# EMPLOYMENT TRIBUNALS

**SITTING AT:** **London South**

**BEFORE:** **EMPLOYMENT JUDGE HARGROVE**

**MEMBERS:** **Ms Elaine Thompson**
**Ms C Bonner**

**BETWEEN:**

**Claimant:** **Miss S Haywoode**

**Respondent:** **Oasis Children's Venture.**

**ON:** **30 September 2019**
**1, 2, 3 & 4 October 2019**
**7, 8, November 2019**
**In Chambers 25, 26 & 27 November 2019**
**& 20 December 2019**

**Representation:** **Claimant in Person.**

**Respondent: Mr Andrew Sawden, Trustee and Committee member.**

# RESERVED JUDGMENT AND REASONS

The unanimous judgement of the tribunal is that:

1. The claim of victimisation succeeds.
2. The claim of a failure to make a reasonable adjustment succeeds.
3. The claim of harassment related to race does not succeed.
4. The circumstances of the refusal of access to shifts at the Camel Club on 16 October 2017 amounted to a dismissal which was unfair and an act of victimisation and discrimination related to disability.

By a majority the Tribunal makes no reduction to the compensation for unfair dismissal or for contributory fault. The minority (Employment Judge) considers that there was a 50% chance that the claimant would have been dismissed fairly and without discrimination within 12 months of 16 October 2017.

# REASONS

1. This is the second hearing of claims brought by the claimant alleging mistreatment amounting to various forms of discrimination in respect of her relationship with the respondent as a volunteer and worker particularly between an incident which took place on the 22nd of September 2016, known as the flapjack incident; and the 16th of October 2017, when the claimant ceased to be offered shifts working at the Camel club.
2. The first set of proceedings was commenced by the claimant on the 21st of April 2017 (claim number 2301169/2017). It went to a hearing before EJ Tsamados and members on 14th to 17th of May 2018, with deliberations on the 11 July and decision promulgated on 24th August 2018. The claimant failed in all of her claims. In the meantime, on the 4th of February 2018, the claimant brought a second set of claims dealt with by this different tribunal.
3. The factual background of the two sets of proceedings is closely interwoven and stems from the flapjack incident in September 2016. Some witnesses for the respondent who gave evidence in the first proceedings also gave evidence in the second proceedings, and the respondent relies upon the witness statement of Gemma Hindi who gave evidence in the first proceedings but not in the second. However, her witness statement at pages 260 to 274 covers the issues in both sets of proceedings.
4. With hindsight it is most unfortunate that the issues arising in the present proceedings were not dealt with during the first hearing, or at least dealt with by the first tribunal at a second hearing. It was decided at a case management hearing on the 8th of May 2018 that the first hearing should deal with the events only up to the 21st of April 2017 (immediately prior to the claimant's first ET1) because there was already a listing window for the 14th to the 17th of May 2018, and if that were vacated, a further listing could not be arranged until well into 2019. In any event, this second hearing, dealing with events after 21 April

2017, did not in fact start until the 30th of September 2019, at least two years after the events in question.

5. There are three reasons why this is unsatisfactory: – first, the events in the two sets of proceedings are very closely interwoven and we need to look at all of them to get a proper picture. Secondly, the first tribunal made findings of fact and reached conclusions by which we are bound. It also expressed views about the credibility of witnesses including the claimant (by which we are not bound in these proceedings), and also gives rise to the possibility of inconsistency of outcome. Thirdly, the claimant has raised a whole series of issues in the present proceedings (originally 43 in number), some of which were decided in the first judgement (res judicata), or ought to have been brought in the first proceedings up to the 21st of September 2017, but were not, (contrary to the rule in Henderson v Henderson). We have had to look closely at the judgement and reasons in order to make rulings on this discrete aspect of the case, which would not have occurred if all issues had been dealt with at one hearing.
6. We have however relied upon the findings of fact and conclusions in the first proceedings in preparing our chronology.
7. We also record that the problems outlined above were aggravated by the fact that neither party has been professionally represented at any stage; and that our hearing has been notable for the degree of hostility, anger and emotion exhibited by the parties and some witnesses in cross-examination, especially the claimant, which did not help us in reaching sensible conclusions. We recognise that the manner in which the claimant conducted the proceedings may have been a manifestation of her depression. In addition, it was abundantly clear that the parties had a very limited knowledge of the relevant legal principles, or how to apply them, particularly those arising under the Equality Act (EQA) 2010, notwithstanding that the first tribunal in its judgement of August 2018 had set them out in some detail. Finally, while the present proceedings were the subject of two case management hearings, in the first of which some initial issues were identified, thereafter the claimant produced a list of 43 issues with no identification of the type of discrimination claimed or the statutory source. We made repeated requests of the claimant for further identification during the hearing, having explained in detail the potential heads of claim and their statutory source, and her attempts continued right up to the last day of the hearing of evidence on 8 November.
8. It is noted and recorded that the employment tribunal made adjustments to the hearing to take into account the claimant's

disability of depression. We gave regular rest breaks of 10 to 15 minutes during the hearing.

9. **The background to the claimant's claims.**

9.1. The respondent is a local children's charity situated within the London borough of Lambeth. It began life as a support group for a Council run adventure playground. Now it is independent of the Council and no longer receives block funding. It relies for its funding on a range of charitable sources and from fees charged for some of its services. The services it provides are illustrated in a plan supplied at the tribunal's request during this hearing. The site is split in two by Larkhall Lane. On the left hand side is the main building and the Forest Garden (FG) and adventure playground (AP). On the right hand side is the nature garden (NG). During the term time there is an After-school club which operates from 3:30 pm to 5:30 pm in the NG; and to 6 pm in the AP.

During the holiday time there is a free play scheme on both sites which operates from 10:30 am to 4 pm. This is free of charge. There is finally the Camel Club which operates principally during holiday times between 8:30 am and 5:30 pm. This operates from the AP site, but children aged 5-6 spend part of the day at the NG. Some fees are charged for the Camel club. A significant proportion of the attendees at these services are children with disabilities.

The workforce consists of permanent, or contract staff, some of them on zero hours contracts; and ad hoc cover staff employed as and when required; and unpaid volunteers.

9.2. **The claimant's work history and employment status.**

The claimant is a black woman. She commenced as a volunteer in 2010 and worked, particularly in the NG, from 2011. In that year she and others received an award from the Mayor of London., The claimant unfortunately did not receive the paper award until it was found under a pile of papers in 2015. The claimant made a complaint that she had been discriminated against as a non-disabled person. She received an apology. There was a further issue in 2015 when the claimant and another opened a Twitter account in the respondent's name to raise funds for the FG. There was already an official Oasis Twitter account in operation and she was instructed to use that. The claimant objected. See paragraph 16 to 18 of the findings of the first tribunal. The claimant was offered and undertook work at the after-

school club as a play worker and also as a cover worker. According to the first Tribunal, the claimant applied for a job with the Camel club when it opened in 2014, but was unsuccessful.

At the time of the first tribunal judgement it was recorded that the claimant satisfied the wider test of employment contained within section 82(2)(a) of EQA, but not the narrower test contained within section 230 (I) of ERA. She was thus covered by the discrimination provisions in the EQA. See paragraph 3 of the reasons. The respondent continued to dispute that the claimant was an employee for the purposes of ERA in the second proceedings. There was a public preliminary hearing on the issue before EJ Andrews on the second and third of May 2019. There was a finding that the claimant had continuity of employment as a play worker at the Camel Club from July 2014 to 16th of October 2017 (on which date it is common ground she was no longer offered shifts) and that accordingly the employment tribunal had jurisdiction to hear the claimant's claim of unfair dismissal from that employment, but not in respect of any other type of, or period of employment. (That is not entirely consistent with the first tribunal's findings at paragraph 19, but we accept the findings at the preliminary hearing). The respondent applied for a reconsideration of that decision, but was unsuccessful – see judgement and part reasons at page 404 onwards.

9.3. **The claimant's status as a disabled person.**

This is again an issue with a complex history. At the first hearing the claimant was claiming that the impairments she had were OCD and depression.Dyslexia was also mentioned. The first tribunal rejected the claimant's claims of disability discrimination in that case, but made no findings that the claimant was disabled. Instead it found that if the claimant were disabled the respondent did not have the relevant knowledge at the relevant time for those claims. See paragraphs 109 to 118 of the reasons at page 324. The relevant time for the purposes of the first claim was the period up to the 22nd of April 2017. The first tribunal noted in the cited passage a lack of clarity on the part of the claimant as to the precise impairments which she had and upon which she relied.

In her claim form in the current proceedings the claimant identified the impairments as being depression and dyslexia (see paragraph 1 on page 15). Further details are

given in her disability impact statement (DIS) at pages 327.1 onwards. Unsurprisingly, they were disputed by the respondent and a public preliminary hearing took place on 2nd to 3rd May 2018, at the same time as the preliminary hearing on the claimant's employment status.
The judgement and reasons are at pages 382 -388. The judgement reads:

> "The claimant was disabled at the relevant times as a result of her depression and the respondent had knowledge of that disability. Whether the respondent had knowledge that she was likely to be placed at the relevant disadvantage remains to be determined".

In the reasons the tribunal reached the following further conclusions as to the claimant's impairments: –
(1). The claimant was disabled in respect of depression during the material period 21st of April to October 2017 (see paragraph 31). Her dyslexia did not of itself amount to a disability, but it was aggravated by her depression and added to the impact of the depression (see paragraph 30).
( 2). The respondent had constructive knowledge of the depression at the very least from receipt of the first ET1 in May 2017, and had actual knowledge (although they denied it was a disability) from the date of the first CMH on the 26th of June 2017.
(3) it is to be noted that that hearing left open the issue whether the respondent had knowledge of the particular disadvantage to which it was alleged the disability put her and it is to be noted that at paragraph 6 of the reasons the employment tribunal set out a table of the claimant's medical reports and the dates of the disclosure of them to the respondent. The claimant asserts that the respondent was on notice of disadvantage at least from the date of her email of the 11th of July (see page 156). This issue, which falls to be decided by this tribunal, relates to the claimant's claim of a failure to make a reasonable adjustment in relation to her assignment (from 27th of April 2017) to work at the AP rather than the NG, which is also a claim of victimisation.

10. **Identification of issues.**

As already indicated, this represented a major problem for the tribunal during this hearing. At the May 2018 preliminary hearing the EJ, in addition to ruling on the claimant's employment and disability status, identified by reference to the contents of the ET1 the heads of claim made in the ET1 as being: –
(1)Unfair dismissal;
(2) Victimisation (paragraphs 3,4,6 and 8);

(3) a single claim of a failure to make a reasonable adjustment in paragraph 5 referring to her email of the 11th of July (without identifying any specific PCP, disadvantage or adjustment required);
(4) race discrimination in paragraph 7.
There were generalised claims identified in paragraph 9 and the claimant was ordered to provide further particulars of them. It was in response to that order that the claimant produced a schedule originally containing at least 43 numbered allegations, which were originally set out at pages 20-28 of the bundle. The issues were not further identified before this Tribunal hearing. This document underwent at least four reiterations during the hearing. Despite this, it remains difficult for the tribunal to attach labels as to the precise statutory heads of claim relied upon by the claimant in relation to each allegation. Some of the allegations overlapped in the sense that they consisted of different aspects or evidence of the same single act of discrimination, victimisation or harassment. There were columns for the identification of the date or dates of allegations, some unspecific, and they were not in chronological order. There were also columns identifying those who were alleged to have been responsible for the actions; and a final column which helpfully identified relevant documents within the bundle. There were some allegations which were claimed as more than one head of claim; i.e. direct discrimination (race) and/or victimisation and/or harassment. This made the tribunal's task in deliberations difficult. We also note and record that it caused prejudice to the respondent in seeking to respond to unclear allegations. We attempted to mitigate this by requiring and receiving detailed written closing submissions from the parties.
It was possible to identify the following statutory heads of claim: –
(1) Direct discrimination – race/colour. Section 13 EQA
(2) Discrimination arising from disability Section 15 EQA,
(3) Failure to make reasonable adjustments – sections 20 to 21 EQA,
(4) Harassment – race or disability– Section 26EQA,
(5) Victimisation – section 27 EQA,
(6) Unfair dismissal – section 98 ERA.

11. We now set out the statutory provisions relevant to those claims.
11.1. **Direct discrimination**. Section 13 (1) provides: -

"A person (A) discriminates against another (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others".

The protected characteristic in this case is race which, pursuant to section 9, includes colour as well as ethnic or national origins. An initial burden falls upon the claimant pursuant to section 136 of the EQA in relation to all of her discrimination claims, but in relation to her direct discrimination claim specifically, it is to prove facts from which a tribunal could reasonably conclude that he or she has been treated less favourably than someone not of his or her colour or ethnic or national origins. The burden then shifts to the employer to establish that the employee's colour or ethnic or national origins had nothing to do with its treatment of the employee.

Section 23 of the Act provides that "On a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case".

In a case where the treatment is not per se discriminatory, the claimant has to identify an actual or hypothetical comparator, who does not share his or her protected characteristic and who would not have been treated in the same way as the claimant. That comparator's circumstances must be the same, or not materially different, other than their non-shared protected characteristic. In other words, would a non black employee in the same position as the claimant have not been treated in the same way as the claimant was?

11.2. **Discrimination arising from disability.** Section 15 provides

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

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

The "something arising" is not the disability itself but something connected, directly or indirectly. with the disability. For example, if an employer dismisses an employee because of repeated or long term sickness

absences connected to his disability, that would be a breach of Section 15, unless the employer was able to justify the dismissal as pursuing a legitimate aim. The employer has to have actual or constructive knowledge of the disability, but may be liable even if he did not have knowledge of how the "something" is related to the disability.

11.3. **Failing to make reasonable adjustments.**

Section 20 provides that there is a duty to make reasonable adjustments for a disabled person where a provision, criterion or practice of the employer'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.

Paragraph 20 in schedule 8 to the Act provides that the employer is not subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage.

There is a three stage process attached to a claim of this type. First, the tribunal has to consider whether a provision criterion or practice, which may be a one off, has been applied by the respondent to the claimant. In this case it is identified as being the assignment of the claimant to work at the AP rather than the NG. Secondly the tribunal has to consider whether that assignment put the claimant at a substantial disadvantage in relation to her disability, and thirdly whether, if it did, the employer failed to make a reasonable adjustment by removing her from work at the AP, such as by returning her to the NG. The employer is however, not under the duty if it did not know, and could not be expected to know of the disability, OR that the claimant w as likely to be placed at the disadvantage. The latter issue is a principal area of dispute between the parties in this head of claim.

11.4. **Harassment**.

Section 26 of the Act provides that

(1) "A person (A) harasses another (B) if: -

(a) A engages in unwanted conduct related to a relevant protected characteristic, (in this case race or disability), and

(b) The conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
Subsection (4) further states that "in deciding whether conduct has the effect referred to in subsection (1)(b) each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the contact to have that effect.

11.5. **Victimisation.**
Section 27 provides that: –
(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.
(2) A protected act includes bringing proceedings under the Act or giving evidence or information in connection with proceedings under the act or doing any other thing for the purpose of own connection with the act or making an allegation that a or another person has contravened the Act.
Subsection (3) provides that "giving false evidence or information, or making a false allegation is not a protected act if the evidence or information is given or the allegation is made in bad faith."

The issues relevant to this head of claim are:
(1).It being admitted that the claimant did a protected act by bringing the first ET claim on 22 September, which was not served on the respondent until May 2017, upon what date earlier than that date in May did the respondent know or believe that she may make a claim of discrimination ?
(2) After that date, did the respondent do an act constituting a detriment to the claimant because she had done the protected act.?
**Causation and motivation**. The employment tribunal directed itself in respect of the claims of direct discrimination and victimisation in accordance with tests late down conveniently in Nagarajan v London Regional Transport 1999 IRLR page 572. Neither claim requires a conscious motivation on the part of the employer; subconscious motivation is sufficient. However there does have to be a causative link between the act and the claimant's protected characteristic in relation to the direct discrimination claim; and the act and the protected act in relation

to the victimisation claim. The tribunal relied upon the following well-known passage in the judgement of Lord Nicholls: –
"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinction are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out." (Tribunal's underlining).

11.6 There are three further relevant statutory provisions in the EQA relevant to the discrimination claims:

(1) Section 39 imports into the field of employment the prohibitions against discrimination set out above. Subsections (2) and (4) provide that an employer A must not discriminate against or victimise B:

"(b) in the way A affords B access to, or by not affording B access to, opportunities for promotion transfer or training or for any other benefit, facility or service;
©by dismissing B;
(d) by subjecting B to any other detriment."

Detriment is not defined in the Act, but is defined in EHRC code of practice: "Generally, a detriment is anything which the reasonable person concerned would reasonably consider changed her position for the worse or put them at a disadvantage ".

(2) Section 108 deals with post employment discrimination, harassment, and victimisation. It is covered by the Act if it is connected with the employment. This is particularly relevant to events occurring after 16 October 2017, when the claimant was notified she would not be offered more shifts.

(3) More importantly, there are the burden of proof provisions contained in Section 136. These have been referred to at paragraph 11.1 above. They are also explained in detail in paragraphs 79-83.13 of the first Tribunal judgment. We adopt that part of the judgment and have applied it during our deliberations.

11.6**. Unfair dismissal.**

It is not now in dispute that the claimant was employed as a care worker at the Camel Club, and that the claimant was employed for the requisite length of time under section 108 of ERA to bring a claim of unfair dismissal. The burden of proof provisions in section 136 of EQA do not apply to unfair dismissal. Accordingly, there is a burden on the claimant to prove that she was dismissed when she was informed by email on 16 October 2017 that she was not to be offered shifts during the upcoming half term holiday. Section 95 (1) (a) of ERA defines dismissal as occurring where "the contract under which he is employed is terminated by the employer (whether or without notice)." The claimant was not expressly told that she was dismissed, but dismissal may also be identified from the surrounding circumstances. If the claimant satisfies us that the respondent's intention at the time of the email was in fact not to offer her any further work in the future, it is almost inevitable that the tribunal will find that she was dismissed. The respondent was also acting at the time under the misapprehension that the claimant was not an employee, but a volunteer.

If the claimant satisfies us that she was dismissed, the burden shifts to the respondent to prove a reason for dismissal of a kind falling within section 98 (1) of the ERA, or some other substantial reason of a kind justifying dismissal. In the event, the respondent did not identify prior to this hearing any such reason as existing at the time, and we note that they failed to follow any procedure before notifying the claimant that she was not to be offered more shifts. As we indicated to the parties during the hearing, this made it inevitable that we would find the dismissal at least procedurally unfair under Section 98(4) of ERA. We then have to consider two remedies issues which we have identified for this hearing notwithstanding that that the other issues of remedies have been put off. The first is a Polkey issue: what are the chances that if the claimant had not been dismissed at the time, she would have been fairly dismissed at some time in the future, and if so, when? The respondent's witness, JB claimed that by 16 October the working relationship between the respondent and some at least of its employees had completely broken down, due the nature and extent of the claimant's (unjustifiable) complaints. If that is established, that could result in a Polkey reduction. In addition, there would arise a second issue: That of contributory fault; namely whether the claimant is proved to have been guilty of such blameworthy conduct leading to her dismissal such that it would be just and equitable to reduce the basic award of compensation, (based on her length of service) under Section 122(2), and/or the compensatory award under Section 123(6) of ERA. In these respects the burden of proof lies upon the respondent.

12.We now set out by way of background a chronology of salient events in two parts; the first being the period from the Flapjack incident in September 2016 to the 21st of April 2017 being the period covered by the judgement of the first tribunal, by which the parties are bound; and the second period, the period from the 21 April to the end of the employment relationship in October 2017, covering the issues which we have to decide. We start by listing the individuals who play a part in the events in question identifying in particular the witnesses by initials and their racial origin or colour: –

The claimant – Sandra Haywoode, black,

Stuart Barker –(SB), white, claimant's partner and a witness for her;

Tim Bowker – (TB), white, a cardiologist and chairman of trustees and witness for the respondent,

Andrew Sawden - (AS), white, also a witness, representative of the respondent and trustee;

Joanne Brown-(JB), white, also a witness and director of the respondent;

David Ogwe -(DO), black, the respondent's project and volunteer coordinator, who also did part-time cleaning work particularly at weekends, and was a witness for the respondent;

Jolene Campbell (JC), black, AP manager and witness for the respondent;

Stella Cole,(SC), black, senior Camel club worker; also a witness for the respondent.

Gemma Hindi, (GH), white, former part-time NG manager, who provided a witness statement for the second hearing, having given evidence in the first hearing, and job shared with –

Harriet Fink, (HF), white, who gave evidence before the first tribunal but not the second.

12.1. **The flapjack incident. 22nd of September 2016.**

The first tribunal made very detailed findings of fact about this incident at paragraphs 20 to 26. The evidence of GH and HF was preferred to that of the claimant. In particular, the employment tribunal accepted that the claimant said that she had OCD, but not that she said she had depression. The initial disputes appeared to concern the absence of certain ingredients for the flapjacks being prepared by GH, HF and the claimant for the after-school cookery club at the NG, and who was responsible for that absence.

12.2. It is clear that for whatever reason, relations between the claimant on the one hand and GH and HF were strained after that meeting. GH decided to have a meeting accompanied by DO, the volunteer coordinator, with the claimant to discuss matters. Regular six monthly supervision meetings were not normally arranged for volunteers or contract workers, so this was out of the ordinary. In the event, DO did

not attend on the 8th of December 2016. The first tribunal again set out the matters discussed at the meeting on the 8th of December in detail at paragraphs 30 to 32.6. Paragraph 32 describe the contents of a contemporaneous note of the meeting prepared by GH in an email to JB of the same date.

12.3. On the 11th of December 2016 the claimant emailed a complaint to JB and HF about the actions of GH and HF, and said she was resigning from the cookery club. See page 82. It is clear that the first tribunal preferred the account of the meeting given by GH. See paragraph 34. The claimant followed up her earlier email to JB with another on 15th of December, described as a timeline – see page 83 of our bundle. JB responded on the 1st of February 2017, having spoken to HF and GH, apologising for the delay. See pages 84 to 85 of the bundle. The claimant replied at some length on the 7th of February 2017 (pages 86 to 88). The content of that email is summarised at paragraph 38. JB arranged a meeting accompanied by DO with the claimant on the 13th of February 2017. The first tribunal indicated at paragraph 39 that it accepted JB‘s account of that meeting. It is apparent from other evidence that the claimant had been informed at around this time that she would not be offered Saturday cover work at the NG for the time being at least. This was of particular concern to her because it was a source of income for her.

12.4. On 14th of February 2017 JB emailed the claimant’s email of 7 February to HF and GH for their comments. Subsequently their comments were inserted into the claimant’s email in differently coloured ink and there were also annotations added from JB. This was copied to the claimant who responded with her comments in green in an email attachment of the 22nd of February (in the bundle at pages 89.20-89.28).

12.5 JB responded on the 28th of February 2017 - see pages 91 to 92. This may be described as an attempt to placate a situation which by this stage had become intractable. JB indicated that the claimant would be offered cover work in the future, but that there were priorities for such work.

12.6 The first tribunal was very critical of the respondent’s email of the 14th of February describing the insertions as “very bad practice”, particularly since HF and GF‘s comments had been sent without their consent. The claimant describes it as “the devastating email”. In her evidence to this tribunal she seeks to put a more sinister interpretatIon, asserting that the respondent had not disclosed this document in proper format until pressed by the Tribunal.

12.7 It was on the 1st of March 2017 that the claimant commenced early conciliation with ACAS, and which led to the commencement of the first set of proceedings on the 21 April 2017.

It is of some relevance to the present proceedings to attempt to identify the gist of a long series of complaints which the claimant was making, in particular against GH and HF in the period starting with the flapjack incident. In addition, we need to consider the evidence relating to 2 issues which are live in the present proceedings, namely (1) whether the claimant provided any information concerning her now claimed disability of depression so as to put the respondent on notice that she was disabled, and (2) what information she provided indicating that she intended to do a protected act for the purposes of her now victimisation claim, namely either by making an allegation of discrimination under the Act, or an intention to bring a claim of such discrimination. The claimant had brought claims of victimisation in the first proceedings, which were rejected, and at paragraph 105, the tribunal summarised the then evidence as to the respondent's potential source of knowledge. It rejected the act of taking the claimant off the cover rota for NG on around 1 February as being an act of victimisation because on any view the respondent could not have had knowledge of a protected act at that stage.

12.7. Amongst the numerous allegations being made against GH and HF were the following themes: –

– The claimant raised repeatedly issues surrounding the absence of the ingredients for the flapjacks and that she felt demeaned when GH had said it was a misunderstanding and "not a priority".

– The claimant complained of not being considered for paid cover work particularly on a Saturday, apparently because she was inexperienced, and claimed that HF gave priority to her family and friends. She said she felt "discriminated" against, but did not specify any Equality Act basis of discrimination.

– The claimant complained that GH had accused her of making an outburst in public against GH on the 22nd of September, and demanded witnesses be identified.

– The claimant complained generally of not being supported as a volunteer and having been told that 4 staff had expressed concerns about her without any details being given.

– There were a series of criticisms of the manner in which GH and HF managed the NG staff generally including as an example that GH had breached the confidentiality of staff at supervision meetings.

12.8. JB's email of the 28th February 2017 is of importance because it sets the scene for the further events leading up to the 21st of April. The first tribunal made a finding at paragraph 50 that JB only became aware of the EC towards the end of the process; that she took advice from the management committee and arranged to meet the claimant again. That meeting took place on or about the 4th of April 2017 and the tribunal accepted JB's account of it. She confirmed that the

claimant was to be offered work at NG again and that supervision and line management were to be provided. Importantly, it is apparent from paragraph 51 of the judgement that the tribunal accepted that the claimant had toldJB that she, the claimant, did not believe that anyone was discriminating against her on the basis of her race but that she had to say something in order for the case to be taken on by ACAS.The tribunal also accepted that the claimant brought up a new demand namely to have a one-to-one meeting with HF. It is apparent that H F was unhappy with the idea of meeting the claimant on her own but was "possibly willing" to agree to meet with the claimant and ACAS, but that ACAS suggested it was more appropriate for conciliation between one worker and another to be dealt with internally or via a third-party mediator. See paragraph 52.

12.9. JB emailed the claimant on the 6th of April confirming that the offer of work on cover sessions at NG was reinstated as of then.

12.10. A meeting took place on the 11th of April attended by the claimant with Mr Barber speaking on the claimant's behalf, HF, GH, and DO in the role of mediator. What happened at that meeting is described in detail at paragraph 54. Again, the tribunal accepted the respondent's evidence as to what happened at the meeting where there was a conflict. DO said that there was a tension in the room. He also stated that the claimant had said that she did not believe that she had suffered discrimination on the grounds of race and disability. It is noted that the claimant said that she did not believe that the respondent was taking the situation seriously. Despite the tone of that meeting, HF sent an email to the claimant on the 12th of April which was described by the Tribunal as being conciliatory. She suggested a further meeting with the claimant and Mr Barber. This meeting took place on the 15th of April and was described by GH as being "more positive". There is again a detailed description of that meeting at page 56. The tribunal accepted on the balance of probabilities GH's account of that meeting contained in a contemporaneous email to JB and GO. This is within our bundle at page is 112 – 113. It is an important document because its contents are relevant to a number of issues including the respondent's knowledge of the claimant's intentions with regard to a protected act; and the knowledge of disability, and it is relevant to a subsequent decision made by the respondent to notify the claimant on the 27th of April that she would again not be offered cover work at NG, which is claimed in the present proceedings as being an act of victimisation and disability discrimination.

12.11. The first tribunal's findings of fact conclude at paragraph 57 where it is noted that on the 20th of April 2017 the claimant sent a further email to JB and DO which she asked to be forwarded to the management committee and in which she set out details of her

grievances and in particular her claims of race discrimination and disability discrimination and victimisation. That email is at page 117-118 of our bundle. In that email, the claimant clearly alleges that HF, at least was guilty of race discrimination, along with GH; and that her views had been ignored. She also asserted that she had sent:

"A polite grievance about her treatment at work- (discriminated against for having mental health issues et cetera) and your drastic response was to stop a third of my livelihood without investigation therefore joining in and continuing this discrimination and adding victimisation to my claim, your hardcode emails to me informing me that I am only chosen as a last resort left me right on the edge, (suicidal) a few times. Please don't treat people like this, if you know a person suffers from depression".

Then in bold –

**"Someone with a clear head needs to grasp the spread of the situation. You ignored my first request for this, which is already spread in Oasis, despite management efforts to curb it. It has the potential to go viral. (I may crowd fund to be well represented) in an age of social media it would be disastrous for Oasis to keep trying to make this go away. I cannot emphasise this enough. I am appealing to you before you blindly decide to continue to defend/condone Harriet's behaviour, please investigate, You may find you have been misled. (Has anyone read all the emails?) The solicitor may point out I had a much weaker case against you before you sent them. Along with my evidence your emails confirm/continue the discrimination".**

12.11. This concludes the chronology up to the commencement of the events we have to consider. However, we need to set out the first Tribunal's conclusions as the then allegations of race and disability discrimination, and victimisation. The first and most important point is that the first tribunal rejected all the claims of race discrimination. See paragraphs 84-102. These included the claimant's assertion that the existence of a racial divide as between the proportion of black and white workers in the AP and NG was a deliberate policy. It accepted that the respondent had made some attempts to address this issue. It is noteworthy that the tribunal accepted DO's acknowledgement of the reason for an imbalance (which is material to an issue arising in the present claim) – see paragraph 87. It is clear from paragraph 91 that the tribunal did not accept that the claimant had got to the first stage of the burden of proof process in this respect. It then rejected a series of individual claims of race discrimination involving white comparators. It is evident from paragraph 96 that the tribunal rejected the claimant's claim that Ellie had been successful in an application for Saturday work and had been chosen over the claimant because she was white and

the claimant was black. This disposes of the basis of the claimant's claim of race discrimination against GH and HF. The tribunal also rejected the claimant's claims of disability discrimination and victimisation but for different reasons which we have already identified.

**Chronology from 21st of April 2017 onwards**.

12.12. On 21st of April 2017 the claimant notified the respondent that she had filed a discrimination claim against it.

12.13.The respondent's letter to the claimant dated the 27th of April 2017 at page 121 was a response to the claimant's letter of the 21st of April. It raised the following relevant matters: –

– The respondent asserted that the claimant was not an employee and in consequence her complaint can be dealt with as a "serious complaint" but not as an employee grievance.

– It noted that the claimant had complained of discrimination on grounds of race while saying "I do not believe management to be racist".

– It denied discrimination on grounds of race or disability.

– It. records that there have been a breakdown in the working relationship between the claimant and HF; that the respondent had considered the possibility of mediation but that since the claimant had filed a claim with ACAS, that superseded that option.

- It notified the claimant of a decision that she should be offered engagement at the AP only but not at the NG noting that was there was no contractual obligation to offer any future level of work. It would be equivalent overall to what have been the case historically. "the role at the AP is in no way inferior or less fulfilling to that at the NG. As a sensible practical measure while not agreeing any fault on the part of Harriet, this will answer what is a breakdown in working relationship and mean that mediation is not needed, and is in the best interests of the children".

-Finally, the respondent issued a warning in the last paragraph, expressing concern about the entry in bold "you must avoid anything that smacks of threatening Oasis or pursuing your approach to the IT to such a public campaign. In particular you must not circulate comments which are unjustified and defamatory, and it is especially the case that you must not make such comments targeted at any individual. If you were an employee this could result in disciplinary action".

This letter is important because it instigated or formed a background to allegations 2,3 and 4; and indirectly, 5 to 8 and 29.

12.14. On the 3rd of May 2017 JB notified JC by email that cover hours would no longer be offered to the claimant at NG but were to be offered at AP instead. In response, on the 8th of May 2017 JC emailed the claimant offering three sessions of cover at AP see page 127.

12.15. On the 5th of June 2017 JB returned from holiday and emailed AS claiming that the claimant had called NG staff "racist" (This was the commencement to allegation 4). Subsequently JB made enquiries of JC and DO and received email responses - pages 132 and 137.

12.16. On the 6 and 13th of June the claimant was offered more work at AP by DO - see pages 131 and 133.

12.17. On the 20th of June 2017 the claimant responded to JB's letter of the 27th of April page 135 warning about what is said outside the tribunal process (part of

allegation 3). She asked to work at NG when HF was not there as a reasonable adjustment (allegation 34).
12.18. On the 26th of June 2017, there was a case management hearing in connection with first claim, in the course of which claims of victimisation and disability discrimination were added to that claim. The issue of the claimant's alleged disability was discussed. At its conclusion the first hearing was listed for the 14th of May 2018 for four days and some issues were identified - see pages 139 to 145. Also on that date JB had a short telephone call with the claimant suggesting a conciliatory meeting. On the 28th of June at a management committee meeting it was noted that a conciliatory meeting was to be arranged between TB and the claimant.
12.19. On the 6th of July AS responded to the claimant's letter of the 20th of June above. See page 150. On the 10th of July JB offered the claimant two hours work per day during the summer play-scheme at AP, but not at NG.
12.20. On the 11th of July the claimant emailed JB at page 156.
It is in that email that she asked for reasonable adjustments, claiming that she did not like large crowds, connecting it with her work at the AP. She asked for lunch cover at the NG when HF was not working there.This is important to the claimant's claim of a failure to make a reasonable adjustment.
12.21. The next day, the 12th of July, the claimant had a meeting with TB which forms the background to issue 37 – the claimant claims that she told him that she was suicidal. There is a relevant diary entry for that date. See page 46. "realise now Oasis have no intention of re-conciliation. After I tell Tim about Harriet's unfair treatment, how her words made me feel suicidal, he concluded twice, Harriet is a very valued staff member. I have no chance…. I believe this is what is preventing them investigating my claim against her".
12.20 AS responded to TB's account of the meeting of the 12th of July at page 159. He said
"I understand you to say that Miss Haywood asked for three things: –
-Work at the NG;
-Exoneration from any wrongdoing;
-Reconciliation with Harriet.
I think that all of these could be possible. "
The letter went on to discuss these matters in more detail and indicated that the respondent could not yet concede that the claimant was disabled until they had a good reason to accept it, and if they did accept it, they would need to be clearly in agreement as to what reasonable adjustments if any, were needed.
12.21. On the 9th of August 2017 the respondent submitted an amended response which was disclosed to the claimant on the 11th of August. This was a very lengthy document, 28 pages in length, in respect of which the claimant subsequently picked up on paragraph 144 at page 189. This referred back to the "racist" issue which had occurred in June. On the 1st of September the claimant submitted what was titled "The three grievance letter" to JC see pages 192.1 and 191.2. She cited the passage from paragraph 144 above. She also referred to another passage in which there is a reference to an acceptance that the claimant had mental health problems, but in effect rejecting that proposition: "There was not psychological condition affecting her performance of work". Immediately after that quotation the claimant wrote: "after the above statement and evidence from my doctor that I have active, long-standing, neurotic reactive depression and dyslexia, Oasis is still saying they do not believe I suffer from depression. This puts us all in a potentially dangerous illegal position. I appeal to you to fulfil your legal obligations based on my doctor's evidence."

The letter was copied to JB and to AS. AS responded on the same day to JB, and in the last paragraph said: -
"I think it is an interesting argument that the claimed disabilities mean that including her in the staff responsible for children is potentially dangerous; I think I/we would've thought very carefully about work at the Camel club if we had thought this was so, or if she had said something to that effect. The work was given to her in good faith, so it would be to late now to do anything about it. But I do not see in the doctor's material anything which supports the claim that it could be potentially dangerous for her to be responsible or part responsible for a group of children".

12.22. On the 4th of September 2019 JB instructed the claimant not to discuss the upcoming ET case with JC "as she has come to the point where she finds your approach unacceptable and uncomfortable" See page 195 – allegation five.
12.23. On the 8th of September the claimant wrote to AS repeating a request that the respondent make reasonable adjustments, but not on this occasion identifying what adjustments she was asking for. See page 198. The email is headed "for Tim" (Bowker).
12.24. On the 9th of September the claimant wrote a lengthy email to AS and JB – page 200 – repeating many previous allegations of harassment including alleging that the respondent had requested staff not to talk about the case to her. On the same day she wrote further to AS asking for a "less hostile approach to her case".
12.25. On the 11th of September DO reported to JP by email that while cleaning the building on the Sunday he had found the claimant going through files in the office. When challenged she had claimed that she had permission from SC, her manager at the AP. The claimant says in her witness statement that she was looking for a copy of her contract of employment which she had requested earlier.
12.26. On the 20th of September JB emailed the claimant stating that management were not happy about her printing out documents in the office. Also on the 20th of September there was a management committee meeting. The notes of it at page 209 mentioned only the existing employment tribunal proceedings; that the claimant had worked during the summer play-scheme and that "there was several incidents that occurred as a result". There is no other mention of the claimant in the notes. However, at paragraph 97 of her witness statement, JB claims that there was a detailed discussion of a restructure of the Camel Club to integrate it into the AP, using AP staff and introducing an early and late shift. She further claims that since the claimant had expressed a wish to work in the NG, and not at the AP, it was decided that she should not be offered work at the Camel Club at the October half term. She claimed that the decision was made for these reasons and also because there has been a pattern of "unacceptable behaviour" by the claimant since the dispute had begun (which was catalogued in an appendix to her witness statement). JB also claims that they received advice from ACAS at the time that the claimant was not an employee.
12.26. It appears that it was decided that the claimant should not be informed of this decision at the time; and two further matters occurred before the claimant was informed on the 16th of October. On the 9th of October DO reported to JB that the claimant had been in the office again printing documents and JB wrote to the claimant asking what the documents were. On the 13th of October GH wrote to JB and AS reporting that the claimant had to come into the office at the NG on the 12th of October and sat down, apparently waiting for SB, which made her feel very uncomfortable. She asked that the claimant be asked not to come to the NG unless she was working there. The claimant however claims that GH cold shouldered her. This is allegation 12 from the claimant.

12.27. It was following these events that JB sent a short email to the claimant on the 16th of October "We will not be needing you to work at the Camel Club this half term (Monday the 23rd to Friday 27th of October 2017)".
12.28. There are two events which followed and need to be mentioned to complete this chronology. The first was that decisions were subsequently made to restrict the claimant's volunteer work at and visits to Oasis. These are the subject of further allegations of victimisation from the claimant arising from the visits she made to Oasis after the 16th of October. Secondly, there was a further meeting between SB and TB on 2 November 2017 intended as a follow-up to the meeting in July which, it had been hoped, would lead to some form of informal resolution. The claimant did not attend the meeting in November, apparently being too upset, and it was clear that no resolution was possible at that stage.

13.**Conclusions**.
13.1. We start by stating our conclusions as to when the respondent was on notice that the claimant had done or may have done **a protected act.** We conclude on the balance of probabilities that the respondent realised that the claimant may do a protected act on receipt of the email of the 7th of February 2017 in which she mentions not only having gone to ACAS but also time limits, but also potential discrimination claims. The respondent certainly had knowledge from the 4th of April 2017 when it received an email from ACAS which mentions race and disability claims.
13.2. Next, we state our conclusions as to **knowledge of disabilit**y. The issue is a fairly narrow one: – When did the respondent have the relevant knowledge of disability in relation to depression prior to the date of in May 2017, on receipt of a copy of the ET1? We referred to a passage in the EHRC Code of Practice of 2011 as follows: –
"5.14. It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a disabled person.
5.15. An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity, and privacy and ensure that personal information is dealt with confidentially."
We have concluded that the respondent was on notice that the claimant had mental health problems, including depression, on receipt by JB of an email from the claimant dated the 22nd of February 2017, and that it was affecting her at work. It was at that stage that the respondent should have started to make enquiries as the gravity of the condition and its affect on her work. The Tribunal has earlier made a finding of fact that the claimant's mental health constituted a disability during the material period from the commencement of the original proceedings on 21 April. In fact, the later medical evidence points to an earlier date. Thus it is no answer for the respondent to say that it did not believe that she was disabled, and to continue to deny it, right up to and beyond the first substantive hearing, when they made no proper enquiries at the time. We have however, rejected any earlier date of imputed knowledge flowing from confidential discussions she may have had with DO which were not intended to be passed on to management.

We note and record before going any further with our conclusions that we have concluded that while we acknowledge that the claimant was challenging and difficult to manage, there were clear opportunities missed to take steps which could have resolved the obviously strained relationship between the claimant and GH and HF. We note that there were indications that GH and HF were amenable in mid April 2017 to discussions continuing with a view to the claimant returning to work at the NG under their management. This was interrupted by two pertinent events. The first being the notification on the 21st of September that the claimant had commenced the tribunal proceedings; and the second being the notification that the claimant was no longer to be offered work at the NG, but was to transfer to AP. The second area of criticism arises from the respondent's failure mentioned above to recognise that she might have a disability, and to deal with it accordingly, by reference for example to external occupational health or or expert HR advice, or by seeking medical advice. We note, however, that ACAS does not appear to have been effective in assisting either party.

With these comments in mind, we chose to select and state our conclusions on four specific events, covering the range of statutory heads of claim, and the central and principal complaints which the claimant makes. The first is the decision to cease to offer her cover work at the NG from the 27th of September April 2017, a claim of victimisation under section 27 of EQA; the second relating to her claim of a failure to make a reasonable adjustment in respect of her continued assignment to the AP in July 2017; the third being the allegation that the respondent had falsely alleged that the claimant had accused GH of being a racist in June 2017, which was labelled as a claim of victimisation and/or of direct discrimination on grounds of race; and the fourth, being the cancellation of her opportunity to work at the Camel Club on 16 October 2017, which is identified as being unfair dismissal, and/or subjection to a detriment amounting to victimisation, and/or discrimination on grounds of disability. All the other allegations may properly be described as ancillary to, or adding little or nothing to the principal claims.

13.3. **The removal of cover work at NG and assignment to AP.**

We have concluded that the fact that the claimant had commenced discrimination proceedings on the 21st April 2017, about which the respondent was aware from the claimant, did have a significant influence on the decision. The reason can be relatively shortly stated. First, the decision was announced very shortly after the respondent became aware of the tribunal proceedings being started (post hoc, propter hoc). Secondly, the respondent had earlier temporarily removed cover work at NG in February, but then restored it on 4 April, apparently on the basis that it was considered that it would be manageable. After that there had been meetings between the claimant and GH and HF, the last of which, on the 15th of April was described by GH as being "more positive". We conclude the GH and HF were amenable at that stage to the claimant returning to work at NG. It appears, however, that the management committee overruled their then wishes. There is a very strong inference that they did so because the claimant had made claims of discrimination; and in particular against GH and HF. It is relevant that the respondent may have had an apparently benign motive of protecting GH and HF against further attacks if, as we find, the respondent was consciously or subconsciously motivated by the claimant beginning discrimination proceedings. Compare Ahmed v Amnesty International. A benign motive cannot justify direct discrimination. We also strongly suspect that the respondent was unaware that the commencement of claims of discrimination in good faith by a worker (the contrary has not been suggested by the respondent), gave a right of protection to the worker for doing so. We are satisfied that the denial of work at the NG, which the claimant

particularly enjoyed, did constitute a detriment as defined in the EHRC code of practice above at paragraph 11.6. We cannot see, however, how the decision had anything to do with her disability or something arising from it.

13.4. **The failure to make reasonable adjustments claim.**

The outcome of this area of dispute depends upon the interpretation of the claimant's email of the 11th of July 2017; and its interpretation by the respondent and their response to it. In that email the claimant is claiming that it was a detriment for her to work at the AP. Working in the Camel club in the afternoon shift was hard because it was more chaotic and crowded even after the mainstream children had left. She also says that she did not like large crowds. The respondent disputes the truth of that allegation claiming that she had previously worked in the AP without complaint or difficulty. We have to apply the following tests: –

Did the respondent apply a PCP to the claimant? Yes, the respondent applied the practice of only offering the claimant work at AP rather than NG.

Did the application of that practice put the claimant at a substantial disadvantage because of her disability? Did the respondent know or could reasonably be expected to know that the claimant was disabled and was placed at that disadvantage? In order to answer these questions, we have considered the contents of the claimant's emails not only of the 11th of July, but also that of the 6th of July at page 152. We have already decided that the respondent was on notice that the claimant was depressed and that it was a disability at least from February 2017. Although they had such notice, they did not undertake any investigation, medical or otherwise, at the time and they continue to deny that the claimant was disabled even after receipt of the claimant's disability impact statement and the medical evidence outlined in the employment tribunal hearing in May 2018. We find that the respondent from the date of receipt of the emails knew that the claimant was claiming specifically that working at the AP, particularly in the afternoons put her at a substantial disadvantage. We acknowledge that nowhere in the medical evidence produced on the 4th of October 2017 or later in the proceedings (see page 384) does it specifically state that the claimant was disadvantaged by working with large crowds, probably because the makers of the reports were never asked the specific question, but one does state that the claimant was vulnerable to anxiety, see especially the South London and Maudsley report of the 30th of January 2019 which states that she was vulnerable to anxiety and panic attacks under stressful situations. We conclude that the claimant was put to this substantial disadvantage by being confined to working in the Camel Club in the AP. We excepted her evidence that before she was in effect banned from working in NG (from the 27th of April 2017), she customerally went with the younger 5 to 6-year-old children from the AP to the NG during the greater part of the day. The respondent in effect ignored what the claimant was claiming in her email when they should have made further and more specific enquiries. There was one obvious adjustment which the respondent could have made; namely to allow her to continue to work in the NG. We do not accept that it was not a reasonable adjustment because of friction between the claimant and the NG staff, when the last indication before the 27th of April 2017 was that both GH and HF were prepared to go to mediation and to continue to work with the claimant, which the respondent did not follow up. This head of claim succeeds.

13.5. **The race harassment/ victimisation claim.**

The claimant put this issue upon the basis that she had been falsely accused of calling the NG staff, in particular HF, of being a racist, which she denied. The respondent gave further details in paragraph 144 of its amended response of

August 2017 on page 189. It was reported by DO and JC to JB upon her return from a period of leave over the Bank Holiday in early June 2017. She made some enquiries and there was a further chain of emails. The issue was not raised with the claimant at the time. The claimant raised the issue on the 1st of September 2017 having spoken to JC, and having also seen the respondent's amended response, which mentioned their claim, which she cited in the 3 grievance letter. Further details follow. JB emailed AS about it on the 5th of June. It was claimed that AP playground staff had made a report about a conversation which had taken place at work over the Holiday period when the claimant was working. It is unclear from the chain of emails from JC and DO that the claimant had specifically used the term "racist" in relation to the NG managers, or HF in particular. It is clear however that the claimant was accusing the managers at NG of appointing white people to work there rather than black people. Tyrone, a black worker, had recently – only after the claimant had begun her claim -been taken on as an employee at the NG. JB reported in her email that the claimant was saying that this had only happened "because of her case – to try to prove that they are not racist". It is noteworthy that the claimant had claimed in her first claim that a white person that had been appointed instead of her (which the first tribunal had subsequently rejected as a claim of direct race discrimination, as it did also that there was a policy, deliberate or otherwise of favouring white people at the NG). The majority of the tribunal do not think it was appropriate in the circumstances to describe the claimant of accusing HF as being a "racist". They take the view that the claimant was only claiming that there was unconscious bias in the way people were appointed to work at posts in the NG. The essential issues which we had to decide were, in relation to the victimisation claim, whether the specific labelling of the claimant's actions was a detriment to her because she had done the protected act; and in relation to the harassment claim, whether it was unwanted conduct related to race which had the purpose and effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, taking into account the factors in section 26 (4) cited above. Our conclusions were that this was a detrimental act which was materially influenced by the fact that the claimant had brought a claim of race discrimination against the respondent. The respondent was particularly exercised by that claim, which was in the event in August 2018 rejected by the first tribunal. We do not consider, however that it was also an act of harassment related to race.

13.6. **The removal of the opportunity for working at the Camel Club in October 2016.**

The questions which we have to consider are: –

(1) Taking into account the existing finding that the claimant was employed at the Camel Club as defined in the ERA and had sufficient length of service to bring a claim of unfair dismissal, was she dismissed?

(2) What was the reason or principal reason for dismissal and was it fair or unfair for that reason.?

(3). Was the dismissal decision significantly influenced by the fact that the claimant had brought the earlier discrimination proceedings (victimisation)9?

(4). Was the decision significantly influenced by the fact of the claimant's disability (direct discrimination) or because of something arising from disability (discrimination arising from disability) which was unjustified?

(5). If the dismissal is found to have been unfair and/ discriminatory, what are the chances that the claimant would have been dismissed fairly and without discrimination or victimisation, and when? – See Polkey and Abbey National Plc V Chagger 2010 ICR page 397 (Court of Appeal).
As to question one the answer is obvious. The claimant was effectively dismissed from her kennel club job. That was not significantly disputed by JB during her evidence. The intention, undisclosed at the time, was not to offer her paid work at the Camel Club again, not just over the October half term; and they did not in fact do so as events unfolded thereafter. It was an effective dismissal even if not recognised by the respondent as such because they were under the misapprehension that she was not employed by them.
As to question two, no reason for dismissal falling within section 98 (1) or (2) was put forward at the time to the claimant or at any time up to the commencement of this hearing in October 2019. No procedure whatsoever was followed by the respondent in compliance with the ACAS code of conduct on disciplinary and grievance procedures. The claimant was given no input into the decision and her subsequent protests were ignored. As to potential reasons for dismissal, we will discuss these further under question 5 below.
As two questions three and four, we deal with these together. We have applied the two-stage burden of proof test described at paragraph 11.6 above. We find that the claimant has proved facts from which we could reasonably conclude that the reasons for her treatment were in part at least because she had done the protected act and was continuing to pursue it against the respondent; and because of something at least arising from the discrimination disability if not the disability itself. The timeline documents prepared by AS at pages 245 to 250 reveal multiple reasons for the decision, but also include, at page 250, a reference to not being safe to manage children albeit that it refers to the information coming from the claimant herself. On any view that is something arising from her disability. We have already pointed out that there was a complete failure to investigate the claimant's depression and its affect upon her work and any possible danger to children in her care. We cannot look at these reasons in isolation. We have already made a finding that the claimant had been victimised by the respondent in relation to the withdrawal of work opportunities at NG in April 2017. We note that the proceedings were active although proceeding slowly and a tribunal hearing had been fixed for May 2018. We accept that there were reasons relating to the claimant's conduct which were not directly related to her disability or to her having brought her proceedings, but they principally arose from the breakdown in the relationship with GH and HF, and they were never put to the claimant for a response or were not accepted. At the second stage, the respondent has failed to prove to us that the fact of her having brought the proceedings had nothing whatsoever to do with the decision not to offer her any more shifts. Nor has the respondent satisfied us that the reason was unrelated to her disability.
As to question five, the tribunal is split in its conclusions. The majority members conclude that there was no chance that the claimant would have been fairly dismissed or without discrimination at any later stage if the respondent had followed up the opportunity for a reconciliation between the claimant and the 2 NG managers, and taken proper steps to deal with the claimant's disability.
The employment Judge in the minority takes a different view. He cannot ignore that all of the claims by the claimant in the first proceedings up to the 22nd of April 2017 failed. They demonstrated an unjustified conviction by the claimant that her then complaints were all legitimate and that everyone else was wrong. This attitude has been apparent from the claimant's conduct of the present proceedings, even

taking into account that she has satisfied us that she had a legitimate ground for the majority of her later complaints. He has also taken into account that the respondent continued to dispute that the claimant was employed to a hearing in May 2018 even to the extent of unsuccessfully applying for reconsideration of the issue. It seems unlikely therefore that a fair dismissal could have taken place at any time during this period. For these reasons, he takes the view that there was a 50% chance that she could have been fairly dismissed for conduct destroying trust and confidence in circumstances not amounting to discrimination or victimisation within 1 year after 16 October 2017.

13.7. **Summary conclusions as to other allegations.**
As to allegation 1, insofar as it refers to events taking place in February 2017, this is covered by the period of the first claim and cannot be claimed in the second. As to allegation 2, this has been dealt with under paragraph 13.3 above. As to allegation 3 we find that this was an act of victimisation – the threat of pursuing a defamation claim in the letter of the 27th of April 2017 in respect of something which was the subject of her first claim (page 138).
Allegation 4 is dealt with at paragraph 13.5 above.
As to the remaining part of allegation 1 and allegations 5, 6, 8, 29 and 41, we find that the respondent spoke predominately to black colleagues of the claimant whom they knew or suspected the claimant was talking to about her first claim and told them that they did not need to speak to the claimant about it, and that this amounted to a detriment to the claimant because she was seeking support for her claims and it created a hostile environment for the claimant constituting victimisation.
We find that allegation 41 is incorporated within these allegations.
As to allegation 8 we find that this was an act of victimisation because immediately prior to the 21st of September 2017, the respondent and HF were prepared to pursue mediation but after that date mediation with HF was ruled out. We recognise however that the respondent did make other attempts at mediation via ACAS, and via a local mediation organisation (refused by the claimant because it was not perceived by her as independent), and via TB, which were in the event not successful.
As to allegation 9, we do not accept the claimant's claim that JB and AS deliberately deleted references in copies of her diary entries which she sent to the respondent for inclusion in the tribunal bundles. We accepted the respondent's explanation of the circumstances. We cannot find evidence of any occasion when AS told staff that she had been refused treatment for a mental health condition, but we accept AS's evidence that he mentioned it in a submission to the tribunal and withdrew it at the subsequent hearing.
As to allocation 10, the fundamental issue here is that the claimant has succeeded in her claim of a failure to make reasonable adjustments, and when the claimant raised a grievance about it, they did not deal with it, all of which we have accepted. The complaint she makes concerns the contents of an email only to TB which was accidentally copied to her. We do not feel that this allegation merits a separate finding.
As to allegations 11, 28, 32, 38 and 40, we regard these as part of the respondent's failure to make reasonable adjustments. We do not consider that they add anything to the failure we have already identified, but we regard the respondents failure to recognise that the claimant had a potentially serious mental health problem as being an aggravating feature.

As to allegations 14, 15, 17, 18, 20, 35 and 43, these allegations are also encompassed within the tribunal is finding that the dismissal was unfair, and act of victimisation and discrimination on grounds of disability.
As to allegation 19, the essential finding we make as to this allegation is that on the 27th of July 2017 the claimant was looking after some 34 children on her own, including cooking and serving food to them, and had a breakdown. When she reported it to DO, he told her to go out side and look after the other old your children not in the Camel Club – see page 47A, a diary entry. Right up to day five of this tribunal hearing the respondent had accused the claimant of falsifying of the numbers by exaggeration, claiming that there were in fact never more than 15 children to care for in the Camel club. It was only after the tribunal had asked the respondent to check their records that the respondent conceded that the allegation was, on this one occasion untrue. This is also closely associated with the claimant's failure to make reasonable adjustments claim and is an aggravating feature.
As to allegations 27A, 30 and 31, they are covered in the first judgement. Allegations 28A, 32 and 39 are also encompassed within a finding of a failure to make reasonable adjustments.

14. Finally, we note that our conclusions in favour of the claimant contrast with the failure of her claims in her first claim. This arises principally from the fact that the claimant had done a protected act immediately after the first claim was presented which the respondent did not appear to recognise and in consequence subjected her to detriment probably being ignorant of the consequences, although it makes no difference to the result. they also failed to take any actions on her justified claim of disability.

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Employment Judge Hargrove
Dated: 23 December 2019

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