



RM

EMPLOYMENT TRIBUNALS

Claimant: Mrs C Freeman

Respondents: UK Power Networks (Operations) Ltd

Heard at: East London Hearing Centre

On: 27, 28, 29 March 2019 and (in chambers) 23 April 2019

Before: Employment Judge Moor

Members: Ms T Breslin
Mr L O'Callaghan

Representation

Claimant: In person

Respondent: Mr J P Waite, counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. the Claimant was not a disabled person within the meaning of the Equality Act 2010 by reason of type 2 diabetes at any material time;
2. from 1 November 2018, the Claimant was a disabled person within the meaning of the Equality Act 2010 by reason of depression;
3. the claims of disability discrimination do not succeed;
4. the claims of harassment relating to disability do not succeed;
5. the claims of direct nationality discrimination do not succeed;
6. the claims of harassment relating to nationality do not succeed;
7. the claims of victimisation do not succeed.

REASONS

1. The Claimant, Mrs Freeman, has worked as a Quotation and Delivery Planning Assistant (a 'QDPA') for the Respondent, a power company, since 12 July 2010. This claim concerns the rejection of Mrs Freeman's request to work at home for 2 or 3 weeks out of 4, which she contends is a failure to make a reasonable adjustment contrary to the Equality Act 2010, and her complaints about the conduct towards her and decisions of her manager, various colleagues, which are contended to be acts direct discrimination or harassment because of nationality or disability and/or victimisation.

Findings of Fact

2. Having read the witness statements and heard the oral evidence of Mrs Freeman, Mrs Themistocleous, Mr Hack, Mr Halsey, Mr Pepper, Mrs Short, Mr Folkerd, Mr Melia and Mr Webb, and having read the documents referred to us in the evidence, we make the following findings of fact.
3. Mrs Freeman was born in Romania. She has lived in the UK for many years.
4. She has been employed as a Quotation and Delivery Planning Assistant ('QDPA') with the Respondent power company since 12 July 2010. Her appointment letter states she would be based at the Bidder Street office, West Ham.
5. She worked in a team of 13 QDPAs who were managed by a team leader, Mrs Themistocleous. Mrs Themistocleous was managed by Mr Pepper, Connections Manager for the London region.
6. Mrs Themistocleous travelled between various offices in the London region but was at the Bidder Street office about 2 days a week.
7. Along with Mrs Freeman who worked full time, Ms Morley and Mrs Short, who were both part time, mainly handled the creation of MPANs. An MPAN is the unique identification number on each new electricity connection associated with a meter. A connection cannot be created without one. Sometimes it is straightforward to create an MPAN, sometimes it is more complicated. Mrs Freeman agreed she could be asked to do other responsibilities within her job description. As a matter of practice, MPANs were what she predominantly worked on. Undoubtedly Mrs Freeman has a great deal of knowledge and experience in this work. The work of MPAN creation was done on the Respondent's computer system and her output could be seen on its databases.
8. In QDPA work, including MPAN work, QDPAs had to communicate with designers, engineers, customers and each other. This communication was a mixture of face-to-face contact (especially where a problem had arisen), on the telephone and by email. Each assistant had their own telephone number but assistants could take calls for others if they were absent. They were not connected to a telephone 'hunt group'.
9. Supervisors would jump in and assist a QDPA where they overheard a difficult conversation taking place with a customer. Designers would speak face to face

with a QDPA to resolve some problems: sometimes it was easier for the designer to look at the QDPA's spreadsheet to identify useful information, as Mr Folkerd described to us in his evidence. QDPAs would share information with each other during the day if it was useful.

10. Some QDPAs worked wholly or partly at other offices. Ms Morley worked partly at Bidder Street and partly at Bengeworth Road. Ms Harrison worked predominantly at Bengeworth Road. They had laptop computers for this purpose, because Bengeworth Road did not have desktop computers. Ms Killon is based at Bidder Street but works out of Falconwood office, nearer to her home, once or twice a month because she has a disabled grandson. Ms Olley is based at Bidder Street but attends Potters Bar to support designers about once per month. Mrs Themistocleous sees those QDPAs who do not work at Bidder Street once a week. She speaks to them every day. When they worked at those other offices they were also supervised by the managers based in those offices.
11. Ms Morley's laptop originally came with the 'standard build' and therefore allowed her to access the systems she needed from anywhere. At some point this was removed so that she could just access the company systems from an office.
12. We find that, exceptionally, Ms Morley worked from home on about 2 occasions. There was no arrangement in place for her to do this. Mrs Freeman relied upon emails to argue that they 'proved' Ms Morley worked at home. They do no more than prove that on one occasion she did so. They do not prove that Ms Morley worked from home generally or that she had any arrangement to do so. The email Mrs Freeman relied upon showing that Ms Morley was working at 8pm does not prove she was at home at that time. We accept Mrs Themistocleous's evidence that, on that occasion, Ms Morley was working in an office. Mrs Themistocleous gave detailed, persuasive evidence about this. She recalled that Ms Morley had had to go home because of childcare problems but had come back into the office to complete the work. We prefer this evidence because Mrs Themistocleous was in a position to know whereas Mrs Freeman has speculated about it.

Incident with Mrs Short

13. In October 2013 Mrs Freeman and Mrs Short had a 'falling out' at work. Mrs Freeman went to HR in tears. HR advised the manager at the time (not Mrs Themistocleous) that she should first attempt to resolve the matter informally. We find this what is likely to have happened because there were no formal complaints to HR.

April 2016 Move to Scotland

14. In April 2016 Mrs Freeman and her family moved to Kilmarnock. Her husband is disabled. He could no longer manage the stairs at their home in Wickford, Essex. It was a lot cheaper to buy a bungalow with a garden in Kilmarnock, than in Essex. Their adult daughter moved, too. While Mrs Freeman is at work she cares for Mr Freeman.
15. Mrs Freeman moved to a mobile home on Canvey Island. Her commute into work from there is about the same time as it was from Wickford. She takes a bus, a C2C train and the DLR. Her commute is approximately 1 hour and 30 minutes

each way, door-to-door.

16. Until May 2016 Mrs Freeman worked 5 days a week, 7.5 hours per day from 7.30am to 3.30pm with a lunch break.
17. In May 2016 Mrs Freeman made a flexible working request, which Mrs Themistocleous agreed: Mrs Freeman would work 9-hour days for 3 weeks and the Monday of the 4th week, 7.30-5.00pm. She worked 'normal hours' on the fourth Tuesday, leaving at 3.30pm. Then travelled to Scotland and used the time in lieu ('TOIL') she had built up to spend the Wednesday to Friday of the fourth week at home with her family.
18. When the family moved to Scotland Mrs Freeman chose to move her GP to Kilmarnock. She could see a GP in Essex using a temporary certificate for the purpose. She was allowed time off for her Scottish GP appointments, even when they required her to stay longer in Scotland.

Reward Schemes: Living Our Values and Think Customer

19. The Respondent ran an overall reward scheme called Living Our Values. Mrs Freeman was nominated for this by several times in 2015, 2016 and 2017 including by Mrs Themistocleous.
20. In about April 2016 Mr Pepper introduced a local recognition scheme called Think Customer for the 85 staff in his teams, including the QDPAs. Its purpose was to encourage really good customer service.
21. Each month the managers reporting to Mr Pepper, including Mrs Themistocleous, would nominate a team member. A guest speaker would then choose a winner who won a £40 voucher and recognition on a poster, which included the names of the nominees (see eg 275).
22. In the four months that it had been going, Ms Morley had been nominated twice and won Think Customer in July 2016.
23. On 1 August 2016, Mrs Freeman emailed Mr Pepper complaining that Ms Morley had been shown favouritism through her nominations to this scheme (242). She somewhat sarcastically stated she was 'thrilled' at Ms Morley's recognition but complained that it was unfair to the rest of the team. Mr Pepper replied in a measured way. He explained how the scheme worked, stating it was not his intention to upset Mrs Freeman and acknowledged the team's work. She accepted his reply and confirmed again to us that she had done so. She was clear in her oral evidence that her complaint was favouritism towards Ms Morley by Mrs Themistocleous and unfairness towards the rest of the team in general, rather than her alone.
24. Mrs Freeman was subsequently shortlisted for the Think Customer award in March 2017.

Argument with Ms Olley

25. On 26 May 2017, Mrs Freeman and Ms Olley had an argument over the use of abbreviations in an email. They shouted at each other.

26. Ms Olley, another QDPA, and Mrs Themistocleous were friends out of work.

31 May 2017 Complaint

27. On 31 May 2017 Mrs Freeman complained verbally to Mrs Themistocleous. She held a letter in her hand. (This has become known as the 'Dear Anne' letter.)
28. We find at this meeting Mrs Freeman did not give the letter to Mrs Themistocleous to read. It is common ground that she did not leave the letter with Mrs Themistocleous at the end of the meeting. We find it implausible that she read the whole of the letter out at the meeting: it is a long letter; it would have been odd for her to incant it at the meeting rather than just leave it with Mrs Themistocleous for her to read. Had she wanted Mrs Themistocleous to know its content she would simply have given it to her. She did not. Furthermore if she had read the whole of it out and Mrs Themistocleous had not acted upon it, we find it very likely that Mrs Freeman would have taken the matter to HR. She was prepared to complain about matters she was unhappy with (as, for example, in the past she had gone to HR about Mrs Short; and had complained to Mr Pepper about the reward scheme). She did not.
29. We find that Mrs Freeman did not refer to point 1 of the letter (an allegation that Ms Olley had been sarcastic about where Mrs Freeman came from) nor did she read out the part of the letter in which she makes a general reference to colleagues mocking her accent. These are the only parts of the letter that could amount to nationality abuse. We are also entirely satisfied that Mrs Freeman did not inform Mrs Themistocleous of these allegations at this meeting in any other way. We find that if she had done so, Mrs Themistocleous would have referred them to HR for investigation. But no such reference was made. Nor did Mrs Freeman follow up with HR whether Mrs Themistocleous had done so, which would have been very likely had she raised complaints of that nature.
30. The meeting between Mrs Themistocleous and Mrs Freeman at this time was about the abbreviations argument with Ms Olley and nothing more. Upon Mrs Freeman saying something to the effect, 'you will side with your drinking cronies', Mrs Themistocleous invited her to bring her complaint to the attention of HR if she was not confident in her (Mrs Themistocleous) dealing with it. Mrs Freeman therefore had a clear opportunity to do so but did not take it.
31. We find that Mrs Themistocleous did not take sides in relation to the argument. She was aware that both Ms Olley and Mrs Freeman had been shouting. She said she would bring up the issue of dealing politely with colleagues at the next team meeting and she did so.
32. The upshot was that Ms Olley and Mrs Freeman agreed to disagree. The two did not speak to each other at work from then on. Mrs Freeman did not take her complaint to HR.

October 2017 Diabetes Diagnosis

33. Mrs Freeman has high blood pressure. In a routine blood test at her GP it was found that her blood sugars were such that she was diagnosed with type 2

diabetes, on 27 October 2017 (654). This is the type of diabetes that does not require to be controlled by insulin. It is a common condition that causes the level of sugar in the blood to become too high. It can cause tiredness (581). Mrs Freeman agreed with her doctor to try to control her diabetes with through a healthy diet. She was understandably worried by the diagnosis.

34. On 1 November 2017 Mrs Freeman informed Mrs Themistocleous of her diabetes diagnosis. Mrs Themistocleous talked with her about her ill health. She recalls that Mrs Freeman told her she was feeling tired and unwell. Mrs Themistocleous referred her to others who had diabetes at work who might be able to share their experiences.
35. From then until about late March 2018 Mrs Freeman experienced 3 or 4 episodes a month of shakiness and blurred vision lasting 6-7 minutes. During these episodes she felt like vomiting but we find only on very few occasions did she do so; she also felt like she might fall to the floor but did not do so. She knew to manage these episodes by eating sugar or a sugary drink quickly.
36. In this period she experienced tiredness. Although we sought to explore her tiredness with her, she did not provide any evidence of how her tiredness impacted on her day-to-day activities. Her fatigue was not such that the quality of her work suffered. She still was able to undertake full-time work, for 3 weeks at longer hours than usual; a total commute of 3 hours per day; and significant regular travelling to and from Scotland.
37. In early April 2018 Mrs Freeman agreed with her doctor to improve her diabetes control by taking medication called metformin. After doing so she did not experience more episodes.
38. Her GP letter of 13 September 2018 informs us that there have been no diabetic complications but does not set out how her diabetes impacts on her current wellbeing (which was the stated purpose of the letter). Mrs Freeman has not been referred to a consultant. Likewise, the second GP letter (658c) refers to poor control of her diabetes but does not indicate what effect this has on her day-to-day activities.

Second Flexible Working Request

39. On 16 January 2018 Mrs Freeman submitted a second Flexible Working Request in which she requested that she be allowed to work at home 3 or 2 weeks of the month and work in the office 1 or 2 weeks. Mrs Freeman had received help in formulating her request from Ms Kelly, a diversity officer in the Respondent. Mrs Kelly had not advised her it would be approved.
40. The reasons Mrs Freeman gave at the time for the request were first to improve her work/life balance: the move to Scotland; her mother's recent death; her diabetes and longer working hours were all having an impact on her wellbeing. Working at home would, she argued, improve her wellbeing and help her attend more of her medical appointments, which currently she had to postpone until she had built up her TOIL. At the Flexible Working Request appeal, she told Mr Hack that her request was so that she could spend more time with her family and informed him about her diabetes, majoring on the need to go to more GP

appointments, but also telling him that it made her tired.

41. Her reasons for homeworking in her oral evidence to us were first of all that she 'needed help to manage medical appointments' and second that she wanted a better work/life balance. When we asked specifically what it was about her health problem that meant she needed to work at home for some of the time she said: 'when I really don't feel well, if I don't come into work my sickness record would plummet'. Of course, this does not make sense because if she were a homeworker and ill she would still be off work sick and that would be included on her sickness record. She then said if she were unwell and working at home she could make a GP appointment on the same day. We find this would be possible while working at the Essex office through her temporary certificates in Essex. Only after being asked for a third time about why her health meant working at home was better did she state her meals would be better and without the commute she would be less tired and she would be able to work 7 and not 9 hours. In her evidence she stated her request was also to avoid the stressful atmosphere at work as she saw it, but this was not set out in her application and we find this is hindsight thinking given that her grievance came later.
42. On the basis of all of the evidence we have heard, we find the reasons for her request were: to spend more time with her family; to make GP appointments in Scotland more easily; to reduce her daily hours; and to reduce her commute.
43. A few days prior to putting in this request, Mrs Freeman had had an informal discussion about it with Mrs Themistocleous, who told her it was unlikely to be approved because hers was an office-based role. While Mrs Freeman initially alleged Mrs Themistocleous told her it would not be approved, she agreed in her evidence that Mrs Themistocleous used the word 'unlikely'. We find the reasons Mrs Themistocleous gave at the time were the genuine reasons for her opinion. This is because they were her reasons for rejecting the formal application and they were also the reasons Mr Hack subsequently rejected the appeal.

Mrs Freeman's query about Ms Morley's absence

44. On 25 January 2018 Mrs Freeman queried with Mrs Themistocleous a sickness absence she thought Ms Morley had taken which had not been recorded as such (327). We agree with Mrs Themistocleous that one member of staff when looking at the system cannot see the reason for absence. The relevant box is simply coloured blue. We find Mrs Freeman was speculating about the absence. In fact it was not a sickness absence. Ms Morley built up hours to be taken as TOIL. She was a single parent and if her son was sick or childcare was required she used her TOIL to take time to care for him. This was an arrangement she had reached with Mrs Themistocleous, not dissimilar to Mrs Freeman's arrangement whereby she built up TOIL in order to have working days off to care for her husband.

Rejection of Second Request for Flexible Working

45. On 26 January Mrs Themistocleous rejected the homeworking request (317). The reasons she gave were: cost; the need for telephone cover in the office; the need to allocate tasks in the office; the need for face to face contact with the team (particularly with engineers and designers); the need to manage Mrs Freeman effectively.

46. Mrs Freeman appealed, informing Mrs Themistocleous that her justifications were 'not only immature but discriminatory'.

Deduction of Hours: Snow Day

47. On 27 February 2018 the snow called the 'Beast from the East' arrived. Mrs Freeman managed to get into work on time. Different members of staff struggled, depending on their train lines. They looked anxiously at the train companies' websites and it became clear that the situation was worsening. Therefore Mrs Freeman left work that day at around 2pm. Mrs Freeman put in a timesheet for the whole day up to 5pm.
48. On 28 February 2018, Mrs Themistocleous approved Mrs Freeman's timesheet up to 3.30pm. As with others, she did not dock normal pay for those who left early. But Mrs Themistocleous decided that she could not approve her timesheet for the hours between 3.30pm and 5pm that were part of the flexible working agreement. Mrs Themistocleous explained to us that she had had a recent reminder about 'integrity' and the need to take care when approving TOIL. She checked with HR telling them that she had a member of staff who had claimed TOIL but not worked the relevant hours. HR told her additional hours not worked could not be approved.
49. Mrs Freeman included a complaint about this in her subsequent grievance and was paid the 1.83 hours missing when that part of her grievance was upheld.
50. We are unimpressed with Mrs Themistocleous's explanation. She knew Mrs Freeman's normal hours on that day were to 5pm. That was the arrangement she had entered into with her. She did not tell HR about this and thereby misled them. Mr Melia told us if he had known of that arrangement it would not have been a problem to approve the hours to 5pm. We find this was a petty and deliberate act by Mrs Themistocleous. We find she was annoyed that Mrs Freeman had not asked her permission to leave early, as other staff members had done. This is because she made point about this in her email reply to Mrs Freeman and placed emphasis on this point in her oral evidence in cross examination.

Rejection of Flexible Working Request Appeal Meeting

51. Mrs Freeman appealed the decision to Mr Hack, Head of Markets – Commercial and Industrial. He met with her on 27 March 2018. Part of the reasons she and her trade union representative gave for her request were to assist with her diabetes both as to arranging GP appointments and enabling her to work fewer daily hours. Mr Hack did not ask any more about this at the meeting.

OH Reference

52. On 28 March 2018, Mrs Freeman asked to be referred to OH (396). On 4 April she stated the conditions were 'diabetes, stress, depression' (395).

Rejection of Flexible Working Appeal

53. On 9 April 2018, Mr Hack rejected her appeal (401). He did not consider cost was an issue: the cost of a workplace assessment and the relevant equipment would be relatively low. But he did consider the role needed to be carried out in an office

within the team for the following reasons (we have translated the management phraseology in his letter into more straightforward language):

- 53.1 working in the office meant there was the flexibility to ask her to do other tasks;
 - 53.2 difficult calls needed to be taken over by a manager or a colleague and, if she was working remotely, that is not something they would be aware of;
 - 53.3 face to face contact was important for team work; and
 - 53.4 'team engagement' was important to the Respondent, a sense of involvement in the company, and being present in the office was important for this.
54. Mr Hack did not refer to Mrs Freeman's diabetes in his reasons. He did not explain whether he had taken it into account although he did point out that, while he did not wish to question her decision, her move to Scotland was her choice and created a risk to her ability to carry out the role to the best of her capabilities (402).
55. Mr Hack had had no training in when an employer's duty to make reasonable adjustments might arise. He had no sense, and had not been advised by HR, that in certain circumstances he might have to consider this as part of a flexible working request.

Depression Diagnosis

56. Mrs Freeman saw her doctor in April 2018 when the GP first made a depression diagnosis. The GP considered she had experienced depression from sometime in March 2018. She was prescribed Citalopram. Her doses of this anti-depressant increased in July 2018. Her GP recorded that she had a high level of depression in August 2018. Her Citalopram was increased again in December 2018. She was still taking it in February 2019 (658c).
57. The medical records show no history of depression.

Grievance against Mrs Themistocleous

58. On 11 April 2018, 2 days after Mr Hack's decision, Mrs Freeman brought a grievance against Mrs Themistocleous. She claimed that Mrs Themistocleous had bullied, harassed and discriminated against her. She relied on 5 initial matters:
- 58.1 nominations for the reward scheme;
 - 58.2 the way Ms Morley's sickness absence was dealt with;
 - 58.3 a failure to deal with her 'dear Anne letter' from May 2017;
 - 58.4 the rejection of the snow day timesheet;
 - 58.5 the rejection of the flexible working request.

59. Mrs Freeman claimed that 'Mrs Themistocleous has constantly and repeatedly made my life difficult, she makes me feel like a bag of rubbish all the time and the working environment is difficult...She is not aggressive or insulting verbally but her actions and decisions are made especially to make me feel worthless'. She contended this was because either she was not British or because she was disabled. She referred to her depression as well as diabetes.

Request to be Moved Upstairs

60. In early April 2018, Mrs Freeman asked Mr Pepper to be moved upstairs during the grievance. He discussed the matter with HR and, while it was a difficult decision, decided not to for fear this would isolate Mrs Freeman from colleagues from whom she was receiving support. Mrs Themistocleous was not sitting next to her. He was not aware of how strongly she felt about her grievance against Mrs Themistocleous.

ACAS EC

61. On 9 April 2018 Mrs Freeman started ACAS Early Conciliation. She had found out about time limits of claim in about the March 2018.

Grievance Interviews

62. Mrs Themistocleous informed the whole team that a staff member had brought a grievance against her and that they might be interviewed about it. She asked them to keep the matter confidential.
63. Mr Halsey, DER Development Manager, investigated the grievance with the help of Mr Melia in HR. He decided to interview about 14 people in the Bidder Street office including Mrs Short and Mr Folkerd. At the beginning of each interview, staff were told that the grievance was brought by Mrs Freeman and it was for bullying harassment and discrimination. Interviewees were required to keep the matter confidential. Mrs Freeman was interviewed twice by Mr Halsey.

Sickness absence, ET Claim, Return to Work and Move Upstairs

64. Mrs Freeman was off work on a sickness absence by reason of 'a depression disorder' for about 2 months, from 30 April to 26 June 2018.
65. Early Conciliation finished on 9 May 2018 and Mrs Freeman presented her claim to the Tribunal on 30 May 2018.
66. Upon her return Mr Pepper confirmed the phased return recommended by Occupational Health (516).
67. On her return she again requested that Mr Pepper move her upstairs and away from the management of Mrs Themistocleous. This time he agreed and found her a seat in the designers' team. From 4 July 2018 she reported to Simon Waller, the designers' line manager. She has continued to work there since and is happy with his management. From time to time team members from downstairs would come and speak to her upstairs about issues.

Mr Pepper Email

68. On 5 July 2018 Mr Pepper received an email from Mrs Freeman complaining about the Disconnections team. He read the email trail and considered Mrs Freeman's communications with the team and a customer to be abrupt and curt. We have read the emails and agree that they can be read in that way. Mr Pepper then received a complaint by the manager of the Disconnections Team about Mrs Freeman and the way she had interacted with the customer and the team. Mr Pepper then emailed Mrs Freeman (523) stating that he was disappointed by the tone of her emails to the Disconnections team, which had caused bad feeling. (He knew this because they had complained.) He stated he expected everyone to work professionally together.
69. We find Mr Pepper's email to Mrs Freeman to be an unsurprising and unremarkable managerial intervention: it was part of his role to set standards and remind staff of those standards when he saw them slip.

Mrs Short Email

70. On 18 July 2018 Mrs Short sent an email to two members of the team (Hannah and Lynn), who had been helping clear the backlog of MPAN work that had built up during Mrs Freeman's absence. She wrote: '*Dear Hannah/Lynn Just letting you know that new jobs have been 'parked' in your file for MPANs. Also, if you have any time then our Blue flagged items just need a Further info email sent to the customer asking for postal addresses. If you do get to them then please update SAP notes to say you've sent the request (& who to) then move a copy of the sent email into the efile (sect 11) the delete the email from within our inbox please. Thanking you. Regards.*' The email was copied into Ms Morley who had instigated their help.
71. Mrs Freeman complains that she was deliberately excluded from this email. We find it was not necessary for Mrs Short to include her in the email: Mrs Freeman knew about the processes described in these emails already. It was Hannah and Lynn who were working on the backlog and needed to know where it was situated. We find Mrs Freeman was not, therefore, deliberately excluded. She was not disadvantaged in any way by not receiving the email.
72. At this point Mrs Short knew about Mrs Freeman's discrimination grievance against Mrs Themistocleous, but we find that this was not part of the reason she did not send the email to Mrs Freeman. Nor was it to do with her nationality or any perceived disability. She did not send the email to Mrs Freeman because there was no need to do so.

Mr Folkerd Incident

73. On 2 August 2018, Mr Folkerd, a designer, told Mrs Freeman he was annoyed about an email she had sent which he thought made him look unprofessional.
74. Mrs Freeman had sent an email in which she reiterated some information Mr Folkerd had already sent to a customer. She also stated that she did not know to whom Mr Folkerd had sent an enquiry. Mr Folkerd was annoyed about this because he thought Mrs Freeman should have checked with him first. If she had done so she would have found out the query had been dealt with. Mr Folkerd said it was a crazy situation to be in. This was especially so, he told us, because she

now sat only a few feet away from him upstairs.

75. While, at this point, Mr Folkerd knew about Mrs Freeman's discrimination grievance against Mrs Themistocleous, this was not the reason he expressed his annoyance to Mrs Freeman. Nor was it to do with her nationality or any perceived disability. We find his response to her email to be entirely unsurprising given that he had already provided the information to the client. He was expressing minor annoyance and understandably so.

Grievance Outcome

76. Mr Halsey sent the grievance outcome letter to Mrs Freeman on 8 August 2018. He upheld her grievance about the loss of pay on the snow day; otherwise he did not uphold her grievance. In summary, he considered that Mrs Themistocleous had shown a flexible approach to Mrs Freeman by the first flexible working request and her response to leave for GP appointments. He speculated that the failure of the second flexible working request was the reason behind her grievance. As we are to make our own findings on the evidence we have heard in relation to the allegations included in the grievance, it is not necessary for us to set out those of Mr Halsey.
77. Mrs Freeman was again absent from work because of depression from 29 August to 25 October 2018.

Grievance Appeal

78. Mr Webb subsequently heard Mrs Freeman's appeal and did not uphold it. He informed her of this on 20 December 2018.

New Allegation of Racist Abuse

79. It was only at the appeal meeting with Mr Webb that Mrs Freeman first alleged that some colleagues had called her 'Eastern European bitch' or 'gypsy' (689). He found it significant that Mrs Freeman had not raised these very strong terms of abuse at any stage before and significant that the allegations in the Dear Anne letter, in full, did not go anywhere near the same level of abuse.
80. Only at this hearing did Mrs Freeman allege that it was Ms Olley and Mrs Short who made these remarks. Ms Olley was not a witness in the case (these allegations not being included on the claim form) and therefore did not have an opportunity of answering them. Mrs Short denied saying any such thing.
81. These new allegations are not matters we are required to make a decision about because they are not matters raised in the claim. But because they are serious we have considered them. We apply the balance of probabilities test to all the evidence before us. In other words we ask what is more likely than not to have happened. Applying that test, we find these allegations of abuse not to be proven. They are very nasty alleged remarks. Our findings of fact show that Mrs Freeman brought several complaints and grievances to the attention of her managers and co-workers. She was able and willing to do so. Her grievance against Mrs Themistocleous included an allegation of discrimination. We therefore do not find her explanation that she was too embarrassed to complain about these

remarks persuasive. We think it likely if they had been said, she would have complained far sooner. Further we consider it likely if these remarks had been said to Mrs Freeman an argument would have ensued, just as there was in relation to other incidents with the two co-workers concerned.

Submissions

82. Both parties made helpful written submissions, to which we refer. Our summaries below do not do justice to the detail in them.
83. In summary the Respondent submitted that Mrs Freeman was not a disabled person at any time; that the Respondent did not know she was and could not reasonably be expected to know. They argued that even if they were wrong about that: the requirement to be work in an office did not put Mrs Freeman to a substantial disadvantage in comparison with non-disabled persons; and that, in any event, it was not a reasonable adjustment to allow Mrs Freeman to work at home at least half the time. The Respondent argued that the separate acts of alleged less favourable treatment were either not made out on the evidence or were for reasons that had nothing to do with disability or nationality or protected acts. They argued that most of the complaints were out of time and it was not just and equitable to extend time.
84. In essence, Mrs Freeman argued that she was a disabled person by reason of her diabetes and depression. She reminded us to look at the question on the basis that she was not taking medication. At the very least she submitted they were progressive conditions, relying on her GP letters. She referred to the Guidance Part B. In relation to reasonable adjustments she set out why the Respondent's reasons for not allowing her to partly work at home were insufficient. She contended a single mother and someone with a disabled son were offered the flexibility of home working. She relied upon her schedule of alleged less favourable treatment (77) and made submissions as to why, on the facts, her allegations were proven. She argued that the Respondent had not responded to her racial abuse allegations and that she had been ostracised. She asked us to prefer her evidence and documents to those put forward by the Respondent. (We note that Mrs Freeman refers us to section 14 of the EA – discrimination by reason of two protected characteristics. This section is not yet in force.)

Law

85. The complaints here are that the Respondent discriminated against Mrs Freeman:
- 85.1 by subjecting her to a detriment her contrary to section 39 of the EA or;
- 85.2 by failing to comply with a duty to make reasonable adjustments, contrary to section 39(5), section 20-21, as read with Schedule 8 EA.

Disability

86. Under section 6 of the EA, a person has a disability if: *(a) [she] has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on [her] ability to carry out normal day-to-day activities.*

87. 'Substantial' here means 'more than minor or trivial', section 212(1) EA.
88. A *long term* impairment is one that has lasted 12 months or is likely to last 12 months or is likely to recur. Whether an impairment is *long term* must be considered as at the date of the alleged discrimination not the date of the tribunal hearing, McDougall v Richmond Adult Community College [2008] ICR 431 CA.
89. The Home Office has published Guidance on matters to be taking into account in determining questions relating to disability ('the Guidance'). Part B concerns what is a substantial adverse effect. Paragraph B7 of the Guidance reminds us that account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities.
90. The Tribunal must consider the question of impairment as if the person was not taking medication or in the absence of measures controlling it. B14 of the Guidance gives the example of someone with diabetes, which is being controlled by medication or diet. In that case the impairment should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet. This was considered in Metroline Travel Limited v Mr J Stoute (Debarred) UKEAT/0302/14/JOJ. HHJ Serota QC decided that the type 2 diabetes, in Mr Stoute's case, did not amount to a disability. And that the mere avoidance of sugary drinks could not be regarded as a 'diet' or treatment for the purposes of that principle. Of course, this case does not establish that type 2 diabetes is not a disability. The question whether someone is disabled does not depend upon the condition they have but how it affects them and this can vary in severity between individuals.

Direct Discrimination

91. Direct discrimination contrary to section 13 and 39 of the EA requires the Tribunal to find that the employee has been treated to her detriment, less favourably by the employer because of a protected characteristic (nationality or disability in this case).
92. To find a *detriment*, a Tribunal '*must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work*', Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL (para 34). An unjustified sense of grievance cannot amount to detriment but nor is it necessary to demonstrate some physical or economic consequence.
93. When considering the reasons for an act, the Tribunal must ask itself what was in the mind of the decision maker/actor. In some cases, it can be useful to go directly to this 'reason why' question. But we bear in mind that it is rare for anyone to admit discrimination even to themselves, and in some cases, it will be appropriate to first consider whether Mrs Freeman has proved facts from which a finding of discrimination could be made (a difference in treatment and a difference in the protected characteristic in comparison with someone whose circumstances are not materially different and 'something more') and then consider the employer's

reason for the act.

Duty to make reasonable adjustments

94. A duty to make reasonable adjustments arises *'where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. ...'* (section 20, EA).
95. The duty does not arise if the Respondent did not know and could not reasonably be expected to know that the worker was disabled. The knowledge is not simply about the condition but that they are a disabled person.
96. The Tribunal must then identify the provision criterion or practice ('the PCP'). This is something that applies not just to the Claimant, but generally. In this case it is the requirement to work in an office as a QDPA. (It cannot be the requirement to work long hours as that was an arrangement that was personal to Mrs Freeman.)
97. Then the Tribunal must ask whether the PCP puts the Claimant to a comparative substantial disadvantage. The comparison is with non-disabled employees.
98. The duty then does not arise if the Respondent did not know or could not be reasonably expected to have known that Mrs Freeman was likely to be placed at that disadvantage.
99. We must then consider how the proposed adjustment would have addressed the substantial disadvantage in question. In earlier legislation the adjustment had to 'prevent' the disadvantage, now the wording is 'avoid' but the principles are the same. It is well established that this is an objective question, the focus being on the practical result (not on the correctness of employer's reasoning for refusing the adjustment); and it does not require a definitive answer. What must be shown is a real prospect of avoiding the disadvantage. A mere opportunity to do so is insufficient.
100. Finally, the Tribunal must consider the 'reasonableness' of the adjustment. There is a wide variety of potential factors for example: the size and resources of the employer; the cost of proposed adjustments; the nature of the role; the effect of the adjustment on the workload of other staff; the other impacts of the adjustment; and the extent it is practical to make (see 7.29 of the Code).

EA, section 26: harassment related to disability/nationality

101. Under section 26 of the EA a person harasses another if they engage in:
 - 101.1 unwanted conduct
 - 101.2 that relates to the protected characteristic; and

101.3 it either had the purpose or (taking into account Mrs Freeman's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating Mrs Freeman's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Mrs Freeman.

101.4 An environment is a state of affairs.

Victimisation

102. Section 27 of the EA defines victimisation as follows:

'(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.'

103. A protected act can be an allegation of unlawful discrimination or a claim to the Tribunal about discrimination.

Application of facts and law to claims

104. Mrs Freeman provided a detailed schedule of the 12 allegations of less favourable treatment she relied upon. At the outset of the hearing we used this as the list of factual issues and set them out here verbatim, numbered sequentially:

105. 1. *1 August 2016 informed Mr Pepper of the discriminatory practice in nominating for commendations within the department, where Ms Morley is constantly nominated and Mrs Freeman isn't.*

106. 2. *30 May 2017 Mrs Freeman discussed with Mrs Themistocleous the racial and bullying episodes of Ms Olley against Mrs Freeman, nothing was done by Mrs Themistocleous and Mr Pepper to alleviate this sort of behaviour in the office.*

107. 3. *Mrs Freeman had an informal discussion with Mrs Themistocleous regarding a possible request for amending the present flexible working arrangement due to the problems arising from the better management of diabetes. Was informed by Mrs Themistocleous that if Mrs Freeman was to apply for an amendment to her flexible working arrangement then it will be denied even though Mrs Freeman had only announced her intention ... to submit such a request.*

108. 4. *Reported the discrimination in treating my sickness record as opposed to how the sickness record of Ms Morley has been treated. Nothing was done about it by management or HR.*

109. 5. *Mrs Freeman was denied by Mrs Themistocleous [her] request to an amended flexible working, including working from home, but approved [the] same request*

for [four] other individuals with no protected characteristics. [It was established at the start of the hearing that these were Ms Olley, Ms Killon, Ms Harrison and Ms Morley.]

110. 6. *1.83 hours have been deducted by Mrs Anne Themistocleous from Mrs Freeman's pay, even though nobody else had hours deducted.*
111. 7. *Appeal against the initial decision for amendments to present flexible working arrangements was rejected, the discrimination was never approached or discussed.*
112. 8. *Was told by Mr Pepper that he will not move Mrs Freeman from the office as she asked in the grievance against Mrs Themistocleous leaving Mrs Freeman to work in the same place and under Mrs Themistocleous this mounting to Mrs Freeman having to go off sick on 30 April 2018 due to eczema triggered by stress and depression.*
113. 9. *Mr Pepper, three days after Mrs Freeman returned to work after two months of sickness, being aware Mrs Freeman had an ongoing grievance against Mrs Themistocleous, victimised Mrs Freeman trying to make her look unprofessional*
114. 10. *Claimant victimised again, is excluded from emails regarding work by Mrs Short.*
115. 11. Claimant bullied and victimised by Mr Folkerd.
116. Whether Mrs Freeman was a disabled person, was a further issue.
117. We established at the start of the hearing that her heads of claim were:
- 117.1 direct discrimination contrary to section 13 of the EA because of disability or nationality.
- 117.2 a failure to make reasonable adjustments (in relation to allegations 5 and 7);
- 117.3 harassment relating to disability and/or nationality (allegations 2, 6, 9, 10 and 11). We are grateful to Mrs Freeman for this work;
- 117.4 victimisation (in relation to allegations 10, 11 and 12) the protected act being the bringing of proceedings on 30 May 2018.
- 117.5 it was also contended that some claims were out of time.

Disability

Type 2 Diabetes

118. Type 2 diabetes is a physical impairment. It is a condition that means blood

sugars in the body are not controlled as well as they should be. The main question for us is whether there was any adverse effect by this impairment on Mrs Freeman's day-to-day activities. And, if so, was it more than minor or trivial (considered as if it was not controlled by medication or other measures).

119. In our judgment, the episodes Mrs Freeman experienced (prior to taking medication) which we can safely assume would have taken place if she had not taken medication, were too few in frequency and duration to be regarded as more than minor. They were no more than a handful of times a month lasting no more than a few minutes which could be brought under control by drinking a sugary drink. This could be regarded as a reasonable coping mechanism. It was only very rarely that the episodes would result in vomiting and they did not cause Mrs Freeman to fall. The impact of them on day-to-day activities was no more than minor. We agree with the EAT in Metroline that taking sugary drinks is not to be disregarded: we see this as a reasonable coping mechanism rather than a particular treatment or measure.
120. We then considered the level of tiredness Mrs Freeman experienced. While we must look at impact on day-to-day activities, we have not heard from Mrs Freeman any detail at all about the impact tiredness had upon her life: she has not for example indicated that she reduced her activities in any way because of fatigue or that it diminished her enjoyment of them or otherwise had an impact. While we acknowledge that tiredness can permeate life, Mrs Freeman has not illustrated that in her case the fatigue she experienced was any more than the tiredness a non-disabled person would have experienced from the longer hours she worked, the long daily commute and the regular travelling to Scotland and the lack of family support she had in Essex. It is appropriate for us to consider this also in the context of her being able to undertake successfully full-time work and being effective in that work. Nor is there anything in her GP's letters to support that tiredness caused by diabetes was having an effect on her day-to-day activities, even though the purpose of those letters was to set out the impact upon her of her diabetes. We are therefore not persuaded on the evidence we have heard that any tiredness that arose from the diabetes passed the threshold of having a more than minor adverse effect on day-to-day activities.
121. Finally, Mrs Freeman placed some reliance on the need to visit her GP more frequently. This is not an adverse impact on her day-to-day activities. In any event the inconvenience she faced by having more appointments was more to do with choosing to have her GP in Scotland because she was not there as often.
122. Even when looking at these two matters (episodes and tiredness) together, we are not persuaded that cumulatively they had a more than minor impact on day-to-day activities. Therefore Mrs Freeman does not come within the ordinary definition of disabled person on the basis of her type 2 diabetes.
123. In her closing submissions, she sought to argue that type 2 diabetes was a progressive condition. But we have no evidence (medical or otherwise) which would enable us to make such a determination. We have heard that type 2 diabetes is lifelong but we have not heard evidence of any likely progression in the disease.

Depression

124. The Respondent accepts that, as from 1 April 2018, her depression had a substantial effect on her day-to-day activities. But it is denied that it is long term.
125. We have found that, from about mid March 2018, Mrs Freeman was experiencing symptoms of depression. She had not had any history of depression (from the GP notes) therefore at that stage it would not have been possible to state that it was likely to be long term: a more likely assessment would be that the events at work had triggered an episode but it could not be said at that stage how long it would last. The evidence also then shows that her depression plainly increased in its severity: there was an increase in medication in July and August 2018 it was assessed as at a high level. The OH report dated 1 November 2018 does not suggest there had been any improvement in symptoms.
126. We consider, doing our best on this limited evidence, that by the time of the OH report it could be said the depression might well last for 12 months: this is because it had persisted for 7 months and was increasing in severity.
127. While we have not heard a great deal of evidence about the impact of her depression upon her, we find a high level of depression was likely to have had an impact on day-to-day activities: it permeates life in general: motivation, concentration, mood and so on. Mrs Freeman had considerable time off work because of this illness. These two matters are good evidence that Mrs Freeman's depressive symptoms had a more than minor effect on day-to-day activities, when considered in the absence of the anti-depressants she was taking.
128. Thus she became a disabled person by reason of her depressive illness on 1 November 2018 when it was likely to last 12 months. We consider this would also be when the Respondent had reasonable notice of that fact.
129. The effect of these determinations is that the disability discrimination claims fail. That is because the alleged acts and/or failures were all prior to 1 November 2018 before Mrs Freeman became a disabled person.
130. Nevertheless, if we are wrong about the way we have decided the issue of disability we go on to consider whether Mrs Freeman would have succeeded in any of her disability discrimination claims.

Reasonable adjustments

131. We start with the head of claim that the Respondent discriminated against Mrs Freeman by failing to make reasonable adjustments at work.
132. This claim concerns the rejection of the flexible working request on 26 January 2018 (Issue 5) and the rejection of her appeal on 27 March 2018 (Issue 7).
133. The PCP here was the requirement to work at an office.

134. If, contrary to our decision, Mrs Freeman was disabled by virtue of type 2 diabetes, was she put at a disadvantage by having to work at an office in comparison to non-disabled persons?
135. First, we strip out from her claim those disadvantages that cannot have had anything to do with disability: being away from her family; having to have medical appointments in Scotland, working longer hours.
136. The disadvantage claimed on the basis of alleged disability was the fatigue that made it harder to cope with the longer day that commuting to an office brought. We would have found that, if there had been substantial tiredness from the diabetes, then a 3 hour daily commute for at least some of the working month, would have put her to a greater disadvantage than non-disabled persons because of the additional strain that put on the day, which would have been more difficult to manage if already fatigued. And working at home at least part of the time would have avoided that disadvantage.
137. We would have decided that there was no more than a minor disadvantage in not being able to prepare meals at home because Mrs Freeman could easily have brought in healthy meals to work by preparing them at home in advance.
138. After careful consideration, we have decided it would not have been a reasonable adjustment to allow Mrs Freeman to work at home, even for half the time, for the following reasons:
- 138.1 the job was made considerably more effective by the QDPA seeing colleagues and supervisors face to face. We accept the evidence that supervisors could overhear difficult conversations that the QDPA may be having with clients and jump in to support. This would not be possible if the QDPA was working remotely. Furthermore problems could sometimes be much more easily resolved by designers working with QDPAs directly to identify them: Mr Folkard gave an example of looking at a screen with a QDPA to resolve a problem quickly;
- 138.2 team members gave each other mutual support and assistance in person: the conversations that happen at work meant they exchanged information that would be missed if they worked in isolation. We note that the move upstairs still allowed this to be achieved;
- 138.3 a supervisor could allocate other tasks to a worker in the office: this would be more difficult if they were working remotely;
- 138.4 the more nuanced idea of 'employee engagement' benefitted from office-working: this goes beyond team work but is about each employee feeling as if they are part of the whole organisation. We accepted the evidence managers gave that this was an aim of the Respondent. We also accept that it would be more difficult to achieve with home working.
- 138.5 We took into account that some parts of the job could adequately have been done and supervised at home: Mrs Freeman could have had

access to the relevant systems on a computer; she use the telephone and email for many communications with customers and colleagues and her output could be measured. The 2 weeks she was in the office would also have given her supervisors time to catch up with her. The difficulty was, though, that this disregarded those aspects that we have set out above, especially of team working and face to face contact, that made the job more effective and that the Respondent could reasonably expect to require of the role.

139. Thus, even if Mrs Freeman had been disabled, she would not have succeeded in her claim that the rejection of her flexible working request was a failure to make reasonable adjustments.
140. We must emphasise that this was not a decision we reached easily. Just because a job is understood to be an office-based job is not a complete answer. This is because the Equality Act can require employers to change the way they normally organise a role in order to accommodate a disabled person. In this context we were concerned that in the flexible working request process managers do not appear to have specifically considered (with the support of HR) what their positive duty to change the way a role was organised might be. There was no adequate inquiry into Mrs Freeman's illness and what, if any, disadvantage the working arrangements might have put her to because of it. There was no thought of a trial period and a lack of appreciation that the duty to make reasonable adjustments (if it had arisen here) might have required some move away from the 'ideal' position. As it turned out in this case Mrs Freeman was not disabled and therefore the duty did not arise but that is not always an easy issue to identify.

Direct disability/nationality discrimination

141. We will now go on to consider the direct discrimination complaints. All disability discrimination complaints fail, but we consider hypothetically whether they would have succeeded and we consider, under each issue, whether there was any less favourable, detrimental treatment because of nationality.

(1) *Rewards Nominations*

142. The two nominations of Ms Morley as opposed to none for Mrs Freeman in the first four months of the Think Customer scheme could be regarded as less favourable, detrimental treatment.

143. It is clear to us, however, that the reason for those nominations (as opposed to none for Mrs Freeman) was not nationality. This is because, even on Mrs Freeman's case (and complaint to Mr Pepper at the time), Ms Morley was treated more favourably than all the other team members many of whom were British. Furthermore, soon after Mrs Freeman was nominated for the Think Customer award which would put paid to any suspicion of less favourable treatment on grounds that related to her own nationality. She was not obviously excluded from the award. This treatment was not therefore because of nationality and the claim fails.

144. On her own case, Mrs Freeman did not have a disability in August 2016. Therefore this first allegation cannot have been because of disability.

(2) *The handling of the Dear Anne letter*

145. We have found as a fact that Mrs Themistocleous did not receive a copy of the Dear Anne letter, nor did she have an opportunity to read it, nor was she otherwise informed of the two allegations of nationality abuse within it (the sarcasm about Romania allegedly by Ms Olley and the mocking of her accent by unknown colleagues). Our findings of fact are that Mrs Themistocleous did not know of any allegation of racial bullying by Ms Olley. Therefore this allegation is not made out on the facts and fails.

146. In any event, we have found as a fact that Mrs Themistocleous invited Mrs Freeman to take her complaints to HR, which was an entirely appropriate response because Mrs Freeman had articulated her lack of trust in Mrs Themistocleous dealing with them. There was no detrimental treatment, therefore, because Mrs Freeman had the opportunity to bring up her complaints with someone she regarded as independent but did not do so.

(3) *Informing Mrs Freeman that her FWR 'will' be denied.*

147. After the evidence, the agreed facts are that Mrs Themistocleous informed Mrs Freeman that her proposed second flexible working request was likely to be refused. She did not inform her that it would be denied.

148. We find this was not less favourable, detrimental treatment. Mrs Themistocleous was simply informing Mrs Freeman of the likely chance of her proposal succeeding. It was an informal discussion and did not inhibit her from making the formal request. The claim therefore fails at the first hurdle.

149. If we are wrong about it not being a detriment, the reason for the refusal was genuinely because Mrs Themistocleous considered the QDPA role needed to be performed in an office. This was ultimately the reason she gave for rejecting the formal request. Mrs Themistocleous had shown herself to be open to flexible working requests by both Mrs Freeman and others. We find therefore she had not shut her mind to the request because of nationality or alleged disability but rather because of her genuine view about the nature of the role.

(4) *Allegedly different treatment of Ms Morley's sickness absence record*

150. We have found that the record of Ms Morley that Mrs Freeman queried was not in fact a sickness absence. We do not therefore consider that there was a difference in treatment as between the sickness record of Mrs Freeman and that of Ms Morley. This allegation therefore fails on the facts.

151. In our judgment, Mrs Freeman and Ms Morley were treated similarly in that they were both allowed to build up TOIL in order to spend time at home: in Mrs Freeman's case with her disabled husband, and in Ms Morley's case with her

child if he was sick or she had no childcare. Mrs Freeman may well not have known about Ms Morley's arrangement as to TOIL that she had reached with Mrs Themistocleous. This is unsurprising: it was personal to Ms Morley.

(5) *Others allegedly allowed to work at home*

152. On the facts we have found, other QDPA staff did not work from home but from other offices. The only exception to this was in the case of Ms Morley who worked from home on a very few, exceptional occasions. There was no arrangement in place for her to do so. It is not the case therefore that British QDPAs or non-disabled QDPAs were granted requests to work partly from home whereas Mrs Freeman was not. She has not proved the different treatment she complains of and therefore this allegation fails on the facts.

(6) *Deduction of Hours on Snow Day*

153. The docking of Mrs Freeman's hours from 3.30pm to 5pm on the snow day was plainly detrimental treatment. We find it was less favourable than others in the team who also left early on that day who did not have their normal hours docked. We find that the first flexible working arrangement meant that working to 5pm had become Mrs Freeman's normal hours and therefore she was treated differently.

154. We note that the Respondent's grievance procedure worked well to restore these hours to her, but nevertheless until that happened she had been treated to her detriment.

155. In our view the reason Mrs Themistocleous docked these hours is that she was annoyed that Mrs Freeman had not informed her on the day that she was leaving early whereas others had done so. This was the factor she emphasised in her oral evidence to us. We do not consider it is because of the HR advice she received: she had not told them the full story of the hours arrangement with Mrs Freeman.

156. In our judgment, Mrs Freeman's nationality or perceived disability had nothing to do with this decision. This is because we note that Mrs Themistocleous had shown flexibility towards Mrs Freeman in the first flexible working request and, for example, in allowing her to stay in Scotland at short notice for GP appointments, even when they meant Mrs Freeman would be away for a week longer than expected. There was no pattern of unfavourable treatment and an obvious reason why Mrs Themistocleous was put out about this hours claim. This claim therefore fails.

(8) *Mr Pepper refusing move upstairs*

157. Mrs Freeman was feeling stressed by being supervised by Mrs Themistocleous downstairs during her grievance against her. Arguably, therefore, it was detrimental less favourable treatment not to accede her request to move her.

158. We have found Mr Pepper's reasons not to do so were because he did not wish to isolate her from her colleagues. This makes sense. Mrs Themistocleous was not in the office every day and did not sit next to Mrs Freeman and Mr Pepper was unaware at that point about Mrs Freeman's strength of feeling. These reasons

have nothing to do with nationality and alleged disability and therefore the claim of direct discrimination here fails.

(9) *Mr Pepper allegedly trying to make Mrs Freeman look unprofessional*

159. We have found that Mr Pepper's interpretation of Mrs Freeman's manner in a chain of mails to be correct and his intervention unsurprising. We have also found that Mr Pepper knew the emails to have caused bad feeling because he had received a complaint about them.

160. While it might be regarded as less favourable, detrimental treatment to be criticised for the tone of one's emails at work, here the reasons were not to do with either alleged disability or nationality but because the criticism was justified. Mrs Freeman's emails had been abrupt and curt and were the cause of complaint and it was appropriate for Mr Pepper to intervene. The claim therefore fails.

(10) *Mrs Short Email*

161. We have found as a fact that there was no need for Mrs Short to copy Mrs Freeman in to the emails to Hannah and Lynn. We have found as a fact that she did not deliberately exclude Mrs Freeman from those emails. The claim of direct discrimination therefore fails because it was not less favourable, detrimental treatment.

162. Even if we are wrong about that, we reject, below, the allegation made in evidence that Mrs Short racially abused Mrs Freeman and there is therefore nothing that would suggest any treatment was because of nationality.

(11) *Mr Folkerd alleged victimisation*

163. In expressing his annoyance at Mrs Freeman it is arguable that she experienced detrimental treatment, although this incident is close to the threshold as we have found it to be an entirely normal to and fro between colleagues.

164. In any event, Mr Folkerd had entirely understandable reasons for expressing his annoyance. This is because he had been handling the matter with the customer and Mrs Freeman had not spoken to him first about the issue when they were sitting so close together. We therefore find his intervention had nothing whatsoever to do with nationality or alleged disability.

165. Overall therefore, on the facts we have found and those judgments we have reached above about the reasons for the treatment complained about we are unanimous in our view that the direct discrimination claims fail.

Harassment

166. As to allegation 2. We have found that the argument with Ms Olley was not related to nationality. We have found it unlikely that Ms Olley made the nationality-related remarks alleged by Mrs Freeman. This allegation of harassment therefore fails on the facts.

167. As to allegation 6. We have found that the docking of hours did not relate to disability or nationality. The harassment claim therefore fails on this point.
168. As to allegations 9, 10 and 11 in our judgment the matters complained of do not meet the threshold of unwanted conduct that had the effect of violating dignity or creating a hostile, intimidating, hostile, degrading, humiliating or offensive environment. This is because we have found them to be part and parcel of working with colleagues in an office: annoyances do arise, managers do set standards. Mr Folkerd's expression of annoyance and Mr Pepper's expression of disappointment are no more than this. Mrs Short sent an email that was not necessary for Mrs Freeman to see. None of this is out of the ordinary.
169. Even if we are wrong about this, we have found as a fact that none of those three allegations related to nationality or disability and therefore the harassment allegation fails on those findings in any event.

Victimisation

170. There are two protected acts here: the allegation of discrimination in the internal grievance and the claim. Mrs Short and Mr Folkerd and, probably, Mr Pepper knew about the first, but probably not the latter.
171. So far as allegation 10 is concerned we have found that this did not subject Mrs Freeman to a detriment and therefore it fails as a victimisation claim.
172. So far as allegations 11 and 12 are concerned, even if they reached the threshold of being a detriment (we are doubtful that Mr Folkerd's conduct does), they were not said because Mrs Freeman had brought her discrimination grievance and/or claim. We have found as a fact in each case that Mr Pepper and Mr Folkerd had other reasons for expressing their views to Mrs Freeman and therefore the victimisation claim fails.

Conclusion

173. In essence Mrs Freeman loses this case on our findings of fact. We recognise that she is a productive member of staff who loves her job. We can understand how a sense of grievance can grow and the ultimate need for it to be tested in a Tribunal. That has now happened. We hope the parties can put this case behind them and find a way of working together harmoniously in the future.

Tribunal's Observations for HR and Managers

174. In this case Mrs Freeman was not disabled at the material time. But the Respondent should be aware that the Tribunal is concerned by the evident lack of understanding of HR and some of its managers about their potential obligations to make reasonable adjustments under the Equality Act.
175. In a case where an employee is disabled, it is sometimes not enough to ensure equal treatment. The Equality Act imposes a positive duty to change the

workplace to ensure that the disabled worker is not disadvantaged. In a different case, it may be that different ways of working, if they are reasonable, would be required. Managers should be alive to this: where a health problem is relied on by a worker making a flexible working request, they should ask questions about the level of impairment and the disadvantages experienced; they might need to be creative about how to adjust working conditions. It is not always up to the employer as to how it organises itself: the Equality Act can impose a duty to change the status quo. It is not every person with a health condition to whom this duty applies, but managers ought to be aware of it. We suggest that both HR and managers are given adequate training in disability and the Equality Act in order that they are properly equipped to make decisions in the future.

Employment Judge Moor

13 May 2019