Case Numbers : 3201257/2018;
3201372/2018;
3201923/2018;
3202402/2018

EMPLOYMENT TRIBUNALS

Claimant: **Miss Y Akinkuolie**

Respondent: **Corps Security (UK) Limited**

Heard at: **East London Hearing Centre**

On: **23, 24, 25, 31 October 2019 and 1 November (in chambers)**

Before: **Employment Judge Gardiner**
Ms L Conwell-Tillotson
Mrs S Jeary

Representation

Claimant: Mr Y Adio, Trainee Solicitor

Respondent: Ms S Tharoo, Counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. The complaints of unauthorised deduction of wages and failure to pay accrued holiday pay are dismissed upon the Claimant's withdrawal.

2. In relation to those complaints brought after the three-month time limit provided in Section 123(1) Equality Act 2010, it would not be just and equitable to extend time. The Tribunal lacks jurisdiction to award the Claimant a remedy.

3. In relation to those complaints brought within the three-month time limit provided in Section 123(1) Equality Act 2010, the complaints fail and are therefore dismissed.

REASONS

Introduction

1. At a meeting on 3 August 2018, the Claimant was dismissed from her employment as Security Lodge Officer with Corp Security (UK) Limited. She was told of her dismissal at the end of that meeting. It was confirmed in a dismissal letter dated 6 November 2018. Her subsequent appeal against dismissal was unsuccessful.

2. In these various employment tribunal claims, the Claimant alleges that her dismissal was an unfair dismissal, contrary to Section 98 of the Employment Rights Act 1996. She also brings various claims of disability discrimination under the Equality Act 2010 in relation to events from February 2017 onwards culminating in the dismissal. These events include the delay in deciding a grievance issued in August 2017. The nature of her disability is said to be her osteoarthritis and her obesity and the related health conditions caused by her obesity.

3. The nature of her disability discrimination claims was discussed at a Preliminary Hearing on 24 September 2018 before Employment Judge Gilbert and a further Preliminary Hearing in a later tribunal claim (3202402/2018) before Employment Judge Jones. At the outset of this Final Hearing there remained a dispute as to the precise formulation of the discrimination issues forming part of the existing claims. That dispute was resolved by the Tribunal following oral argument at the start of the hearing. The Tribunal gave an oral judgment explaining its reasons.

4. The Claimant had also issued a claim (3201257/2018) seeking reimbursement of salary in relation to the period from 1 December 2017 to 5 January 2018 which had not been paid. It was indicated during the Final Hearing that this claim had been resolved by agreement. The Claimant's representative also informed the Tribunal that the Claimant was no longer claiming accrued holiday pay. As a result, the complaints of unauthorised deduction of wages and failure to pay accrued holiday pay are dismissed upon withdrawal.

Overview

5. The Claimant's role was based at the premises of a particular client, Here East, located in the Queen Elizabeth Olympic Park, Stratford. At the point of her dismissal the Respondent, Corps Security (UK) Limited ("Corps Security"), had the security contract to provide guarding services for Here East. They had acquired this contract with effect from 1 September 2017, replacing the previous contractor, Axis Group Integrated Services Limited ("Axis"). In so acquiring the contract, the Respondent acquired those employees assigned to the contract, including the Claimant. They also acquired any pre-transfer liability of Axis for the manner in which the Claimant had been treated. This is the effect of the Transfer of Undertakings (Protection of Employment) Regulations 2013 (TUPE).

6. The Respondent was therefore only the Claimant's employer since 1 September 2017. It was not the Claimant's employer during the period from February 2017 until the end of August 2017. Yet many of the events of which the Claimant complains relate to a period before the Respondent was her employer. This includes her interaction with other security staff engaged to work at Here East, and the treatment she received from the site manager for the Here East contract, Steve Williams.

7. Her formal grievance lodged on 25 August 2017 raised twelve points about the way in which she had been treated. It criticised several of her colleagues working with her at Here East. As a result, Axis decided to suspend the Claimant on full pay for her own protection, pending the outcome of the grievance. Thus, when she became an employee of Corps Security, she had already been suspended.

8. At the outset, the grievance was investigated by Francesca Halton-Woodwood, Operations Manager, who met with the Claimant on 29 September 2017 to discuss her concerns. However, she was transferred to other duties at that point and so handed over responsibility for the grievance to Glen Bowen, who had only been an employee of the Respondent since 18 September 2017. Mr Bowen interviewed Steve Williams on 18 October 2017 and spoke informally to other staff. He did not speak to the Claimant herself, relying instead on the typed notes taken when the Claimant met with Ms Halton-Woodwood.

9. Mr Bowen published the outcome of the grievance in a letter dated 21 November 2017. The outcome in relation to particular complaints is dealt with below, insofar as the outcome is relevant to particular complaints brought before the Tribunal. In summary, the grievance was partially upheld, although several of the Claimant's complaints were rejected. The Claimant was dissatisfied with the outcome, lodging grounds of appeal. An appeal hearing took place on 12 January 2018 before Mr Seetan Varsani. There was a delay in concluding the grievance appeal. The grievance appeal outcome letter was not sent to the Claimant until 9 May 2018. The upshot was that Mr Bowen's grievance outcome was upheld and the appeal was unsuccessful.

10. On 23 November 2017, two days after the conclusion of the grievance hearing, Mr Bowen wrote to his contact at Here East, Martin Barnett. His email told Mr Barnett that the grievance had ended. It had been partially successful, mainly in relation to the behaviour of her colleagues, behaviour of her managers and the actions of Axis. He said that he would like to reintroduce the Claimant back into her role at site in the Dock Office, if that coincided with Mr Barnett's wishes. The email noted that the steps taken 'cleared the decks' for her reintroduction but noted that Here East's views carried a large degree of weight.

11. The prompt response from Mr Barnett indicated that the Claimant's introduction back into the Here East team would be unwise and would be 'extremely disruptive'. Despite further efforts of Mr Bowen's part, Here East continued to object to the Claimant's return. In the meantime, she remained suspended. Mr Bowen conducted a search for other potentially suitable roles. There is a dispute about

whether the Respondent did all it could to persuade Hear East to take the Claimant back or to obtain a role working with other clients.

12. Matters came to a head when Mr Bowen wrote the Claimant a letter dated 30 July 2018 inviting her to attend a meeting on 3 August 2018, labelled a 'follow up removal from site meeting'. At the conclusion of that meeting, the Claimant was told she would be dismissed on two weeks' notice. The reason given for the dismissal was that the client, Here East, had requested the Claimant's removal, and no other suitable work had been identified. The Claimant had been offered the role of a Relief Officer on a zero hours contract, but decided to decline this. The dismissal was confirmed in a letter on 6 August 2018. The Claimant appealed against the dismissal decision. The appeal was heard by Mr Varsani and was unsuccessful.

Issues

13. A final list of the issues for determination was concluded following argument on the first day of the hearing. This was a combination of the issues as set out by Employment Judge Gilbert in her Case Management Summary on 24 September 2018, the dismissal related issues recorded by Employment Judge Jones on 25 March 2019, and the issues resolved before the start of evidence. In particular, there was a dispute as to the scope of the Claimant's claim under Section 15 of the Equality Act 2010. The Claimant wanted to argue that certain pre-dismissal matters and her dismissal were unfavourable treatment arising in consequence of her disability. The Tribunal decided that this was not already part of the Claimant's claims and refused to grant her permission to bring such complaints, given the stage at which the amendment application was first made and the potential prejudice to the Respondent. Two specific matters, listed below, could be raised by way of a claim under Section 15 Equality Act 2010. Reasons were given orally at the time and are not repeated as part of these Written Reasons.

14. The final list of issues for determination can be set out as follows, largely mirroring the sequence and language of the issues used in previous case management orders :

(1) Time limits/limitation issues :

a. Were all of the Claimant's complaints presented within the time limits set out in Sections 123(1)(a) and (b) of the Equality Act 2010 ("EQA") or within the time limits contained in the Employment Rights Act 1996 ("ERA").

b. The Claimant says the disability discrimination forms part of conduct extending over a period which started when the Claimant was working for the previous contractor, Axis, and continued when the new contractor took over the contract right up until the time these proceedings were issued and thereafter to her dismissal on 7 August 2018. If the Tribunal decides it is not conduct extending over a period then the Claimant says it would nonetheless be just

and equitable for the Tribunal to extend time and consider her complaints.

c. Insofar as the ERA claims are concerned, the Claimant will have to show why it was not reasonably practicable to submit her claims within the applicable time limit and that she has submitted her claims within a reasonable time after that.

(2) Disability : Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EqA") at all relevant times. The Claimant is morbidly obese and relies on her obesity and related conditions. The Respondent accepts that the Claimant's osteoarthritis constitutes a disability, but does not accept that her obesity is a disability.

(3) Harassment, contrary to Section 26 of the Equality Act 2010.

a. The Claimant alleged that the Respondent had engaged in the following unwanted conduct :

i. In 2017, the Claimant's colleagues colluded to make extensive incorrect allegations with a view to getting the Claimant dismissed, resulting in disciplinary proceedings being commenced against her;

ii. Thereafter the Respondent failing to take any action against the perpetrators when the complaints against the Claimant were dismissed;

iii. While the Claimant was suspended pending the disciplinary hearing, destroying and damaging personal items including her uniform;

iv. Removing her from all shifts on the rota during her suspension – this issue had been recorded in the record of Preliminary Hearing before Employment Judge Gilbert as "Removing her from all shifts when she returned to work following the suspension", but it was understood by both parties that this complaint related to the state of the rotas during suspension;

v. In February 2017, not permitting her to skip breaks to facilitate an early departure and preventing her from attending hospital appointments without taking annual leave;

vi. In February 2017, two managers, Mr Riley and Mr O'Dell constantly shouting at the Claimant and making her cover a post they knew would irritate her back injury in the full knowledge that this was a post she was not expected to

cover; Mr O'Dell thereafter taunting her, calling her incompetent and saying that he would make sure she worked that post permanently;

vii. In June 2017 receiving an email at work at her personal office email confirming her registration to Weight Watchers with a unique username "fatbitchforever999" and the Respondent failing to do anything about it;

viii. In June 2017 a colleague Michael Brabon sending a sexually explicit email to another colleague Dan purporting to be from the Claimant and the Respondent again failing to do anything about it;

ix. On 22 and 23 June 2017 all the Claimant's email being deleted including an email she sent her manager reporting the Weightwatchers incident; and the Respondent again failing to do anything about it;

x. In August 2017 blacklisting the Claimant's car from the car park so she had to pay the £18 fee herself.

xi. In August 2017 sabotaging the Claimant's duty post which included different keys to different mailbox servers and swapping around the keys as part of the campaign to harass her;

xii. Taking from 1 September 2017 until May 2018 to complete the grievance procedure commenced on 25 August 2017 following on from her further suspension on 30 August 2017 by the previous contractor Axis Security after she raised the grievance;

b. Did the conduct occur ?

c. If so, was that conduct unwanted ?

d. If so, did it relate to the protected characteristic of disability ?

e. The Claimant says the conduct :

i. Had the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

ii. If this is not established, then she says it had the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

f. In considering the effect the Tribunal will take into account:

i. The Claimant's perception, the other circumstances of the case; and

ii. Whether it is reasonable for the conduct to have that effect.

(4) Direct disability discrimination (Section 13 EqA 2010) :

a. The Claimant alleges that the Respondent has subjected her to the following less favourable treatment :

i. In February 2017, not permitting her to skip breaks to facilitate an early departure and preventing her from attending hospital appointments without taking annual leave;

ii. The Claimant's dismissal on 3 August 2018.

b. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances ? The Claimant relies on the following comparators :
i. other colleagues at work who were not disabled; and/or
ii. hypothetical comparators

c. If so, was this because of the Claimant's particular disability of obesity and/or because of the protected characteristic of disability more generally ?

(5) Discrimination arising out of disability, contrary to Section 15 of the Equality Act 2010 :

a. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability, in the following respects:

i. Preventing the Claimant from attending hospital appointments unless she used her annual leave to facilitate the same?

ii. Being required to carry out duties in the North Loading Bay in circumstances when she was unable to do so, given her back pain, as a result of osteoarthritis?

b. If so, then can the Respondent show that the Claimant's treatment is a proportionate means of achieving a legitimate aim ?

(6) Victimisation, contrary to Section 27 of the Equality Act 2010 :

a. Did the Claimant's grievance amount to a protected act ?

b. Did the Respondent subject the Claimant to a detriment, namely her dismissal, because the Claimant had done a protected act ?

(7) Unfair dismissal, contrary to Section 98(4) of the Employment Rights Act 1996 :

a. What was the reason for the Claimant's dismissal? Was it a potentially fair reason, namely some other substantial reason justifying dismissal. The Respondent's case is that the Claimant was dismissed as a result of third party pressure from its client, Here East, to remove her from her role, and the lack of suitable alternative work.

b. If the reason for dismissal was a potentially fair reason, did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant ?

Evidence

15. The Tribunal has heard evidence from the Claimant herself. It has also heard evidence from Glen Bowen, the Respondent's Key Accounts Manager, and from Seetan Varsani, his line manager, who was the Regional Operations Director covering the London Area. It has not heard evidence from Steve Williams, who has apparently left the Respondent's employment. Nor has it heard evidence from those colleagues who she alleges were spiteful towards her.

16. Each witness prepared a witness statement of the evidence they wanted to give, cross-referenced to documents in an agreed bundle. In the Claimant's case, she had prepared two witness statements and a disability impact statement. The latter statement strayed beyond the scope of the Tribunal's order granting the Claimant permission to explain the impact of her disability. As a result, the Tribunal ruled at the end of the first day of the Final Hearing that the Claimant would only be entitled to rely on the first ten paragraphs of that statement and those subsequent references that were specific to the Claimant's medical condition. The remainder of that statement would not be considered. Each witness confirmed the contents of their witness statements and was cross examined.

17. The Tribunal has read only those documents included in three bundles, which have been cross referenced in the witness statements, raised in cross examination, or which feature in the closing submissions. We also listened to three covert audio recordings made by the Claimant. Two were of conversations with the car park attendant, called Nathan, and the third was of a conversation with a cleaner, Katia. These recordings were referred to in the Claimant's witness statements but had not previously been disclosed to the Respondent.

18. Both parties had drafted written closing submissions to which they briefly spoke. In addition to some of the legal authorities listed in the Tribunal's summary of the Legal Principles below, the Tribunal was also referred by the Claimant's representative to *Regent Security Services Limited v Power* [2007] EWCA Civ 1188, and *Bridgen v American Express Bank Limited* QBD 14.10.99.

19. The Tribunal had originally allocated six days for the Final Hearing of all matters, including judgment on liability and remedy if appropriate. This was reduced to five days when the original listing was postponed. In the event, on the first morning the Tribunal discussed with the parties that the final two days would need to be shifted back by two days to be heard on 31 October and 1 November 2019 rather than 29 and 30 October 2019. Respondent's counsel was available on 31 October 2019 but not available on 1 November 2019. It was agreed with the parties that evidence and submissions restricted to liability would be concluded by the end of the fourth day, 31 October 2019, and the Tribunal would deliberate on 1 November 2019. The Judgment and Reasons would be sent out to the parties and a Remedy Hearing would be fixed if appropriate. With the Tribunal sitting for an extended day on 31 October, this was achieved. The Claimant was granted breaks during her cross examination. On other occasions during the case, the Claimant left the Tribunal room for short period for a comfort break. She was content for the hearing to continue with Mr Adio representing her during her brief absences.

20. Mr Adio chose to focus his cross examination of Mr Bowen on alleged deficiencies in the grievance process, despite repeated encouragement from the Tribunal to move on. The result was that Mr Adio had less time to cover other issues and less time to cross-examine Mr Varsani in relation to the grievance appeal and the appeal against dismissal. The Tribunal extended the time available to Mr Adio by sitting earlier, shortening the lunch adjournment and sitting later than the parties had been advised at the outset of the day.

Factual findings

The Claimant's role

21. In her role at Here East, the Claimant worked 50 hours a week during standard daytime working hours from Monday to Friday. She was based in the Security Lodge where her responsibilities included signing for parcels, speaking to members of the public and contractors visiting the site**,** and looking after various keys for different parts of the site, as well as some administration using emails. There was no need to work at evenings and weekends. There was generally no need to patrol around the site and she was based in the Security Lodge office, which was effectively Here East's post room.

22. There were several other Security Officers at the same level as the Claimant employed by the Respondent and also assigned to the Here East site.

The Claimant's health

23. At the time of the events said to amount to disability discrimination, the Claimant was approximately 26 stone in weight. The Tribunal finds that the Claimant had the following impairments :

    a. Chronic back problems and knee problems caused by osteoarthritis in her right knee and lower back, worsened by the Claimant's obesity. She had difficulty standing for relatively short periods of time, including difficulties standing whilst cooking. She walked more slowly and was unable to run, and was limited in the physical tasks often expected of security officers;

    b. Urinary continence problems, for which she took medication. She also experienced the need to pass lose stools frequently, which was the consequence of previous bariatric surgery. She needed to have frequent comfort breaks;

    c. Hypertension secondary to severe obesity for which she was on medication. She experienced resulting headaches on occasions;

    d. Anxiety and depression which by November 2017 was sufficiently severe that she was referred to a counsellor. She was prescribed medication for her depression, namely Sertraline. This affected her motivation, concentration and memory.

Sequence of events

24. On 23 November 2016, Mr Williams provided the Claimant with a back support to help ease pains in her lower back. The Claimant told Mr Williams that injuries sustained in a recent accident would take a long time to heal, given her body mass and the nature of her fall.

25. On 2 February 2017, the Claimant wrote to Steve Williams to ask him to inform Nigel Riley, a supervisor that she could not work in the North Loading Bay due to her backache. She also told him that she had appointment letters for medical appointments and was on painkillers. The following day, 3 February 2017, the Claimant attended for work and was expected by Mr Riley to work in the North Loading Bay. He told the Claimant that he was unaware of any restriction on where the Claimant could work. We accept the Claimant's evidence that Mr Riley told her that she was refusing to work. The same morning, Mr Tony O'Dell, a fellow security officer, told her that she was incompetent and not capable of doing the job. He threated the Claimant with having to work in the North Loading Bay permanently. There is no evidence he made any specific reference to the Claimant's weight or to her health during this conversation.

26. At the time, Mr Riley knew about the Claimant's back pain. The Claimant had not shared her other health matters with Mr Riley or with Mr O'Dell.

27. The Claimant emailed Mr Williams on 7 February 2017 to complain about the way she had been treated on 3 February 2017. She told him she had been unable to sleep properly since the events of the day which had almost reduced her to tears. She said she was still very distressed with the way they had treated her. She asked Mr Williams to speak to Mr Riley and Mr O'Dell about the way they had spoken to her. On 8 February 2017, someone approached the Claimant to attempt to apologise for the incident on 3 February 2017. Mr Peter Morris, Assistant Account Manager, who was Mr Williams' line manager, asked the Claimant if she wanted to raise a formal complaint about the issue. The Claimant told him that she wanted to reflect on how to proceed. Until the Claimant's grievance raised at the end of August 2017, over six months later, the Claimant chose not to make further complaint about this particular incident.

28. On the same day, 7 February 2017, Mr Morris spoke to the Claimant with concerns about her health. Mr Morris was not himself based at Here East, but had heard of these concerns which had been raised by a couple of the Claimant's colleagues. He asked the Claimant if she wished to be referred to Occupational Health. Her response was that concerns about her health were unfounded and she was fit to perform all the tasks currently associated with her role. This conversation was confirmed in a subsequent letter from Mr Morris sent to the Claimant on 10 February 2017. The letter was copied to the HR Department. He ended his letter by saying that if the Claimant wanted an occupational health assessment in the future she was to ask for this. She never did so. As she told her union representative, Peter Coleman, by email the same day, she was worried that the Respondent would use an occupational health report to declare her unfit for work and dismiss her.

29. On 16 February 2017, the Claimant spoke to Mr Morris and Mr Williams about her forthcoming hospital appointments. That day she had been asked by her GP to obtain what she described as a vital blood test, and this was scheduled for 20 February 2017. The timing and the duration of the appointment was not specified either then, or in evidence before the Tribunal. She asked for time off to obtain this blood test and was told by Mr Morris she would need to take it as annual leave, or unpaid leave. As a result, she emailed to request she be permitted to take the day as annual leave.

30. On 3 March 2017, the Claimant emailed Mr Coleman summarising the problems she had experienced to date. She said she had been wrongly accused of complaining to her employer about people going home early. The result, according to her email to Mr Coleman, was that Mr Williams sent out an email saying that nobody could go home early. The Tribunal concludes from this document that, contrary to the Claimant's witness evidence, the Claimant's colleagues were not permitted to go home early if they skipped their lunch breaks. No-one was permitted to go home early, and if they had been doing so, then this had been without permission.

31. In the same email, the Claimant recorded the current position in relation to taking time off for medical appointments. She wrote that initially she had to take annual leave for hospital appointments. That position changed once she stated she would

be seeking further advice about this, in that "they have started allowing [her] to take time out to go for [her] hospital appointments". The Tribunal infers from this that by early March 2017, Axis Security had relaxed an earlier insistence that she would need to take annual leave if she wanted to attend a medical appointment.

32. On 11 May 2017, Mr Morris emailed the Claimant to follow up on an earlier letter of 7 May 2017 in which he had requested a meeting to discuss her current health conditions. There was a meeting between Mr Morris and the Claimant on 19 May 2017.

33. On 17 May 2017, the Claimant became unwell during the working day. She had planned to attend the dentist on that day, and had been permitted to leave at 4pm to do so. Because she was unwell, she emailed Mr Williams to tell him she would no longer be going to the dentist. She thought he had said in a subsequent telephone conversation that she could still leave at 4pm. In fact, Mr Williams expected her to stay until the end of her normal shift, at 5pm. As a result, when she left at 4.30pm, he regarded her as leaving early without permission.

34. On 19 May 2017 the Claimant was invited to attend an investigatory meeting on 23 May 2017. At that meeting, the Claimant was asked to explain her position in relation to four allegations. These covered leaving site before the designated shift finish time, breach of trust and confidence, consuming food at her post, and using client lockers even though she had been advised to return keys. The investigation concluded on 30 May 2017 with a recommendation that the Claimant should attend a disciplinary hearing in relation to each allegation, apart from consuming food at her post. Around this time, the Claimant was suspended pending the conclusion of the disciplinary process.

35. A disciplinary hearing took place on 8 June 2017, conducted by Riz Sayed, Account Manager. Riz Sayed decided that no formal disciplinary action would be taken in relation to any of the matters raised. Limited reasons were given for this outcome, as recorded in the outcome letter dated 15 June 2017. Her suspension would be lifted and she would be expected to return to work at 0700 on 9 June 2017.

36. In advance of the disciplinary hearing, the Claimant had been sent several witness statements potentially relevant to the disciplinary charges as well as a record of the investigation findings. Those witness statements were not produced to the Tribunal at this hearing.

37. During her suspension, there was a deep clean of the offices including the area where the Claimant worked. In breach of Axis procedures, the Claimant had chosen to store some of her personal items at her desk, including a mirror and a plant pot. When she returned from suspension after the conclusion of the disciplinary process, she discovered that the plant pot and mirror had gone missing and the jacket she had been given as part of her uniform was on the floor. Mr Williams subsequently had the jacket cleaned and returned to her. The mirror and the plant plot were never found. The Tribunal does not accept the Claimant's witness evidence on this topic, namely that "all my belongings mugs, uniforms,

plates, notebooks, in short everything I left in my locker prior to suspension had been damaged and some were completely destroyed with the remains strewn across the floor". This is a significant embellishment of the complaint made in writing her December 2017 grievance appeal, to the effect that the missing items were her mirror and plant pot.

38. After the disciplinary process was concluded, Axis took no action against those who had made allegations against the Claimant. The Claimant argues that witnesses had colluded to bring evidence against her. As the Tribunal has not seen the witness statements prepared for the disciplinary hearing nor heard any evidence form those witnesses, we are unable to find that there was any collusion in the way that the witness statements were prepared. Nor do we find that instigating the disciplinary proceedings was the result of collusion in any other way.

39. Whilst the Claimant was suspended pending the disciplinary hearing, she was removed from the rota. She alleges that this was different treatment from other employees who had also been suspended but who remained on the rota. The Tribunal has not been shown any evidence that other employees were suspended around this time or that, if suspended, they had remained on the rota, unlike her.

40. On 21 June 2017 the Claimant was not in work. On that date, an email was drafted and sent from the Dock Office email address. The email was worded as follows, which is recorded exactly as written:

> Hi Dan
>
> Thank you for the kind invite to go out for a drink and a meal with you, I was told this morning of you deep desire for me and I must say I have the same for you.
>
> Are you free tonight ?
>
> You could come round my house if you'd like, im all alone tonight and you are welcome to stay 😊

41. The email footer featured the Claimant's name and stated her position as the Press Centre Dock Officer. The effect of this email was to suggest to anybody reading the email that she was romantically attracted to Dan who worked in the South Loading Bay and would be willing to sleep with him.

42. On 22 June 2017, the Claimant arrived at work to discover that emails on the Dock office computer had been deleted. These included personal emails that the Claimant had sent and received on this email account.

43. She was able to restore them to the Dock Office inbox. On doing so, she discovered the inappropriate email addressed to Dan the previous day, purporting to be from her. She cut and pasted the content of the email into an email that she sent to Mr Williams and Mr Cox. She said that she was absolutely disgusted that anyone could think of typing such an email on her account. She did not identify in

her email anyone that she believed was responsible for the email's creation, although in a later email dated 30 June 2017 she named Michael Brabon, another Security Officer.

44. Mr Williams commenced an investigation into this incident on the same day but left for a period of two-week annual leave before informing her of his findings. On 22 June 2017, Mr Williams emailed the Claimant saying "if you want to bring a grievance against the officer involved, you are quite in your right to do so".

45. In the meantime, on 22 June 2017, the day after the incident, and after the complaint had been logged with Mr Williams, Mr Brabon came to relieve the Claimant at the end of her shift. The Claimant took exception to this.

46. On 23 June 2017, when the Claimant attended work at the start of her shift, she again discovered that her emails had been deleted. This included the email that she had sent to Mr Williams and Mr Cox complaining about the inappropriate email sent to Dan.

47. On 24 June 2017, the Claimant emailed Mr Williams to complain that Mr Brabon had replaced her at the end of her shift on 22 June 2017. She said that it felt like management was not taking her complaint very seriously. The email was copied to Peter Cox, Deputy Security Manager. The Claimant sent a further email on 28 June 2017, this time to Mr Cox, complaining that again Mr Brabon had been sent to replace her at the end of her shift.

48. The outcome of Mr Williams' investigation was that Mr Brabon was held responsible for drafting the inappropriate email from the Dock Office email address. He was not subject to a formal disciplinary sanction but a personal file note was place on Mr Brabon's personnel file.

49. On 30 June 2017, the Claimant emailed Mr Cox asking him to investigate why most of her personal emails were deleted between 17:10 and 17:12 on 22 June 2017.

50. Also on 30 June 2017, the Dock Office email account received an email from WeightWatchers. The email thanked the recipient for registering with their unique username, which was given as fatbitchforever666. Understandably, the Claimant was very upset. She reported the matter to Mr Cox, who emailed her the same day to say he had spoken to management who would check with the server provider to see if the email had originated from any of the Axis computers. He suggested that the Claimant should call 101 and inform the Police about the email.

51. Despite the internal investigation, Axis were unable to establish who had created the WeightWatchers account. It could have been created from any device accessing the WeightWatchers website. In these proceedings, the Claimant has argued that this WeightWatchers account was created by one of the Axis colleagues with whom she worked. In her witness statement, she claims that this was the work of Mr Brabon. However, there is no direct evidence to support this, beyond an inference created by his responsibility for the inappropriate email sent on 21 June 2017.

52. We infer that this WeightWatchers account was created, on the balance of probabilities, by an Axis employee based at Hear East. We do so for the following reasons :

    a. The account was created within eight days of the inappropriate email to Dan on 21 June 2017 which was written by an Axis employee, Mr Brabon;

    b. It is part of the same pattern of offensive behaviour as the inappropriate email;

    c. The inappropriate email was received in the South Loading Bay office and therefore is likely to be have been seen by other Axis staff;

    d. As a result, it is likely to have been a topic of conversation between Axis staff and to have prompted further similar behaviour either by Mr Brabon or by one of his fellow Axis employees who found his inappropriate email amusing;

    e. There is no evidence that any Hear East employees or other personnel based at the site had been treating her in a way that was inappropriate or offensive, and that therefore they could have been responsible for the creation of the WeightWatchers account.

53. On 13 July 2017, the Claimant emailed Mr Williams, copying in Mr Cox, to complain again about the deletion of her emails that she discovered on 22 June 2017 and on 23 June 2017. She blamed Michael Brabon for deleting her personal emails twice in the space of a day. She said that she wanted Mr Williams to investigate why he had done this. Mr Williams responded by asking whether she would like this to be heard as a formal grievance. The Claimant did so about six weeks later, when she issued her grievance on 25 August 2017.

54. Also on 13 July 2017, Mr Williams sent the Claimant a letter to her home address, in which he purported to deal with the matters that had been raised in the Claimant's email of the same date. He said that there was no reason why Mr Brabon should not have relieved the Claimant at the end of her shift on 22 June 2017, because he had not been suspended. He noted that the Claimant had not raised a grievance about the email sent from the Dock Office addressed to Dan. He said that she should not have been using the Dock Office computer to send personal emails and that it was reasonable for employees to delete emails for various reasons. He said that, at that stage, there was no evidence that the WeightWatchers account had been created by an employee of Axis. He made no reference to any investigation he had carried out to establish whether an Axis employee had done this, referring only to his belief that WeightWatchers were investigating this for the Claimant.

55. He placed the onus on the Claimant to inform him as a matter of urgency if WeightWatchers suggested that the account had been created by an Axis employee. He noted that he had now addressed her concerns as part of an

informal grievance and said that if she was unhappy with any of what he had said she should escalate it to stage 2, which was the formal grievance stage.

56. On 26 July 2017, someone accessed the Dock Office keys for mail boxes and shuffled the keys. The result was that the Claimant was not able to access any of the mail boxes to give mail to the clients who were waiting to collect their post. She was distressed by this act which she later described in her grievance as an act of sabotage. She raised this with Peter Cox, who came to the Dock Office and reassigned the keys to their correct locations. As a result, the problem was resolved reasonably quickly. On the balance of probabilities, this act was designed to inconvenience and embarrass her, and was carried out by the same perpetrator or perpetrators who were responsible for the inappropriate email to Dan and the WeightWatchers registration.

57. In late July and early August 2017, the Claimant had a problem accessing the staff car park. This was operated by another company. The barrier would not lift when she drove to the entrance of the car park. She called Nathan, the car park attendant, who told her that her car had been taken off the list of cars who had permission to park. She went on annual leave for a few days and when she returned she found that the barrier still would not allow her access. The Claimant raised the issue with Mr Williams when he returned from a week's annual leave, and he was able to restore her access to the car park. We find that access to the car park was a problem for other members of staff, including Mr Bowen. There were not infrequent problems in accessing the car park around this time. There is no evidence that the treatment that the Claimant received in relation to car parking was inconsistent with the experiences of other employees.

58. By late August 2017, Corps Security had been identified as the incoming contractor who would assume responsibility for Axis staff based at Here East. On 21 August 2017, the Claimant completed a "Post Offer/Employee TUPE transfer Health Questionnaire" provided by Corps Security. In that questionnaire she gave her weight as 168kg, which is around 26.5 stone. She declared various health issues, including back, joint and limb pain for which she said she took painkillers when needed; high blood pressure for which she told the Respondent that she took medication; work related stress over the last year; work related depression and anxiety, again over the last year; and added a number of addition health matters which she wrote on the form. These were gastro reflux, weak bladder, migraine, and she repeated that she had leg pain as a result of a previous fall. She said that she considered herself disabled. She also added that "she was being made to feel that her weight affected her job".

59. That Health Questionnaire was sent to Corps Security's HR Department. It was placed on her personnel file. It was not disclosed at any time to her line manager.

60. As already stated, the next important event was that on 25 August 2017 the Claimant chose to formalise a grievance complaining about the way she had been treated over the period since February 2017. The grievance had twelve numbered paragraphs and covered the same ground as her allegations in these proceedings. The grievance email was sent to Amy Hewer at Axis's HR and copied to the

Claimant's trade union representative. It alleged disability related discrimination in relation to comments made in the loading bay, and differential treatment in relation to the time at which other members of staff were permitted to leave work.

61. On 30 August 2017, Tom Jacob visited the Claimant to discuss her grievance, asking her if she felt safe on site. She expressed concern about her safety and Mr Jacob told her that she was being suspended on full pay pending the investigation into the grievance. The suspension was confirmed in a letter of the same date. The following day, Mr Jacob informed the Claimant that the grievance was now being handed over to Corps Security. He told her that their HR department would be in touch with her shortly.

62. On 1 September 2017, the Claimant became an employee of Corps Security as a result of a TUPE transfer. Corps Security were engaged by Innovation City (London) Limited to provide security services at Here East. The security services were provided from 1 September 2017 onwards, but the agreement recording the arrangement was not dated until 5 December 2017.

63. Under that agreement, Clause 5.14.12 provides as follows :

> The Employer reserves the right to require the Contractor to remove immediately and replace any individual, without obligation to give a reason. In such cases the Contractor shall provide a suitable and acceptable replacement as soon as is reasonably practicable.

64. The Claimant's grievance was initially handled by Francesca Halton-Woodward, Operations Manager. It was subsequently passed to Mr Glen Bowen. Mr Bowen did not interview the Claimant as part of the grievance but relied on the notes of the grievance meeting held with Francesca Halton-Woodward on 29 September 2017. His outcome letter, dated 21 November 2017, noted that the sanction imposed on Mr Brabon of a P note on his file for the inappropriate email to Dan was unduly lenient but that he could not reopen this issue because an outcome had already been announced. He did not consider that there was fault on the part of the Respondent in relation to the WeightWatchers email, and in relation to the shuffling of the keys for the mail boxes, because the culprit had not been traced. He offered the Claimant a phased return to work.

65. The Claimant appealed against the grievance, as set out in a detailed letter to Mr Bowen on 18 December 2017. The grievance was heard by Mr Vasani. Mr Vasani was passed the appeal on about 21 December 2017. He wrote to the Claimant on 4 January 2018 inviting the Claimant to a grievance appeal meeting on 10 January 2018. In fact, the grievance appeal meeting took place on 12 January 2018. The meeting took just over an hour and a half, and the Claimant was accompanied at the meeting by her union representative, Mr Coleman. This was the same person who had represented the Claimant throughout the period with which this claim is concerned.

66. The meeting notes clearly do not reflect the entirety of the conversation during a meeting of that length. We find that the meeting would have covered all the issues that the Claimant and her representative wanted to raise during the meeting.

67. The grievance outcome was not published until 9 May 2018. Mr Vasani sought to explain the delay of almost four months from the grievance appeal meeting on the basis that he was on leave for the first half of February 2018. On 6 April 2018, Mr Vasani emailed Michael Antill at Axis in an attempt to get further information in relation to the matters covered by the grievance. Mr Antill was on annual leave around the time that this email was sent, and as a result there was no response from Axis until 23 April 2018. Mr Vasani reiterated that he still wanted a response and Axis provided information in relation to the specific points raised in an email on 23 April 2018. At that point, Mr Vasani produced a four-page long grievance outcome letter in which he listed the twelve points in the Claimant's original grievance. He told the tribunal that he conducted the appeal by way of a review of Mr Bowen's original grievance outcome rather than a full rehearing.

68. There is only a partial explanation for the delay between January and May in that there do appear to be periods of apparent inaction on Mr Vasani's part. He said that the delay was regrettable and did not attempt to justify the full extent of the period.

69. Once the grievance outcome letter had been sent to the Claimant on 21 November 2017, Mr Bowen wrote to the client, Martin Barnett at Here East, to inform him that the grievance had been concluded. He said he would like to reintroduce the Claimant back into her role at site in the Dock Office, "if that coincides with your wishes". His email noted that the grievance had been upheld in part, relating "mainly to the behaviour of her colleagues, behaviour of her managers and actions of her controlling company at the time (Axis)". It noted the steps taken by the Respondent to address these matters "in an effort to make her workplace a safe and reasonable environment for her to work in". It concluded that these steps "effectively 'clears the decks' for her reintroduction" and added :

> "of course the customer (Here East) has a significant input into this and their views carry a large degree of weight".

70. Mr Barnett responded the same day in the following terms :

> "I don't think Funmi's introduction back in to the Here East team would be wise. In fact, I think it would be extremely disruptive.
>
> Funmi's behaviour in front of the Here East management team has not been of a standard we'd expect, therefore I request that Funmi is not returned to the Here East contract."

71. Mr Bowen made a further attempt at the start of January 2018 to persuade Here East to change its mind. However, in an email dated 4 January 2018 and in a letter on 5 January 2018, Mr Barnett reiterated his initial stance that the Claimant could not return to the site. As a result, on 5 January 2018 Mr Bowen wrote to the Claimant inviting her to attend a meeting on 12 January 2018 to discuss her role

within the Respondent. This was done in a letter sent by first class post and recorded delivery, as well as by email. The letter attached an extract from the Corps Security Colleague Handbook referring to the Site Removal Process. This reiterated that the client may choose not to provide Corps Security with a reason for the removal and the company would still be expected to act on the client's instruction.

72. The meeting went ahead on 12 January 2018. This was on the same day as, but separate from, the grievance appeal hearing. Mr Bowen told the Claimant that he would ask Mr Barnett for clarification of the reasons for her removal. He told her that she would need to consider other jobs within the company. The Claimant was provided with a list of current vacancies and was asked to visit the company website for up to date information. It was left that the Claimant would notify Mr Bowen if there were vacancies for which the Claimant was interested in applying.

73. Mr Bowen sent a further letter to Mr Barnett on 26 January 2018 which included seven questions previously submitted by the Claimant, and asked for Here East to formally reconsider its previous decision. Whilst waiting for a response, Mr Bowen wrote to the Claimant on 12 February 2018, reminding her she was currently in a consultation period and warning her that if the client did not change its mind and the Respondent was unable to reassign her to another job during the consultation period, there would be no alternative but to terminate the Claimant's employment.

74. On 1 March 2018, the Claimant emailed Mr Bowen to indicate four jobs she would like to discuss a meeting scheduled for the next day. At that meeting, the Claimant was accompanied by her trade union representative, Peter Coleman. She indicated she would prefer to work days rather than nights and wanted to earn as much as she had at Here East or more. She said that she would prefer a static role in a corporate environment on a full-time basis. She indicated she would consider a relief role too.

75. On 15 March 2018, Mr Bowen emailed around fifteen other managers in the Respondent's South Region, asking if they could offer the Claimant other employment and specifying the hours and the pay she was looking for. He included a sentence that the Claimant challenges, which was worded as follows:

> Would suit a CBRE style single building type reception role where she can take ownership of matters and charm the clients.

76. Contrary to the Claimant's contentions, the Tribunal did not consider that this sentence made any allusions to the Claimant's size or was inappropriate in any way.

77. On 25 March 2018, the Claimant wrote to Mr Bowen identifying three job vacancies in which she was interested. They were all administrative roles, either 45 or 50 hours a week, working from Monday to Friday. A further meeting was held between the Claimant and Mr Bowen on 29 March 2018. By this point, the Claimant's main interest was in a security supervisor role based at the Gherkin in the City of London. She identified a further two vacancies in an email on 9 April 2018, and

additional vacancies in a second email sent on 11 April 2018, and a further vacancy in a third email on 12 April 2018.

78. On 21 May 2018, Mr Bowen repeated his earlier email to management colleagues in the South Region, enquiring about relevant vacancies for the Claimant.

79. There was further email correspondence between the Claimant and Mr Bowen about vacancies in May, June and July. On 22 May 2018, with Mr Bowen's encouragement, Jimmy Flynn, one of Mr Bowen's fellow managers, emailed the Claimant to inform her of a potential vacancy in Camden working 45 hours a week at the start and the end of each day, and throughout the day on Saturday. The Claimant's immediate response was to say that the role would require her to make four journeys a day by bus, as she did not like trains as they made her feel claustrophobic. In a later email, sent on 8 June 2018, she said that due to public transport it was not guaranteed that she would be able to get to Camden to start work at 6.30am. Mr Floyd responded that timekeeping was critical for the role and therefore he would not be putting her forward for an interview.

80. In a further email sent to Mr Bowen on 12 June 2018, the Claimant identified alternative roles of interest. She indicated that she wanted a role with similar hours and pay to her role at Here East, given her family commitments and in particular because she was her disabled mother's carer. On about 15 June 2018, the Claimant met with David Bristow, a Contract Manager at Corps Security, to discuss the types of role that she was interested in performing. During that meeting she made it clear that she wanted a static role. As a result, a potential role with the Royal College of Nursing would not be suitable. At that stage, there was a possible receptionist role in Hammersmith, although it was subject to confirmation of sufficient funding. Even then she would need to interview for the role.

81. On 16 July 2018, Mr Bowen wrote to the Claimant again, inviting her to a further meeting on 20 July 2018 to discuss the potential for being offered other work. He followed it up with another email on 18 July 2018, listing current vacancies. Only one was in London, a receptionist role in Farringdon at the Respondent's Head Office. The role had only been available for two days, since 16 July 2018. It was not the same receptionist vacancy that the Claimant had identified in an email on 1 June 2018. That role had already been filled at that point, but not deleted due to poor administration, as Mr Bowen told the Claimant in a further email on 18 July 2018.

82. There was a general pattern, in relation to many of the vacancies identified by the Claimant, that many of the roles had either been filled or withdrawn, but the vacancy had not been removed. This was explained to the Claimant on 20 July 2018. She was told, as the Tribunal accepts, that there were only two roles that the Claimant had identified which were of potential relevance – the first, a Front of House Commissionaire role, involved excessive standing, and was therefore not suitable; in relation to the second, that of Security Shift Supervisor, which was the supervisory position at the Gherkin, the Claimant's application had not been shortlisted for interview, given the calibre of the candidates applying.

83. The intended meeting on 20 July 2018 did not take place, given the possibility that the Claimant could be interviewed for the receptionist role at Head Office.

84. On 30 July 2018, Mr Bowen emailed the Claimant to tell her that the employee who had submitted her resignation in relation to the receptionist role at Head Office had now retracted her resignation and intended to carry out the role for the foreseeable future. As a result, he told her that she was to attend a meeting on 3 August 2018 to discuss the extent to which there were viable alternative positions available.

85. At the meeting on 3 August 2018, she was told that there were limited opportunities to find her a suitable role. She was asked if she would be prepared to consider a zero hours contract, referred to a 'flexy contract'. She replied she would not be willing to consider such a contract. The conclusion of the meeting was that her employment would be terminated. This was confirmed in a letter dated 6 August 2018. The letter told her that she was entitled to two weeks' notice which would be paid in lieu of working her notice. Her last date of employment was 7 August 2018. The letter attached typed notes of the dismissal hearing. It offered the Claimant the right to appeal.

86. By that point, despite an extensive search, no vacancies had been identified as suitable for the Claimant given her particular requirements and experience. The Respondent had made reasonable attempts to find the Claimant an alternative role.

87. On 28 August 2018, the Claimant submitted her appeal against the dismissal decision. This was lodged outside the five working days deadline provided in the dismissal letter. Notwithstanding the delay, Mr Vasani considered her appeal on its merits at a hearing on 13 September 2018. In a dismissal appeal outcome letter dated 9 October 2018, he rejected the Claimant's appeal. Having reviewed the grounds of appeal, he considered that Mr Bowen took all the actions he could have taken in the circumstances to avoid the Claimant's dismissal.

Legal principles

Disability discrimination

(1) Definition of disability

88. In order to bring a claim for disability discrimination, the Claimant must establish she has a disability within the meaning given to that term in the Equality Act 2010.

89. The statutory definition of disability in Section 6 of the Equality Act 2010 is as follows :

> A physical or mental impairment which has a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities.

90. The Tribunal must assess whether this definition is satisfied as at the date of the alleged discrimination, by reference to the evidence at that point in time. The Tribunal is to deduce the extent of the impairment caused by the underlying condition, where possible, if the Claimant was not taking medication.

91. An impairment is long-term if it has lasted or is likely to last for at least 12 months. The phrase 'likely to last' means 'could well' last. An impairment is substantial if it is more than trivial. The focus is on what the Claimant cannot do, rather than on what she can do.

92. The Tribunal must have regard to the Secretary of State's Guidance on matters to be taken into account in determining questions relating to the definition of disability. Of relevance to the present case are the following paragraphs :

> A7 : A woman is obese. Her obesity in itself is not an impairment, but it causes breathing and mobility difficulties which substantially adversely affect her ability to walk … It is the effects of these impairments that need to be considered, rather than the underlying conditions themselves.
>
> B2 : The time taken by a person with an impairment to carry out normal day-to-day activity should be considered when considering whether the effect of the impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete an activity.
>
> B14 : A person with long-term depression is being treated by counselling. The effect of the treatment is to enable the person to undertake normal day to day activities, like shopping and going to work. If the effect of the treatment is disregarded, the person's impairment would have a substantial adverse effect on his ability to carry out normal day to day activities.

93. It is for the Claimant to prove, on the balance of probabilities, that she satisfies the definition of disability.

94. The Respondent accepts that the Claimant has a disability prompted by her back condition. It does not accept that her obesity in itself amounts to a disability. In *Walker v Sita Information Networking Computing Limited* UKEAT/0097/12/KN (EAT 08.02.13), Langstaff J (at paragraph 18) said that whilst obesity did not render a person disabled by itself, it may make it more likely that someone is disabled. On an evidential basis, it may permit a Tribunal more readily to conclude that the individual before them does indeed suffer from an impairment. The CJEU clarified in *Fag og Arbejde v Kommunernes Landsforening* [2015] ICR 322, that obesity could amount to a disability on particular facts. At paragraph 60, the CJEU stated that the statutory definition would be satisfied if the obesity of the worker hindered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical

conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.

(2) Direct discrimination

95. Section 13 of the Equality Act 2010 is worded as follows :

> (1) A person (A) discriminates against other (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

96. In a claim for direct disability discrimination, the Tribunal must determine whether the Claimant has been treated less favourably because of the Claimant's disability than how an actual or hypothetical comparator without the Claimant's disability would have been treated in equivalent circumstances. Here, no actual comparators are advanced. Rather the Claimant chooses to compare herself with how a hypothetical non-disabled employee would have been treated.

(3) Discrimination arising from disability

97. Section 15 Equality Act 2010 is worded as follows :

> (1) A person (A) discriminates against a disabled person (B) if-
>
> a. A treats B unfavourably because of something arising in consequence of B's disability; and
> b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

98. The first issue for the Tribunal to assess is whether the alleged unfavourable treatment was influenced to any significant extent by any consequences of the disability. This requires a focus on the reasoning in the mind of the individuals who were responsible for that treatment. The Tribunal needs to consider the conscious or unconscious thought processes of the alleged discriminator, keeping in mind that his actual motive in acting as he did is irrelevant. Further guidance is given at paragraph 31 of *Pnaiser v NHS England* [2016] ICR 170, to which the Tribunal has had regard.

99. In *York City Council v Grosset* [2018] ICR 1492, the Court of Appeal considered the extent of knowledge that was required under Section 15(1). In short, there is none beyond the fact of the disability. If there is a causal link between the consequences of the disability and the alleged unfavourable treatment, it is not necessary that Mr Bowen knew of that connection (see paragraph 39).

100. Section 15(2) provides a limited statutory defence. That is that there is no discrimination arising from disability if the Respondent shows that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability. However, as Sales LJ put it in *Grosset* "if the defendant does know that there is a disability, he would be wise to look into the matter more carefully before taking unfavourable action" (paragraph 47). By reference to an example at paragraph 5.9 of the EHRC Employment Code of Practice, he stated (at paragraph 51) that "it is not suggested that the employer has to be aware that the employee's loss of temper was due to her cancer, but only that the employer should be aware that she suffers from cancer (ie so that the employer cannot avail himself of the defence in subsection 15(2))". Here, in a claim under Section 15(1), if the Respondent knew that the Claimant suffered ongoing back and joint pain amounting to a disability, it is not necessary that the employer should also know of the other symptoms or their consequences (such as the need to attend hospital appointments).

101. If an unfavourable decision was influenced by any consequences of the disability, then under Section 15(1)(b), it is for the Respondent to show on the balance of probabilities that the decision was justified. That requires that the Tribunal form its own assessment of whether the decision was a proportionate means of achieving a legitimate aim. This is a different analysis from the range of reasonable responses approach required when considering the unfair dismissal claim.

102. In assessing proportionality, the Tribunal must assess whether on a fair and detailed analysis of the working practices and business considerations involved, the decision was reasonably necessary in order to achieve the legitimate aim (*Hardys & Hansons Plc v Lax* [2005] ICR 1565).

(4) Harassment

103. Section 26 of the Equality Act 2010 is worded as follows :

> (1) A person (A) harasses another (B) if-
>
> a. A engages in unwanted conduct related to a relevant protected characteristic, and
> b. The conduct has the purpose or effect of –
>
> i. Violating B's dignity, or
> ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B
>
> (4) In deciding whether conduct has the effect referred to in (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 conduct to have that effect

104. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally (*Munchkins Restaurant Ltd v Karmazyn and others* EAT 0359/09). The Equality and Human Rights Commission : Code of Practice on Employment (2011) states as follows :

> 7.7. Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.
>
> 7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not meant that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

105. When considering whether a comment was related to a protected characteristic under Section 26 Equality Act 2010, this covers a wider category of conduct than conduct "because of a protected characteristic" under Section 13 Equality Act 2010. A broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (*Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester* [2018] UKEAT/0176/17).

106. In assessing whether the conduct met the proscribed threshold, Tribunals should not place too much weight on the timing of any objection (*Weeks v Newham College of Further Education* UKEAT/0630/11). Whether it was reasonable for the Claimant to regard treatment as amounting to treatment that violates her dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336). In that case the EAT said :

> Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended.

(5) Victimisation

107. Section 27 of the Equality Act 2010 is worded as follows :

> (1) A person 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

108. Under Section 27(2)(d) making an allegation (whether or not express) that A or another person has contravened the Equality Act is a protected act.

109. In order to succeed with a claim of victimisation, there must be a sufficient causal connection between a protected act and the alleged detriment. In the present case, the Respondent accepts that the Claimant did a protected act, namely she alleged in her grievance dated 25 August 2017 that the Respondent was guilty of disability related discrimination.

(6) General

110. In considering whether the treatment was because of a relevant characteristic (section 13), discrimination arising from disability (section 15), related to a relevant characteristic (section 26), or because of a protected act (section 27), the focus is on the mental processes of the person who made the decision said to amount to discrimination. The Tribunal should consider whether that person consciously or unconsciously was influenced to a significant (ie a non-trivial) extent by the Claimant's disability, by its consequences or by a protected act. Their motive is irrelevant.

(7) Burden of proof

111. Section 136(2) of the Equality Act 2010 is worded as follows :

> (2) If there are facts from which the Court could decide in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred;
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

112. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).

113. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that the Claimant's dismissal was because of her disability or because she had done a protected act.

114. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 56). In *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865, Elias J at paragraph 15 said that the mere fact that an unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more.

115. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic or protected act formed no part of the reasoning for treatment.

(8) Time limits - discrimination

116. Under Section 123 of the Equality Act 2010, proceedings on a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. The three-month time for bringing Tribunal proceedings is paused during early conciliation such that the period starting with the day after early conciliation is initiated and ending with the day of the early conciliation certificate does not count (Section 140B, Equality Act 2010).

117. Conduct extending over a period is to be treated as done at the end of the period (Section 123(3) Equality Act 2010). There is conduct extending over a period If there is a continuing discriminatory state of affairs as opposed to a succession of unconnected or isolated specific acts. If so, then the three-month time period for bringing a claim only runs from the date on which the state of affairs ends (*Metropolitan Police Commissioner v Hendricks* [2003] ICR 530).

118. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim if it was brought within such other period as the Tribunal considers just and equitable. Considering a claim brought outside the three-month time limit (as extended by the early conciliation provisions) is the exception rather than the norm. Time limits are exercised strictly in employment and industrial cases. The onus is on the Claimant to establish that it is just and equitable for time to be extended (paragraph 25 of *Robertson v Bexley Community Centre (t/a Leisure Link)* [2003] IRLR 434, CA).

119. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the Respondent (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 at paragraph 19). However :

> There is no … requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard (*Abertawe* at para 25)

120. It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

Unfair dismissal

121. The fact that a third-party client is insisting that an employer removes its employee for their site, is a potentially fair reason for the employee's subsequent dismissal, being some other substantial reason justifying dismissal (*Dobie v Burns International Security Services (UK) Limited* [1984] ICR 812). The test is whether the dismissal has caused the employee to suffer an injustice at the hands of the employer, and if so the extent of the injustice. As Sir John Donaldson said :

> For example, [the employer] will clearly have to take account of the length of time during which the employee has been employed by him, the satisfactoriness or otherwise of the employee's service, the difficulties which may face the employee in obtaining other employment, and matters of that sort. None of these is decisive, but they are all matters of which he has to take account and they are all matters which affect the justice or injustice to the employee of being dismissed.

122. In *Henderson v Connect (Tyneside) Limited* [2010] IRLR 466, Underhill J (as he then was) said this, at paragraph 13 :

> It must follow from the language of s. 98(4) that if the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client – most obviously, by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee – but has failed, any eventual dismissal will be fair: the outcome may remain unjust, but that is not the result of any unreasonableness on the part of the employer. That may seem a harsh conclusion; but it would of course be equally harsh for the employer to have to bear the consequences of the client's behaviour, and Parliament has not chosen to create any kind of mechanism for imposing vicarious liability or third-party responsibility for unfair dismissal.

123. In a case where the potentially fair reason for dismissal is the stance adopted by a third-party client, the Tribunal will consider whether the decision by the Respondent to treat this as a sufficient basis for dismissal fell within the band of reasonable responses. If a reasonable employer could have regarded it as a sufficient reason for dismissal, then it is still a fair dismissal even if other reasonable employers may have waited longer or carried out more extensive enquiries into the availability of other potentially suitable roles.

Conclusions: Disability Discrimination

Disability

124. Given the Tribunal's findings of fact as to the Claimant's state of health, the Tribunal concludes that the Claimant satisfied the statutory definition of a disabled person in Section 6 of the Equality Act 2010 throughout the period spanning the Claimant's complaints. The Claimant was a disabled person not just in relation to

her symptoms of osteoarthritis, but given the aggregate substantial and long-term adverse effect of all her impairments on her normal day to day activities.

125. In her written closing submissions on the Respondent's behalf, Ms Tharoo focuses on the issue of disability at some length, both in relation to the extent of the Claimant's disability and the Respondent's knowledge of that disability. Her argument is that obesity in itself is not a disability, and the Tribunal should focus on the extent of the impairment rather than the cause. The Tribunal agrees. The extent of the Claimant's impairments, from whatever cause, including but not limited to her obesity, renders her disabled, as defined in Section 6, Equality Act 2010. The Tribunal disagrees with the Respondent's further proposition, advanced in Ms Tharoo's written closing submissions, that the Claimant was only disabled by reason of her osteoarthritis, but not her obesity. She was disabled by reason of the varied physical and mental impairments recorded by the Tribunal in its Factual Findings above, irrespective of their precise medical causes.

126. So far as the Respondent's knowledge of the Claimant's impairments is concerned, and thus of the extent of her disability, it is likely that this will have varied amongst the Respondent's employees, and those of its predecessor, Axis. Fellow security officers and supervisors are likely to have known of her reduced mobility, limiting the scope of the tasks she could perform, and are likely to have ascribed this to her obesity, rightly or wrongly. This is a reasonable inference from the unsympathetic reaction from Mr Riley and Mr O'Dell to the difficulties she experienced when working in the North Loading Bay on 3 February 2017, and the likelihood that the events on that day would have been the subject of discussion with other security officers and supervisors. It is difficult for the Respondent to rebut such an inference in circumstances where it has not called any of her fellow security officers or supervisors during her time at Axis, to give evidence before the Tribunal.

127. Ordinarily, a line manager would know more about their employee's health and fitness for work than her colleagues, as a result of receiving occupational health reports following referrals. However, the Claimant was reluctant to share information about her fitness for work and reluctant to agree to a referral to occupational health. This inevitably limited the extent to which the Respondent could be expected to have a detailed knowledge of the full range of her impairments. On receipt of the Health Questionnaire dated 21 August 2017, the Respondent as an organisation had further information about the Claimant's health, which the Claimant stated she regarded as disability. At that point the extent of the Respondent's knowledge of these impairments was obviously greater, given this more detailed information. The extent of the Respondent's knowledge as a result of the Health Questionnaire is not diminished, from a legal perspective, by the Respondent's decision to place the Health Questionnaire on her personnel file, without disclosing its contents to anyone.

Harassment

128. Each of the alleged acts of harassment is considered in the order in which they were listed in the final list of issues, even though these incidents were not listed in chronological order.

(i) In 2017, the Claimant's colleagues colluded to make extensive incorrect allegations with a view to getting the Claimant dismissed, resulting in disciplinary proceedings being commenced against her

129. The Tribunal has found in its Factual Findings that there was no collusion in the way in which the witness statements were prepared for the disciplinary proceedings, or any other evidence of collusion in relation to that disciplinary process. As a result, this alleged act of harassment fails, because it did not happen.

(ii) Thereafter, the Respondent failing to take any action against the perpetrators when the complaints against the Claimant were dismissed

130. There is no evidence that the Respondent took any action against those who considered the Claimant should face disciplinary sanctions. However because, on the Tribunals findings, these individuals were not colluding to get the Claimant dismissed, there is no basis for the Tribunal to consider them guilty of misconduct meriting disciplinary action. Therefore, a failure to take disciplinary action against these individuals was not capable of being unwanted conduct. In any event, such a failure did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

(iii) While the Claimant was suspended pending the disciplinary hearing, destroying and damaging personal items including her uniform

131. The Tribunal has found that the Claimant's personal items were destroyed or damaged whilst she was suspended. This was clearly unwanted conduct. However, this was not conduct which was related to her disability. It was conduct which was the result of the deep clean of the offices, including the area where the Claimant worked, in circumstances where storing personal items was not permitted and therefore not expected. Mr Williams arranged for the jacket to be cleaned and returned to her, which is action inconsistent with seeking to disadvantage the Claimant during her absence.

132. The loss and damage of the Claimant's items, coupled with her status as a disabled person, is insufficient to establish a prima facie case that this conduct was related to her disability in the absence of a non-discriminatory explanation. The most likely explanation for the treatment is that the cleaners made a mistake whilst undertaking the deep clean. This was therefore not harassment related to the Claimant's disability, contrary to Section 26 of the Equality Act 2010. It is therefore not necessary to determine whether this conduct satisfied the requirements of Section 26(1)(b), namely being conduct which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment - referred to hereafter as the proscribed environment.

(iv) Removing her from all shifts on the rota during her suspension

133. Although the Claimant was removed from the updated rota for May 2017 during the period she was suspended, and did not feature on the June 2017 rota until her suspension was lifted, the Claimant should not have been surprised at this. Such a rota change in these circumstances is readily explicable. If an employee is not available to work for whatever reason and this is likely to remain the position in the near future, it is sensible not to include that person's name on the rota. Otherwise the rota records that person as being expected at work when this is not the case. Their name can always be added and/or the rota amended if the suspension is lifted. Even if this was unwanted conduct from the Claimant's point of view, any objection to the rota change was unreasonable.

134. Furthermore, there is no evidence that this conduct was inconsistent with the way any non-disabled employees were treated if they were suspended. As a result, the Claimant has not established a prima facie case that her removal from the rota was related to her disability. The Claimant's name was removed from the rota because she was suspended and therefore would not be working any shifts, a decision which was not related to her disability.

135. In addition, exclusion from a rota during a period when the Claimant was suspended is not conduct which violated the Claimant's dignity nor did it create the proscribed environment detailed in Section 26(1)(b)(ii). The Tribunal applies the passage from *Dhaliwal* cited above. This was not harassment in any sense, nor was it harassment related to the Claimant's disability.

(v) In February 2017, not permitting her to skip breaks to facilitate an early departure and preventing her from attending hospital appointments without taking annual leave

136. The Tribunal has found that all employers were not generally permitted to leave work before the end of their shift, as confirmed in the email from the Claimant to her union representative on 3 March 2017. Therefore, if this was also the stance in relation to the Claimant's shifts, she was treated in the same way as all other comparable staff. As a result, the Tribunal rejects the factual assumption on which the first part of this allegation is founded.

137. The Claimant was told on 10 February 2017 that requests for time off work for medical matters had to be made to Peter Morris, the Assistant Account Manager. Apart from an appointment for a blood test on 20 February 2017, the Claimant has not identified particular examples of dates when she was refused time off work to attend medical appointments without taking annual leave. Even in that specific instance, the Claimant raised it with Mr Williams, but there is no evidence she spoke to Mr Morris as she had been instructed to do. Therefore, there is no evidence from the Claimant that Mr Morris refused to allow her to have time off or insisted it be taken as annual leave.

138. In relation to that particular occasion, the Tribunal finds that it was her choice to ask to take the day as annual leave, rather than request paid time off on medical grounds.

139. Subsequently, by early March 2017, according to the Claimant's contemporaneous account given to Mr Coleman, Axis appears to have relaxed its stance that annual leave needed to be taken where absence was sought for medical appointments.

140. Further, there is no evidence from which an inference could be drawn that the Respondent's stance in relation to the Claimant's time off for medical appointments was related to the Claimant's disability. The same stance would have been taken where a non-disabled employee had requested time off to attend a medical appointment.

141. Finally, the Respondent's action did not violate the Claimant's dignity or create the proscribed environment. This complaint of harassment fails.

(vi) In February 2017, two managers, Mr Riley and Mr O'Dell constantly shouting at the Claimant and making her cover a post they knew would irritate her back injury in the full knowledge that this was a post she was not expected to cover; Mr O'Dell thereafter taunting her, calling her incompetent and saying that he would make sure she worked that post permanently

142. The Tribunal has made findings about this incident in its Factual Findings. It relates to a single occasion on 3 February 2017. The conduct was unwanted conduct. Having regard to the Claimant's perception, it was conduct which had the effect of violating her dignity and creating a hostile and offensive environment. The Claimant's perception is clear from her email of complaint to Mr Williams on 7 February 2017. The Tribunal concludes that the conduct was related to her disability, in that it was related to one of her physical impairments, the extent of her back pain, its impact on her lack of mobility and its effect on her ability to perform all aspects of the role she had been asked to carry out at the North Loading Bay.

143. It therefore amounts to harassment related to her disability.

(vii) In June 2017 receiving an email at work at her personal office email confirming her registration to WeightWatchers with a unique username "fatbitchforever999" and the Respondent failing to do anything about it

144. The Tribunal has found as a fact that this WeightWatchers account was created by an Axis employee based at Hear East. Self-evidently, it was unwanted conduct. It was specifically directed at the Claimant and had the purpose and effect of violating her dignity and creating a humiliating and offensive environment. Adopting the broader approach to causation indicated by the EAT in *Bakkali*, the Tribunal finds that this conduct was related to her disability. By its very nature, it was evidently related to her obesity. Whilst this, in itself, is an insufficient feature linking the conduct to her disability, the Tribunal infers from the surrounding context

that the Claimant has shown a prima facie case that the conduct was at least in part prompted by her reduced mobility and restricted activities, which could have inconvenienced her colleagues and could have been regarded as the result of her obesity. These same restrictions had led to the conduct from colleagues on 3 February 2017 which the Tribunal has already found amounts to harassment related to her disability. Therefore, the burden of proof shifts to the Respondent.

145. In the absence of any non-discriminatory explanation from Axis staff, the Respondent has failed to rebut the inference of discriminatory harassment that must otherwise be drawn.

146. So far as the response from Axis to her complaint is concerned, the Tribunal does not find that this amounted to discriminatory harassment. When the Claimant complained about receiving the email, Mr Cox responded the same day. By that point, he told her he had already checked with the server provider to see if the email had originated from any of the Axis computers. He suggested that the Claimant should call 101 and inform the Police about the email. Without knowing the identity of the culprit, it was difficult for Axis to do much, if anything more. That response did not violate the Claimant's dignity nor did it create the proscribed environment.

(viii) In June 2017 a colleague Michael Brabon sending a sexually explicit email to another colleague Dan purporting to be from the Claimant and the Respondent again failing to do anything about it

147. This was clearly unwanted conduct. For the same reasons as in relation to the previous allegation, and in the absence of any non-discriminatory explanation from Mr Brabon, the Tribunal infers that it was related to the Claimant's disability. It was part of a course of conduct from her colleagues in which she was being mocked, at least in part, for the restrictions on her mobility. Having regard to the circumstances in which it was created, and the Claimant's perception, it had the purpose and effect of violating her dignity and creating a degrading, humiliating and offensive environment, in wrongly suggesting that the Claimant wanted to sleep with a colleague named Dan.

148. It is therefore a further act of harassment.

149. So far as Axis's reaction is concerned, for which the Respondent is potentially liable, Mr Brabon was treated leniently. He was not disciplined, and the only action taken was that a personal file note was placed on his personnel file. Whilst the Claimant would have wanted a more severe sanction to be given to Mr Brabon, the Tribunal does not regard this particular management response as unwanted conduct which violated the Claimant's dignity or created the proscribed environment. Further, there is an insufficient evidential basis to infer that the lenient response was related to the Claimant's disability. Discriminatory harassment in this respect is therefore rejected.

(ix) On 22 and 23 June 2017, all the Claimant's emails being deleted including an email she sent her manager reporting the WeightWatchers incident and the Respondent again failing to do anything about it

150. The Tribunal finds that the act of deleting the Claimant's emails was unwanted conduct. Given that these emails included personal emails, and that there was no good reason for their deletion, this was conduct which had the effect of creating a hostile environment for the Claimant. This was the effect, even though the Claimant was able to restore her emails, and even though others might use also use the Dock Office computer. For the same reasons as already given in relation to previous alleged acts of harassment, the Tribunal infers that it was related to the Claimant's disability. It is therefore a further act of discriminatory harassment.

151. So far as the reaction from Axis is concerned, when the Claimant raised these issues, the Tribunal does not find that the reaction amounts to discriminatory harassment. Although the Claimant would have wanted disciplinary action to be taken, it was not necessarily clear who had deleted the emails. Further, the Claimant should not have been storing personal emails on the computer in her office, which was contrary to Axis Security's policy. The failure to take disciplinary action in relation to the act of deleting her emails was not unwanted conduct that violated her dignity or created a proscribed environment. There is an insufficient evidential basis to infer it was related to the Claimant's disability.

(x) In August 2017 blacklisting the Claimant's car from the car park so she had to pay the £18 fee herself.

152. The Tribunal has found that the treatment that the Claimant received in relation to car parking was not inconsistent with the experiences of other employees. There were not infrequent problems in accessing the car park around this time. In any event, the car park was operated by Here East, rather than by Axis Security. As a result, the conduct experienced by the Claimant was not related to her disability, and therefore not discriminatory harassment.

(xi) In August 2017 sabotaging the Claimant's duty post which included different keys to different mailbox servers and swapping around the keys as part of the campaign to harass her

153. The Tribunal has found that someone accessed the Dock Office keys for mail boxes and shuffled them. When this was raised with Peter Cox, Mr Cox came to the office himself and reassigned the keys to their correct locations, enabling the problem to be quickly resolved.

154. As already stated, this was designed to inconvenience and embarrass the Claimant and was carried out by the same perpetrator or perpetrators who were responsible for the inappropriate email to Dan and the WeightWatchers registration. It was unwanted conduct, carried out with the purpose of creating a hostile environment, by making her job more difficult and unpredictable. In the absence of a non-discriminatory explanation, the inference is that it was, at least in part, related

to the Claimant's physical impairment at work, and therefore related to her disability. It was therefore discriminatory harassment.

(xii) Taking from 1 September 2017 until May 2018 to complete the grievance procedure commenced on 25 August 2017 following on from her further suspension on 30 August 2017 by the previous contractor Axis Security after she raised the grievance

155. The Tribunal does not consider that the lengthy timespan of the grievance procedure and the subsequent appeal was an act of discriminatory harassment.

156. The grievance was issued on 25 August 2017, and the Claimant was sent the outcome letter on 21 November 2017. Part of the explanation for the delay is the TUPE transfer of the Claimant's employment from Axis to the Respondent; part due to the grievance initially being assigned to Francesca Halton-Woodward before being passed to Mr Bowen, and part due to the wide scope of the grievance, largely mirroring the harassment allegations in these proceedings.

157. There is no evidence from which the Tribunal could infer that the delay was related to the Claimant's disability. In any event, having heard evidence from Mr Bowen, the Tribunal accepts that the Claimant's disability did not form part of the reason for the delay. Mr Bowen had not seen the Claimant's medical forms or even met her when he produced the grievance outcome letter.

158. In any event, the Tribunal is not persuaded that the delay violated the Claimant's dignity or created the proscribed environment, which is an essential component of a successful harassment claim.

159. So far as the grievance appeal is concerned, this was initiated on 18 December 2017. There was no significant delay in Mr Vasani's response to the Claimant inviting her to a grievance appeal hearing and convening that hearing for 12 January 2018. There was a significant delay from 12 January 2018 until 9 May 2018 when the grievance appeal outcome letter was sent to the Claimant. The Tribunal has dealt with the explanation for the delay in its Factual Findings, which is only a partial explanation. However, the Tribunal does not consider that there is a sufficient evidential basis for inferring that the delay in dealing with the grievance appeal related to the Claimant's disability. Having heard evidence given to the Tribunal by Mr Vasani, the Tribunal accepts that the Claimant's disability was not a contributing factor in the delay in resolving the Claimant's appeal.

160. Further, the Tribunal is not persuaded that the delay violated the Claimant's dignity or created the proscribed environment.

161. There are no other legal issues for the Tribunal to resolve in relation to the grievance, although Mr Adio spent a long time in cross examination addressing various aspects of the grievance process.

Harassment summary

162. In summary, the treatment of the Claimant did amount to discriminatory harassment in the five separate respects set out above. However, the Tribunal only has jurisdiction to award the Claimant a remedy in relation to those acts of discriminatory harassment if the harassment claim has been brought with the required statutory time periods.

163. It has been suggested that the inappropriate email sent on 21 June 2017 from the Claimant's email address may also amount to an act of sexual harassment. No such claim is raised on the Claimant's claim forms and no application has been made to amend the claim to include such an allegation. As a result, such an argument does not need to be addressed.

Direct discrimination

Skipping breaks/time off for medical appointments

164. The Tribunal has found in its Factual Findings that there is no basis for criticising Axis Security in relation to the time at which the Claimant was permitted to go home, and whether the Claimant was allowed to leave early if she had skipped her breaks. In addition, the Claimant has not identified any instance where she was unreasonably refused time off for a medical appointment, or where she was required to take annual leave to attend for treatment in circumstances where others would have been permitted the time off without needing to take annual leave.

165. No actual or evidential comparator has been identified to show that the Claimant was being treated unfavourably. The Claimant was treated no differently from any other security officer. This direct discrimination claim therefore fails.

Dismissal

166. The Claimant alleges that her dismissal was an act of direct discrimination because of her disability. The Tribunal disagrees. There is no evidence from which the Tribunal can infer that Mr Bowen's decision to dismiss the Claimant was at least in part because of her disability. The Respondent delayed almost seven months between the date on which the client at Here East had indicated that it no longer wanted the Claimant on site and her dismissal, even though there was no current role for the Claimant to perform.

167. During that time, it went to significant lengths to try to find the Claimant an alternative role, ultimately without success. Even if the burden of proof were to shift to the Respondent (which in our view it does not), the Respondent has established on the balance of probabilities, a non-discriminatory explanation – that the Claimant could no longer continue with her substantive role at Here East, and no other role had been identified.

Discrimination arising from disability

Attending hospital appointments

168. The Claimant did need to attend hospital appointments during working hours. This was a consequence of her various medical conditions that together amounted to a disability. The only specific instance identified by the Claimant was a hospital appointment to have a blood test on Monday 20 February 2017 for which, on Thursday 16 February 2017, the Claimant requested she be permitted time off. She was told that she would need to take it as annual leave, or unpaid leave.

169. This isolated instance of needing to take annual leave or unpaid leave was unfavourable treatment in comparison with those who did not have to attend hospital appointments.

170. There is no evidence from the Respondent showing that, in relation to 20 February 2017, there was a legitimate aim in requiring the Claimant to take annual leave and that, in her case, asking her to take the time off as annual leave or unpaid leave was a proportionate means of achieving that aim.

171. Therefore, subject to the issue of time limits, on the evidence before the Tribunal, this was discrimination arising from disability contrary to Section 15 Equality Act 2010.

Being required to carry out duties in the North Loading Bay

172. This allegation of discrimination arising from disability is misconceived. The requirement that the Claimant carry out duties in the North Loading Bay was not something arising in consequence of her disability. It arose because she had been asked to cover duties on this part of the site.

173. The essence of the Claimant's complaint about this incident concerns the conduct of Mr Riley and Mr O'Dell when she was assigned to work in this area – which the Tribunal has found amounted to harassment – rather than the fact she was asked to work in that location in the first place. This allegation therefore fails.

Victimisation

174. The Claimant's grievance was a protected act under Section 27(2)(d) Equality Act 2010, in that it included an allegation of disability related discrimination. However, there is no evidence supporting any potential inference that this reference to disability related discrimination in the grievance influenced Mr Bowen's decision to dismiss the Claimant almost a year later. There is no reference in the dismissal letter to the grievance or to the allegations of discrimination made in the grievance. Nor is there any reference to the grievance or to allegations of discrimination in any of the correspondence between the Claimant and Mr Bowen in advance of the dismissal meeting or in the notes of the dismissal meeting itself.

175. The Tribunal accepts the Respondent's non-discriminatory explanation, namely that the Claimant was dismissed because no suitable role had yet been identified seven months after the client had indicated that the Claimant could not return to their site at Here East.

176. The victimisation claim therefore fails.

Time limits

(1) Impact of Early Conciliation on primary time limit

177. The Claimant presented her first claim to the Tribunal on 13 June 2018 in which she made allegations of harassment and discrimination arising from disability. This had been preceded by a period of Early Conciliation from 15 May 2018 to 8 June 2018. The effect is to pause the three-month time limit for a period of 24 days. As a result, only acts occurring on or after 17 February 2018 are within the primary three-month time limit. Earlier acts are out of time.

178. Of the complaints raised in those proceedings, only the complaints relating the duration of the grievance process are in time, given that the grievance concluded on 9 May 2018, unless the earlier complaints can be said to be part of conduct extending over a period.

(2) Conduct extending over a period

Harassment

179. Insofar as the Claimant complains of the conduct of her colleagues alleged to be harassment, the Tribunal concludes that the five proven incidents of harassment amount to a discriminatory state of affairs from 3 February 2017 until the last proven incident of harassment, which was the interference with the Dock Office keys on 26 July 2017. The common thread is that although there were different individuals involved, the conduct was all carried out by her immediate colleagues or (in the case of Nigel Riley) by her supervisor, all employed by Axis and all based at the Here East site. The conduct was directed at her, united by the common theme of mocking her for her impaired mobility manifesting itself in her obesity. This was conduct extending over a period extending until 26 July 2017.

180. The result is that the Claimant's complaint about this conduct extending over a period has been issued over six and a half months out of time.

Discrimination arising from disability

181. The sole potentially successful claim of discrimination arising from disability relates to 16 February 2017. This claim is almost exactly a year out of time.

(3) Just and Equitable Extension

Harassment

182. In relation to the harassment claims, the Tribunal does not consider it would be just and equitable to extend the primary time period by over six and a half months. As set out above, the onus is on the Claimant to establish why the primary time should be extended, and an extension is the exception rather than the norm. Although the issue of time limits was identified at the Preliminary Hearing conducted by Employment Judge Gilbert on 24 September 2018, surprisingly the Claimant has chosen not to address the delay in any of her witness statements which were admitted into evidence. There is therefore no explanation advanced by the Claimant to explain the significant delay. She has not sought to rely on any mental impairment to justify why she did not issue proceedings earlier. She was not signed off work on medical grounds at any point before her dismissal.

183. This omission to provide an explanation may be less significant in a case where the Claimant had been acted throughout without any advice. However here, from around March 2017 onwards, the Claimant had assistance from her trade union representative, Peter Coleman. Even if the Claimant herself did not know about the time limits for making complaints to Employment Tribunals, the Tribunal infers that this would or should have been known by Mr Coleman. In addition, the Claimant has been assisted for much of the proceedings by here by Mr Adio, Trainee Solicitor, who first represented her at the hearing before Employment Judge Gilbert on 24 September 2018.

184. The Respondent has been prejudiced by the delay. Although the Claimant's harassment complaints were, in large part, raised in the Claimant's grievance on 25 August 2017, there is a significant difference between investigating and responding to a grievance, and investigating and responding to an employment tribunal claim.

185. By the time the proceedings were issued, the Tribunal has been told that most of the individuals criticised in the Claimant's claims (with the exception of Mr Bowen and Mr Vasani) were no longer employed by the Respondent. That has hindered the Respondent's ability to call them as witnesses. Furthermore, as an organisation, the Respondent was not involved in matters prior to September 2017, because at that time the Claimant's employer was Axis. Therefore the Respondent would not ordinarily retain the same degree of documentary records in relation to the earlier point in time with which the harassment claim is largely concerned.

Discrimination arising from disability

186. It would not be just and equitable to extend time to enable the Claimant to bring her complaint of discrimination arising from disability contrary to Section 15 Equality Act in relation to the requirement that the Claimant take annual or unpaid leave to attend a medical appointment. This complaint is about a year out of time. No explanation has been provided for the very substantial delay. The Respondent is prejudiced by the delay, in that it does not have evidence before the Tribunal to explain why Mr Morris was not willing to grant the Claimant additional paid time off

work to attend this appointment. In those circumstances, the Respondent is unable to justify the potential discrimination.

Conclusions : Unfair Dismissal

187. The reason or the principal reason for the Claimant's dismissal was that the Respondent's client, Here East, had repeated refused to allow her to return to the Here East site when her suspension was lifted, following the end of the disciplinary process. That remained the Respondent's position at the point, several months later, when the Claimant was dismissed. As a result, the Claimant was unable to carry out the specific role for which she was employed by the Respondent. It is a potentially fair reason, being some other substantial reason of a kind such as to justify dismissal.

188. The Respondent acted reasonably in treating that reason as a sufficient reason for the Claimant's dismissal. The Respondent had contacted Here East's representative on three occasions, asking that the Claimant should be allowed to return to the Here East site. This included sending them the specific questions that the Claimant wanted to raise about Here East's concerns. The Respondent had waited from 21 November 2017 until 3 August 2018 before terminating the Claimant's employment. Having initially attempted to persuade Here East to allow the Claimant to return, thereafter, it actively searched to see if there were other potentially suitable jobs available for the Claimant, having discussed the Claimant's requirements with her. The Claimant was London based and was limited in her willingness to travel and her ability to work outside normal daytime working hours. The Respondent ultimately offered the Claimant a potential role, albeit on a zero hours contract. The Claimant declined to consider this role.

189. In these circumstances, the Respondent's decision to dismiss the Claimant fell within the band of reasonable responses. The Claimant's dismissal was not unfair.

Conclusion

190. The Tribunal's conclusion is that all the Claimant's claims fail for the Reasons given. In closing submissions, Mr Adio sought to raise new claims of automatic unfair dismissal because of a transfer of undertaking, liability arising out of contract under the Unfair Contract Terms Act 1977, and failing to provide a statement of employment particulars. Those claims were not identified in the final list of issues at the start of the Final Hearing and do not require determination.

Employment Judge Gardiner

23 December 2019