleged unfavourable treatment (including dates of any acts or omissions relied upon);*

6.2.2 *What is the “something arising” in consequence of the Claimant’s alleged disability.*

6.3 *Does the Claimant prove that the Respondent treated the Claimant as set out in paragraph 6.1 above?*

6.4 *Did the Respondent treat the Claimant as aforesaid because of the “something arising” in consequence of the disability?*

6.5 *Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following as to the business aim or need sought to be achieved:*

6.5.1 *Ensuring the safety of employees and service users; and*

6.5.2 *Protecting the company’s reputation from disrepute.*

6.6 *Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?*

- 6.7 *The claim form was presented on 28 July 2017. Accordingly, and bearing in mind the effects of ACAS early conciliation any act or omission which took place before 25 April 2017 is potentially out of time so that the Tribunal may not have jurisdiction.*
- 6.8 *Does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of that period? Is such conduct accordingly in time?*
- 6.9 *Was any complaint presented within such other period as the employment tribunal considers just and equitable?*
- 6.10 *Was there an unreasonable failure to comply with the ACAS Code of Practice and if so should any award be increased under section 207A TULRCA 1992?*

## **7 Remedies**

- 7.1 *If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.*
- 7.2 *There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.*
12. The case management summary had also identified, at section 5, that the question of whether the Claimant in fact suffered from a disability at the relevant time in the form of arthritis and a stress and anxiety condition would also be an issue that would need to be resolved. In the event, the Respondent confirmed that it had conceded that the Claimant was disabled in both those manners.
13. In addition to the issues identified, we were also mindful, when judging the Respondent's actions in relation to the unfair dismissal claim, that it was not our role to step into the shoes of the Respondent, but only to judge whether the Respondent's actions were reasonable, applying, in the main, the range of reasonable responses test.

## **Findings**

14. Our findings, on a balance of probabilities wherever there was any dispute, were as follows.
15. The Respondent is a residential property group which provides, amongst other things, social housing, primarily in the London area. It is a large employer, employing approximately 900 employees in total.
16. The Claimant was employed as a Neighbourhood Officer and her responsibilities included managing anti-social behaviour, completing estate inspections, the collection of rental income and managing all tenant-related

contact with residents. She had some 25 years' experience in the field prior to her dismissal, and had been employed by the Respondent for four years. There had been no prior issues with regard to the Claimant's performance or conduct before the event which led to her dismissal which is dealt with below.

17. The Claimant had suffered for some time with osteoarthritis and that led to the Respondent referring her to an occupational health adviser in February 2016. The report from the adviser noted that the Claimant had already had a total knee replacement on her left side and was awaiting a total right knee replacement. The report also noted that the Claimant had osteoarthritis in both her hands and feet and her spine.
18. The focus of the report appeared to be on the Claimant's mobility, with adjustments being needed for visits to flats on multiple floors when no lifts were available. The report also noted that the Claimant had low mood but that, subject to the adjustment about flats on higher levels, she was fit to perform the remainder of her role.
19. A meeting took place between the Claimant and one of her managers, Jane Clarges, shortly after that report, on 4 March 2016, during which Ms Clarges noted that the report stated that the Claimant was also suffering with osteoarthritis in her right knee, both hands and feet, and her spine. The record of the meeting noted that the Claimant had said that she had received cortisone injections in her hands the previous year and that they were now "ok".
20. A further occupational health report was obtained in November 2016, again appearing to arise largely from the Claimant's knee problem. The report noted that the Claimant had been on long term sick leave since 24 July 2016, having had the knee replacement operation at around that time. There had been some post-operative complications, but the report noted that the Claimant had since returned to work on a phased return basis, and the report anticipated that the Claimant would be able to return to full time working following a phased return of some 8 – 12 weeks. There were some recommendations around the provision of a suitable desk and chair, but again these focused on the Claimant's mobility. No mention of any issues with her hands was made in this report.
21. The Claimant's duties were partly office-based, where she would deal with issues regarding tenants and tenancies by telephone or by email, but also involved her visiting premises and meeting tenants directly. This could therefore involve lone working, i.e. working by herself without close or direct supervision. The Respondent has a detailed personal safety policy which specifically deals with lone working. This notes various responsibilities of the Respondent's health and safety department and its line managers, but also notes responsibilities of individual employees and of individual employees who are lone workers. This involved specific lone working safety measures as follows:

*“a) Lone workers who are considered to be at risk and identified as requiring a safety device, will be provided with the services of “Solo Protect Lone Worker Personal Security Service.” This is an Identicom device.*

*b) Lone worker devices will not prevent incidents but used alongside good procedures, they will enhance the protection of vulnerable lone workers. This could include the use of personal alarms, mobiles, code words, buddy systems, whereabouts board charts etc.”*

22. The policy refers to a “buddy” system which did not appear to have been implemented, with instead the housing team as a whole taking on these “buddy” duties, which involved receiving details of where a lone worker was going, and their expected timings, so that checks could be made.

23. The policy also contains a section dealing with threats of assault. This included the following:

*“e) Defuse potentially difficult situations by agreeing to go away and make further enquiries.*

*f) Keep your distance, never touch a client.*

*g) If the individual’s behaviour makes you feel in danger or threatened, terminate the interview and leave. If necessary make an excuse and go.*

*h) If the individual produces a weapon or assaults you, LEAVE IMMEDIATELY.*

*i) Be prepared to use a personal alarm in order to do so and remember that you are entitled to use appropriate physical force if the circumstances demand it and if you have no other choice.*

*j) If you cannot leave, follow the Identicom Lone Worker Procedure.”*

24. The policy also includes sections relating to off site visits and visits to client homes, which confirm that visits should not be made alone if there are any concerns, and that the Identicom is to be turned on and fully charged during such visits.

25. The Identicom is a GPS device which allows the equipment provider to remotely monitor the user. This involves checking the location of the individual and also recording what is being said by and to the individual. The Identicom also contains an ability to raise an alert and also for an alarm to be triggered if the Identicom is removed from its lanyard.

26. The events which led to the Claimant’s dismissal occurred on 1 February 2018. The Respondent has tenants at an estate in Teddington and complaints from the managing agents about bicycles being left chained to railings and left in corridors had been received. A letter had been sent by the Claimant to the tenants in July 2017, prior to her absence, advising

them about this. Nothing however appears to have happened whilst the Claimant was away and, on her return, in January 2017, a further complaint was raised. Consequently, the Claimant sent a letter to the residents, dated 23 January 2017, noting the problem with the bicycles and confirming that if any bicycles were found chained to the railings or in the corridors as of Wednesday 1 February 2017, they would be removed and disposed of. The letter concluded by saying that it was the last and final warning as other letters had been ignored and that the enforcement was to be in place permanently as of 1 February 2017.

27. The Claimant arranged for two contractor employees to attend with her to undertake the removals on the afternoon of 1 February 2017. It appears that the contractors proceeded to start to remove bicycles chained to railings outside the premises and, whilst they were doing that, the Claimant decided to go into the building to see if any bicycles remained in the hallways. Her intention was then to knock on the doors of nearby tenants and to inform them that if their bicycles were not taken indoors, they would be removed, i.e. to give the residents a final opportunity to move the bicycles.
28. The Claimant appreciated that, when entering the premises, she would be in a lone working situation. She attempted to put on the Identicom but could not. In her claim form, the Claimant stated that she had been unable to turn it on due to being unable to apply the necessary pressure to do so, i.e. because of her arthritis. However, at the time, the information she provided to her manager on the day was that the Identicom was not working, and that the battery was low and she could not use it. It was only in a further meeting with her manager on the day after the incident that she referred to previous problems with turning on the device and that she had arthritis in her thumbs and therefore had trouble using enough pressure to turn it on.
29. Evidence was however before us of a log of Identicom usage which confirmed that the Claimant was a high user of the Identicom and had used it frequently during the months of December and January, notwithstanding that she had had trouble with an earlier Identicom which had been replaced.
30. Regardless of the reason for the Identicom not being in operation, the Claimant was aware that it was not in operation at the time she entered the premises. The Claimant felt that it was appropriate for her to continue notwithstanding the terms of the Respondent's policy. She confirmed that it was not unusual for an Identicom not to work and that there were estates where the Identicom simply would not raise a signal. She confirmed that she had, before leaving the office, checked the files of residents to see if there were any "red flags", i.e. records of concerns that a tenant might be a danger, and there had been none, that she had her mobile phone with her, and also that her colleagues knew where she was. She therefore felt it appropriate to continue with her plans.



31. It appears that initially her contact with residents was welcomed, with bicycles being removed. However, when the Claimant knocked on the door of one particular resident, an altercation ensued. As we could see from the documentation, there was a significant debate over the cause of this altercation. The tenant contended that the Claimant had demanded that he move his bicycles, which he had refused, that the Claimant then explained who she was and said that letters had been sent about moving the bicycles and that she then screamed in his face saying that she would take the bicycles. He then replied saying that that would be stealing, and went inside. He then returned to the corridor which led to the Claimant screaming in his face and waving her phone around, and he then took her phone, at which point the Claimant kicked him.
32. The Claimant's version of events, whilst agreeing that she did ultimately kick the tenant, was very different. She asserted that she had knocked on the particular door and the door was answered by a woman to whom she indicated that the bicycle needed to be moved. At this point, a man, later understood to be the husband of the woman, came out, shouted at the Claimant, told her that she would be stealing the bicycle if she touched it, and pushed the Claimant against a wall with his face almost touching hers.
33. Both versions of events then agreed that the tenant went into the property but then came out soon afterwards. The Claimant indicated that she was leaving the premises but took a photo on her phone of the bicycle as she was doing so. At that point, however, the tenant came out of the property again, shouted at her again, pushed her against the wall and towered over her, at which point, she kicked him and was able to move away. The Claimant's version did change slightly in that initially she said that she kicked the tenant to get the phone back, whereas on other occasions she confirmed that she kicked him to get away.
34. The Claimant called the police, although it transpired that another resident had also done that, and it appears that the police initially seemed to take the view that the Claimant was the perpetrator. She was required to sit in a police car and was taken to the police station to provide a statement, which the police subsequently confirmed was not an appropriate course of action for them to have taken. A complaint was then received about the incident by the Respondent from the tenant's wife which was subsequently followed by emails from the individual pursuing a claim of compensation for the injury he asserted was caused by the kick.
35. Ultimately, by early March 2017, the police had confirmed that they were not going to proceed with any prosecution. That appeared then to lead the individual tenant to complain that that was not an appropriate action and that the Claimant should have been prosecuted for what she had done, which appeared then to have led to a review which in turn led to the same conclusion, i.e. that there was simply no evidence available which tended to prove or disprove either allegation; a pure case of one person's word against the other's.

36. Prior to that however, the Respondent considered that a potential disciplinary matter had arisen and therefore a meeting took place on 6 February 2017 during which the Claimant was told that she would be suspended on full pay pending an investigation into two allegations:
- *You were involved in an altercation with a resident on Thursday 2 February 2017, which resulted in you kicking the resident.*
  - *You did not follow procedure for lone working by activating and using your Identicom during the incident on Thursday 2 February 2017.*
37. An investigation was then undertaken by the Claimant's manager, Ms Connor. This involved meeting with the Claimant on 9 February 2017, but did not involve meeting with the tenant who had raised the complaint or any nearby tenants who may have observed matters. Instead, Ms Connor spoke to the tenant by telephone and attempted to speak to, and succeeded in speaking to, certain other residents to understand what they may or may not have witnessed.
38. The specific tenant repeated his assertions. The other conversations did not provide anything conclusive other than from one neighbour who reported that she had in fact called the police herself. Ms Connor also spoke to her manager, Ms Clarges, in relation to the Identicom, and she confirmed that she had been able to turn it on.
39. The Respondent also had a report from the Identicom provider noting that the device had not been switched on until 15:40 on the day in question and that the battery was full. It also confirmed that the device had been working consistently every day subsequently. The Claimant confirmed, in fact, that when she was in the police car outside the premises shortly after the incident, she tried to turn the Identicom on and did indeed manage to turn it on at that point.
40. Ms Connor completed her report on 15 March 2017. Annexed to it were file notes of her conversations with the Claimant and the tenant, a table showing the results of telephone calls with residents from the area, photographs of the incident location and alleged injuries, the Identicom user report, the Identicom Lone Worker Safety Procedure, which included a section saying that failure to comply with the policy or procedure could result in disciplinary action, notes of the investigation meeting undertaken with the Claimant on 9 February 2017 and the Claimant's suggested amendments to those notes, and witness statements from the two contractors who confirmed that, whilst they had heard shouting, they had not observed anything. The conclusion of the investigation was that it was recommended that the case proceed to a disciplinary hearing.
41. The notes of the meeting with the Claimant on 9 February 2017 were only sent to her on 1 March 2017. No contact had been made with the Claimant prior to that by any member of the Respondent's staff, albeit the suspension letter had noted the Claimant's ability to contact the

Respondent's employee assistance programme. The Claimant noted in emails of 4 March and 8 March that she was concerned that she had not received a letter from the Respondent's HR adviser as she had expected would have followed, and was also concerned that the process was taking a long time. The HR adviser confirmed, in an email dated 8 March 2017, that the next stage would be a letter confirming the outcome of the investigation which they anticipated would be available by the end of that week or early the following week. The Claimant was requested to return her notes with comments by 13 March 2017.

42. The HR adviser then sent a letter to the Claimant on 17 March 2017, confirming receipt of the Claimant's amendments, noting that contact would be made with her shortly to discuss the next steps and that, in the meantime, the employee assistance programme support was available.
43. A further letter was then sent to the Claimant on 23 March 2017, noting the findings, that Richard Bampton, Head of Income, had been appointed to act as the disciplinary officer, and that a disciplinary hearing would be held on 5 April 2017. The letter confirmed that a potential outcome of the hearing could be dismissal but that a decision on that would not be made until the Claimant had had an opportunity to put forward her case and the hearing had been concluded. The Claimant was notified of her entitlement to be accompanied by a work colleague, employee representative or trade union representative. The letter also noted that any requests for relevant witnesses to attend the hearing should be submitted to Mr Bampton by 31 March 2017, outlining the evidence the witness would present.
44. The Claimant then sent an email to the Respondent's HR business partner noting that a union representative was not available on 5 April and requested that the hearing be changed to either 2 or 3 May. The Respondent's HR business partner noted that the Respondent's policy was to postpone for five working days and therefore suggested either 12 April or 18 April. She noted that they would not be able to delay the hearing until the beginning of May and suggested that the Claimant advise her union of that so that an alternative representative could be found. In the event, no representative was available, and the Claimant attended the hearing with her sister as her companion.
45. The meeting took place on 18 April 2017 with the HR business partner there as a note-taker. Prior to that, the Claimant had prepared a nine-page typed statement setting out her responses to the investigation report and that was read out at the start of the hearing. Mr Bampton explored the issues with the Claimant and asked her several questions about the events of 1 February 2017. In particular, he asked the Claimant why the bicycles had simply not been taken, to which she replied that she felt that that would have led to complaints and also that she felt that she would have been reprimanded by her manager for not knocking on doors before removing the bicycles. She confirmed that she could have asked the contractor's operators to accompany her, although it had not occurred to her to do so. Her perspective was that she was not knocking on the doors

in circumstances which would be perceived by the tenants in any form of negative manner.

46. Mr Bampton asked the Claimant why she had taken a picture when leaving the premises, and she confirmed that she had had a feeling that the tenant would make a complaint. Mr Bampton queried why that was more important than leaving a place where she had been threatened and the Claimant replied that she thought that the tenant had finished and had gone in to his flat and would not return.
47. Following that meeting, Mr Bampton emailed three individual colleagues whom the Claimant had provided information on with regard to confirming difficulties with regard to turning on the Identicom device, as she had given it to them to try on 3 February 2017. Prior to that, whilst the Claimant had informed the Respondent that she had asked three colleagues to try to switch on the Identicom on 3 February 2017, she had not provided their names. All of the colleagues confirmed that they did manage to turn the device on albeit not without difficulty, with the buttons being stiff. Ms Clarges also confirmed that she had been asked to test the Identicom by Ms Connor on 6 February 2017 and that it seemed to her that the device had turned on with no problem.
48. Following receipt of that further information, and indeed a further email from the Claimant dated 20 April 2017 raising some further points, Mr Bampton completed his deliberations and concluded that the Claimant should be dismissed. He sent her a letter dated 25 April 2017 confirming this.
49. In his letter, Mr Bampton confirmed that the Claimant had admitted that her Identicom had not been switched on, but that other members of staff had been able to get the device to work in subsequent days and that the Identicom provider had confirmed that the device was in good working order. He confirmed however that what he viewed as the “concerning factor” was that, knowing the device was not working, the Claimant had continued to proceed with working alone while on site.
50. He concluded that, whilst the lone working device had not been switched on, the Claimant had put her own personal safety at risk and had failed to take steps to minimise the risk by calling her manager to question how she should proceed being unable to turn the device on. He also noted that the Claimant had chosen to go into the block and look in corridors for bicycles alone and did not ask the contractor’s operators to attend with her, had decided to knock on tenants’ doors, when it was not necessary for her to do that as she had already sent a clear letter advising the residents of the date of bicycle removal, and that, after the first encounter with the tenant, she had not left the corridor despite having had an opportunity to do so. Instead, she had remained in the corridor and had taken a picture of the bicycle which was an unnecessary action.
51. Mr Bampton noted that the Claimant had admitted kicking the tenant, and that he had given consideration to the circumstances that led to that, both

in terms of the tenant's behaviour and the Claimant's mitigation surrounding it. However, he felt that her decision to kick the tenant was not a justified or proportionate response and that there had been other ways to have removed herself from the building. The Claimant had been present at the building on behalf of the Respondent and therefore had potentially placed the Group's reputation at risk.

52. Mr Bampton concluded the letter by confirming that the Claimant had a right of appeal, although he did not expressly state that the dismissal was summary and immediate, nor did he provide any information with regard to the Claimant's final pay.
53. The Claimant requested an extension of time within which to appeal, which she was given, and she then submitted an appeal, received by the Respondent on 9 May 2017. An appeal hearing was scheduled at the Respondent's Ealing office on 2 June 2017, although, at the Claimant's request, the venue was changed to the Staines office, i.e. the office at which she generally worked, and took place on 30 May 2017. The Claimant was accompanied by her trade union representative and Ms Wightman was accompanied by an HR representative. In accessing the specific meeting room, the Claimant had to pass colleagues with whom she worked, although not her direct team, which she indicated she found stressful.
54. No notes were produced of the appeal meeting, but the letter sent by Ms Wightman on 7 June 2017, confirming the outcome of the meeting, set out a detailed summary of the issues discussed.
55. Ms Wightman noted that the Claimant's appeal was based on the severity of the sanction of summary dismissal, which she felt should be reduced to a warning, and also on several faults in the procedure, including; suspension not being immediate, the length of time the procedure had taken, not being fully provided with existing documentation, the dismissal letter not being clear that she was being summarily dismissed, inequitable treatment, a lack of concern for her as an employee in preference to concern for the resident, and a lack of updates during her suspension.
56. Ms Wightman outlined the points made by the Claimant regarding the inability to use the Identicom. She noted however that the Claimant had been very aware of the need to use the device and also that she had been able to turn the device on shortly after the events occurred whilst waiting in the police car. She noted that the Claimant was often in situations of lone working where she knew it was appropriate for the device to be used and was aware of the Identicom and lone working policies. She concluded that there had been options for the Claimant to reduce the risk to herself and reduce the exposure to the Respondent of vicarious liability.
57. With regard to the altercation with the tenant, Ms Wightman noted her concern that the Claimant had stopped to take a photo of the resident's bicycle after being pushed, i.e. after a time when the Claimant had had an opportunity to leave the premises and avoid escalation, particularly in

circumstances where she had some difficulty with walking. She concluded that the Claimant had made a decision alone to put herself into a lone working situation without the appropriate security arrangements and that kicking anyone would be a serious breach of conduct impacting on the reputation of the Group. She therefore considered that dismissal was an appropriate sanction.

58. Ms Wightman also responded to the Claimant's procedural concerns and noted that it had not been appropriate to suspend the Claimant on 2 February, the day after the incident, on the basis that information was being gathered, that the Claimant was then away on an away day on 3 February and it was therefore only on the following Monday, 6 February 2017, that the suspension could have taken place. She considered that the delay in relation to the finalisation of the investigation report was not unreasonable, that documents, apart from two photographs, appeared to have been provided, and that support had been provided. She also confirmed that it would not be appropriate to apply the Respondent's employment procedures to the conduct of a resident and that it was intended to provide a communication to the residents to ensure that they were reminded of the standards of behaviour expected of them.
59. With regard to the Claimant's complaint that the dismissal letter had not been clear that summary dismissal was the sanction, and that she had been expecting to receive notice, Ms Wightman accepted that the letter could have been more clear and decided therefore that the Claimant would be provided with one month's salary, albeit that that would not change the effective date of termination.

## Conclusions

60. Applying our findings to the issues set out above, our conclusions were as follows.
61. First, with regard to unfair dismissal, we noted the Claimant's concession that the reason for dismissal was conduct. We therefore moved on to consider the fairness of dismissal for that reason, applying the well-known test set out in the case of BHS v Burchell [1978] ICR 303 and summarised in the issue identified at section 4.2 of paragraph 11 above, i.e. did the Respondent have a genuine belief in the Claimant's guilt of the alleged misconduct, was that belief based on reasonable grounds, and were those reasonable grounds derived from a sufficient investigation. We were conscious with regard to the last matter that our assessment of the sufficiency of the investigation would need to be undertaken by reference to the question of whether the investigation undertaken fell within the range of responses open to an employer acting reasonably in the circumstances.
62. Applying the Burchell test, we were satisfied that the Respondent, in the form of Mr Bampton and Ms Wightman, had had a genuine belief of the Respondent's guilt. Whilst there had been some assertions in the Claimant's claim form and in her evidence with regard to concerns that she

had been bullied by her manager, we did not see any connection of any such matter to the Respondent's decision. There were no assertions of any form of bad faith on the part of Mr Bampton and Ms Wightman and we therefore were satisfied that there had been a genuine belief on their part of the Claimant's guilt.

63. With regard to reasonable grounds, whilst there was a degree of difference between the versions of the Claimant and the tenant with regard to what happened on the day, the Claimant's own evidence was clear that she had indeed kicked the tenant. It was also clear that the Claimant had not put on her Identicom device and, whatever the reason for that, continued to proceed to be alone with tenants in such circumstances. Bearing in mind the issues outlined above regarding the Respondent's policy, which the Claimant had not observed, we considered that there were reasonable grounds for the Respondent's belief.
64. With regard to the sufficiency of the investigation, as we have noted, it was not for us to put ourselves into the shoes of the Respondent and to consider what we would have done in the circumstances or whether what the Respondent did was, in any sense, correct. We were judging the Respondent's actions by reference to the range of reasonable responses test.
65. In that regard, whilst we considered that there were some further angles of investigation that the Respondent could have pursued, in that they could have more formally interviewed the complaining tenant and the surrounding residents, we did not consider that it was unreasonable for the Respondent not to do so. The Respondent's own disciplinary policy notes that when investigating incidents involved witnesses who were not employees of the Respondent the means and nature of communication with them would be agreed with the HR department and consideration would be given to the Group's reputation and to protecting the professional standing and continuing relationship with the alleged perpetrator. We did not therefore consider that it was necessarily unreasonable of the Respondent not to have interviewed the resident in the same way that they interviewed the Claimant. Indeed, we noted that it would not be uncommon for employers to limit the knowledge of disciplinary action against one of its employees as far as possible and we also noted that, had a formal statement been taken from the individual resident and his wife, then it would be likely that they would have simply maintained the evidence provided and therefore that any failure, had there been one, would have had no bearing on the outcome.
66. With regard to the Claimant's concerns regarding the identification of witnesses regarding the test of the Identicom, we noted that whilst the Claimant had stated early on in the proceedings that colleagues had tested the machine and had found it difficult to put on, she had not provided the names of those individuals until the disciplinary hearing with Mr Bampton. Whilst the Claimant in her evidence noted on several occasions that she felt that this would have been something for the Respondent to have done, we did not consider that it was something that the Respondent necessarily

needed to do from the perspective of acting reasonably. We noted that the Respondent had asked one of its managers to check the machine and had also asked the company providing the machine to confirm that it was in working order and had been satisfied that it had been.

67. Even though therefore we concluded that a different employer might have undertaken the investigation differently, we did not consider that we could say that what the Respondent did fell outside the range of reasonable responses. We therefore considered that the BHS v Burchell test had been satisfied.
68. We then proceeded to consider whether dismissal was a fair sanction and whether it was again within the range of reasonable responses of a reasonable employer, applying the test set out in Iceland Frozen Foods v Jones [1983] ICR 17. Again, whilst we considered that the decision of the Respondent was a relatively harsh one, in that it was a one-off event and the Claimant was someone with previous unblemished service, we did not consider that we could say that the response was one which no reasonable employer could have reached. The Respondent gave cogent reasons as to why it considered that dismissal was appropriate, in light of the Claimant's many opportunities to have avoided the circumstances, her significant experience, and the ultimately admitted kick. In the circumstances therefore, we considered that the sanction of dismissal was a fair one.
69. With regard to procedural matters, again, whilst we had some concerns about the length of the investigation process and the disciplinary process, some of those delays arose at the Claimant's request, and there was an understandable desire on the Respondent's part to try to understand what the police were doing from a criminal perspective before taking matters further. We therefore again concluded that the Respondent's actions were not unreasonable, and that the dismissal of her was not unfair.
70. Turning to the claim of discrimination arising from disability and the four allegations outlined at section 6.1 of paragraph 11 above, we took the first two together. The Claimant contended that she was treated unfavourably due to the Respondent failing to sufficiently investigate the Claimant's assertion that several colleagues had also had difficulty in activating the Identicom, and in proceeding with the disciplinary procedure with an allegation of failing to activate the Identicom and in dismissing her.
71. As we have noted above, we did not consider that the Claimant had been treated unfavourably by reason of any failure to sufficiently investigate the Claimant's comments in this regard. Indeed, we did not consider that there had been an insufficient investigation regarding the Identicom. As we have noted, the Claimant did not provide details of the names of her colleagues until the disciplinary hearing with Mr Bampton and he, the very next day, contacted those colleagues for their information. In any event, Mr Bampton's conclusion was very much based on what the Claimant did after knowing that the Identicom was not in operation, and not the particular reason as to why the Identicom was not in operation.



72. Similarly, whilst the failure to activate the Identicom was the starting point of the disciplinary allegations against the Claimant, even if that failure had arisen due to the Claimant's disability, we did not consider that the treatment of her would have been unfavourable treatment arising from her disability in anything other than a very basic "but for" way. As we have noted, the Respondent's concerns were very much focused on the Claimant's actions after it became apparent to her that the Identicom could not be put into operation regardless of how that came about. We also did not consider that the dismissal in any sense arose from the Claimant's disability, again other than in a very basic "but for" way.
73. With regard to the Claimant's assertion that she had been treated unfavourably due to a failure to take account of her stress and anxiety during the phased return to work, we heard very little about this in terms of evidence. However, we were in any event not satisfied that the claim had been brought within the required timeframe set out in the Equality Act or that it would be just and equitable to extend time.
74. The Claimant had returned to work in November 2016 and that had been phased over the following months. Her complaint was that she had been expected to carry out the role as if she was working full time and that the adjustments had therefore led to an increase in her stress and anxiety levels.
75. However, that state of affairs ended by January 2017 and the Claimant did not submit her claim form until 28 July 2017, following a 5 day period of early conciliation in May. Therefore, the last date in relation to which a claim could have been brought within time would have been an event on around 23 April 2017. It was therefore quite some distance out of time and we did not consider that any issue regarding the Claimant's phased return to work formed any form of connection with the disciplinary action taken against the Claimant in February so as to amount to a course of conduct. No evidence was put before us regarding whether it would be just and equitable to extend time in the circumstances, and we did not consider it appropriate to do so.
76. Finally, with regard to the Claimant's claim that the failure to take account of her stress and anxiety during the investigation and disciplinary procedure amounted to unfavourable treatment arising from her disability, we considered that the Claimant had in fact approached this from the wrong direction. Whilst we could readily appreciate that the Claimant would have been stressed and anxious as a result of the investigation and the disciplinary process, and indeed the length of time that they were taking, we could not say that that was in any sense caused by her condition.
77. The Claimant complained that the length of time the process took, and the fact that the appeal hearing was held on a floor in the building where her former colleagues were present, caused her stress. We could understand why she felt that way and indeed why she felt concerned about the lack of

any contact by the Respondent during the period, but we did not consider that that was in any sense treatment arising from her disability. Rather, we considered that any stress and anxiety was in fact caused by the process. Ultimately therefore, we considered that the Claimant's discrimination claims also failed.

---

**Employment Judge S Jenkins**

Date: 30 April 2019

Sent to the parties on: .....

.....  
For the Tribunals Office

**Public access to employment tribunal decisions:**

All judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.