Case Numbers: 1810014/2018
1810015/2018

EMPLOYMENT TRIBUNALS

Claimants:	**Mr M R Sabir** **Mr M A Sabir**		
Respondent:	**Schaeffler (UK) Limited**		
Heard at:	**Sheffield**	**On:**	**3, 4 and 5 April 2019** **3 and 4 February 2020** **5 February 2020 (in chambers)**
Before:	**Employment Judge Brain** **Mr G Harker** **Mrs S Robinson**		

Representation
Claimant: Mr P Morgan of Counsel
Respondent: Mr P Sandeman, Solicitor

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:

a. The claimants' complaints of harassment (brought under sections 26 and 40 of the Equality Act 2010) based upon the comments made by three of the claimants' work colleagues (as set out in paragraph 10.1, 10.3 and 10.4 of the reasons below) were presented outside the time limit provided for by section 123 of the 2010 Act.

b. It is just and equitable to extend time to enable the Tribunal to consider the complaints referred to in paragraph a.

c. The claimants' complaints of harassment based upon the comments referred to in paragraph 10 of the reasons below succeed in part (to the extent set out in paragraph 186).

d. The claimants' complaints of harassment (brought under sections 26 and 40 of the Equality Act 2010) about the handling by the respondent of the claimants' grievance (that was received by the respondent on 15 March 2018) fails and stands dismissed.

e. The complaint of victimisation (brought under sections 27 and 39(4) of the 2010 Act) fails and stands dismissed.

REASONS

1. Following the receipt of each party's helpful submissions at the close of the case, the Tribunal reserved its Judgment. We now set out the reasons for the Judgment that we have reached.

Introduction

2. This is the second set of proceedings brought by the claimants against the respondent. The first set of proceedings (with case numbers 1801155/2016 and 1801156/2016) were heard by the Tribunal during the second half of 2018. For convenience, we shall now refer to the instant case as *"the second claim"* and to the earlier proceedings as *"the first claim"*.

3. At the outset of the hearing of the first claim the claimants made an application to amend their claim. This amendment application was refused by the Tribunal. On 30 August 2018 the claimants presented the second claim to the Employment Tribunal.

4. The amendment application made during the currency of the hearing of the first claim sought to pursue a complaint of harassment. The second claim comprises a complaint of harassment and covers much the same ground as the failed amendment application in the first claim. In addition, in the second claim the claimants have brought a complaint of victimisation.

5. The second claim benefited from a case management preliminary hearing. This was presided over by the Employment Judge and took place on 1 November 2018. It was common ground that it was consistent with the overriding objective in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 for the second claim to be heard by the same panel as had heard the first claim. This is because the complex factual history forming the background to the second claim was familiar to the panel. The reasons for the Judgment that we have reached for the second claim must therefore be read in conjunction with the reasons for the Reserved Judgment reached in the first claim.

6. The second claim arises out of the respondent's attempts to recruit support workers to assist the claimants to return to their substantive roles. The claimants say that they suffered harassment (as defined by section 26 of the Equality Act 2010) at the two meetings which were held on 8 March 2018 and which were arranged by the respondent in an endeavour to recruit support workers from the internal workforce. Arising from those meetings, the claimants raised a grievance and an appeal against the rejection of their grievance. The respondent's dealings with the claimants' grievance and grievance appeal formed the basis of additional allegations of harassment and victimisation (within the meaning of section 27 of the 2010 Act). Harassment and victimisation are made unlawful in the workplace pursuant to the provisions of section 40 and 39(4) of the 2010 Act respectively.

7. As we say, the history of the matter leading to the meetings of 8 March 2018 may be found in the reasons for the Reserved Judgment upon the first claim. We refer in particular to paragraphs 213 to 232. The findings of fact about the claimant's grievance and the procedure that was followed may be found at paragraphs 237 to 245.

8. The first claim was not, of course, concerned with the complaints of harassment and victimisation brought in the second claim. It was common ground therefore that additional evidence would have to be given by each side upon matters aired already in evidence as part of the first claim. The minute of the case management preliminary hearing held on 1 November 2018 recorded (at paragraph 9) that the Tribunal *"will be astute to a party who has already given evidence impermissibly seeking to re-visit evidence given before the Tribunal when the first claim was heard earlier this year".* This passage became pertinent when, upon the first morning of the hearing of the second claim, Mr Sandeman sought the strike out of parts of the claimants' witness statements upon the basis that they sought to re-visit matters that had already been aired in the first claim. In the event, the strike out application was not pursued, the Tribunal directing that those parts of the claimants' witness statements to which Mr Sandeman took objection were simply repetition of matters which the Tribunal had heard already in the first claim and of which the Tribunal had notice in any event. Further, the Tribunal directed that no part of the evidence heard as part of the second claim would form the basis of the Judgment that had already been reached in the first claim.

9. On 1 November 2018 the claimants were directed to file and serve further and better particulars of paragraph 9 of the grounds of the second claim. Paragraph 9 sets out (without attribution to any individual) the comments allegedly made by members of staff which forms the basis of part of the harassment claim.

10. The claimants complied with this direction. It is worth setting out the further particulars in full:

1. Kelly Wheatley

- *"What is in it for us" and "why should we do the role" in a loud voice.*
- *Kelly said angrily "why do I get moved around?"*
- *"Why should you remain in your old roles!"*
- *"Why do you get special treatment!"*
- *"Why do they have assisted technology?"*
- *"Why do they have taxis?"*

2. Jamie Scott

- *Asked question about our past, our high performance and our technical know-how, and our team performance.*
- *"Why we were working daylight hours".*
- *"Before going off work it was all about you. Now you're saying it's all about us".*

3. Karen Broadhead

- *"Why we were getting special treatment?"*

- *"Why we could not work full-time?"*
- *"You are going part-time because you are getting disability benefits!"*

4. Rachael Bell

- *"You are more dangerous now you have the eye condition".*
- *"You should stay in your alternative role".*
- *"Be thankful for having a job".*

11. The Tribunal heard evidence from the claimants. Mohammed Alyas Sabir gave evidence first. His witness statement was adopted by Mohammed Riaz Sabir. It was agreed that Mohammed Riaz Sabir may give supplemental evidence upon several points that arose from his brother's evidence and be cross-examined upon those. No point will be taken against the respondent arising from a failure to cross-examine Mohammed Riaz Sabir upon all of the issues raised in his witness statement by reason of this simply being an adaptation of his brother's statement. It was agreed that the respondent would be deemed to have cross-examined Mohammed Riaz Sabir to the same extent.

12. The three issues in question upon which Mohammed Riaz Sabir gave evidence were:

    (1) An allegation that he himself compared the claimants' relevant disability to cancer at one of the meetings held on 8 March 2018;
    (2) The allegation made by Karen Broadhead at paragraph 15 of her witness statement;
    (3) A comment allegedly made by Mr Littlefair at the grievance appeal hearing concerning Karen Broadhead.

Findings of fact

13. We shall now set out our findings of fact. We shall then consider the issues in the case and the relevant law. We shall then go on to set out our conclusions. As with the Reserved Judgment in the first claim we shall now refer to the claimants as *'MAS'* and *'MRS'* respectively. However, from time to time the claimants shall be referred as *'the brothers'.*

14. The Tribunal heard from the following witnesses called upon behalf of the respondent: (where the witness has already given evidence in the first claim we shall not repeat the witnesses' job title. We refer to paragraph 8 of the reasons for the Reserved Judgment in the first claim):

    (1) Jayne Burkin
    (2) Richard Bowgen
    (3) Darren Milton
    (4) Kelly Wheatley. She is employed by the respondent as a production operative.
    (5) Jamie Scott. He is employed by the respondent as a machine operative.
    (6) Karen Broadhead. She is employed by the respondent as a machine operative.
    (7) Rachael Bell. She is employed as a full-time operator.

(8) Ian Hamilton. He is employed as a CNC machinist who currently works in disassembly. He has been a shop steward on behalf of Unite for over 30 years and the convener for the past 12 years.
(9) Katie Brookesbank
(10) Kevin Robson. He is employed as segment leader machine shop.
(11) Greig Littlefair. He is the respondent's managing director.

We shall not set out the history of the matter leading up to the meetings held on 8 March 2018. We have already referred to the salient paragraphs (in paragraphs 213 to 232 of the Reserve Judgment upon the first claim) where we made our factual findings about those meetings. However, we need to make additional findings of fact in order to determine the harassment and victimisation claims.

15. We referred at paragraph 223 of the reasons for the Reserved Judgment in the first claim to a pre-meeting held on 7 March 2018. (We observe in passing that the claimants think that this meeting took place on 6 March 2018. Nothing turns upon whether the meeting was held on 6 or 7 March. Upon the basis of the document at page 880 referred to in paragraph 223 of the Reserved Judgment for the first claim we shall proceed upon the basis that the meeting took place on 7 March 2018. Page 880 is a note prepared by the respondent recording the matters discussed at that meeting). MAS stated his reservations about the group format. Mr Hamilton reminded the claimants that they need not attend the meeting but had chosen to be there. The agreed format of the meeting was for Mr Bowgen to address the meeting on behalf of the respondent, Mr Hamilton to speak on behalf of the claimants and then for the claimants to talk about "the personal impact-physical and psychological."

16. We also referred at paragraph 223 to the claimants having produced some literature which they had printed from the internet. It is common ground that this material may be found in the bundle at pages 879 (a) to (n). In summary, this literature:

- Promotes disciplinary awareness training (in particular, to enable employees "to learn how better to interact with people of all types of disabilities").
- In a similar vein, promotes awareness of appropriate use of language when discussing such matters.
- Provides details of adjustments and adaptations which may be made within the workplace for the benefit of the employer and the disabled person.

17. We had observed at paragraph 222 of the Reserved Judgment for the first claim that Mrs Burkin apprehended a risk of the claimants being offended by comments made by the workforce at the meetings. (She did not expect this to be the case but of course there was the risk of the claimants interpreting remarks made in a negative way). That the claimants produced the literature (at pages 879 (a) to (n)) evidences, in our judgment, that the claimants apprehended a negative reaction from the workforce. From this, we infer that there was a degree of apprehension about the support worker meetings upon the part of both parties.

18. It will be recalled (from paragraphs 223 and 224 of the reasons for the Reserved Judgment in the first claim) that the intention had been for Mr

Bowgen to be present at both of the meetings held on the morning of 8 March 2018. The plan was for Mrs Burkin to introduce the first meeting. However, she was unable to stay because she had a pre-arranged meeting elsewhere. In the event, Mr Bowgen was delayed by inclement weather and did not arrive to participate in the first meeting. He arrived in time for the second one held later that day.

19. Mrs Burkin prepared some handwritten notes to be used at the first meeting held on 8 March 2018. She endorsed this at the top with the words *"be mindful of mentioning disability".* We refer to page 881.

20. The claimants contend that Mr Hamilton (whom, it will be recalled, was to speak at the meetings on behalf of the union) made inappropriate remarks. However, the claimants pursue no claim arising out of Mr Hamilton's conduct. Nonetheless, we shall make findings of fact about what Mr Hamilton said, this being necessary background.

21. MAS gave evidence that when addressing the first meeting Mr Hamilton used the word *"blind".* MAS says (in paragraph 57 of his witness statement) that, "we had already mentioned that we were uncomfortable with using negative words that did not fill the criteria for having a positive meeting and the use of correct language. We had made it clear that we were happy to use the words "eye condition". We are mentioning this in the statement as whilst we are not pursuing a claim against Mr Hamilton we consider his comments were inappropriate and offensive and this has been taken up separately with the union". MAS goes on to say at paragraph 58 of his witness statement that, "by using the word *'blind'* this can give some people an impression that blind people are unable to see and do anything when in reality there is a sliding scale. This information was given to the HR manager and the shop steward to explain this to the workforce, and the consequences of using incorrect language was also made clear". (We infer that MAS is referring at paragraph 58 to the literature at pages 879 (a) to (n) to which we have referred above).

22. The claimants also contend that at the first meeting Mr Hamilton went into some detail about the incident of 3 February 2016. We made factual findings about this incident (in particular in paragraphs 25 and 26 of the reasons for the Reserved Judgment in the first case). The consequence of the incident of 3 February 2016 was that the claimants were signed off as unfit for work through work related stress.

23. MAS surmises at paragraph 61 of his witness statement that, "I think why Ian Hamilton said these comments was because he may have felt the need to fill the void left by there being no management presence [at the first meeting] and felt he had to say something. This by no means excuses his behaviour and he should have known better. But I put his comments down to the respondent putting him in a difficult position. Lack of preparation, structure, presence and facilitation to not to be at their own meeting is quite unbelievable".

24. The brothers' account is that "more information about our health condition was discussed *[at the first meeting]* than was previously agreed by Jayne Burkin the HR manager on the 6 March meeting. Our medical condition was

discussed by Ian Hamilton eg tunnel vision, loss of peripheral vision and we did not want or agree for this to happen. We wanted the focus of the meeting to be on the support worker role". We refer to paragraph 65 of MAS' witness statement. He goes on to say at paragraph 66 that, 'The disclosure of our medical condition could have been shared with co-workers in another setting, we are not opposed to letting people know. But this meeting was not about this but rather focusing on the support worker role and activities". At paragraph 67 he said that, "Ian Hamilton talked about health and safety and gave inappropriate examples that we might "throw ourselves underneath a truck". We do not know why these comments were said and to what purpose they were intended for".

25. MAS said (in paragraph 68) that Ian Hamilton's comments, "made me feel, since I have a visual impairment I am more dangerous or a liability. But also, if I was to throw myself under a truck would make me dim and thick. By saying this made me think he was implying that having a visual impairment makes me cognitive impaired too".

26. The brothers complain (in paragraph 72 of MAS's witness statement) that the first meeting "turned into a free for all with co-workers being allowed to bash us and ask humiliating questions about our condition rather than engage in a support worker process". At paragraph 73 MAS said, "rather than staying focused on the matter at hand, regarding the support worker role, instead it was diverted and focused on us. It turned into an attack on us because the respondent did not take the meetings seriously".

27. The claimants then complain about the lack of preparation which, they say, hindered the employees' understanding of the support worker role. We have already made findings of fact about the flyers and job descriptions (in particular in paragraphs 229 and 236 of the reasons for the Reserved Judgment in the first case).

28. MAS said, at paragraph 74 of his witness statement, that the absence of a management presence at the first meeting coupled with the failure to produce a flyer and job description made it "inevitable that the co-workers would talk about our capabilities and disability bearing in mind that there was 40 minutes of time to fill which wasn't filled by information that should have been given about the support worker role. Therefore, the co-workers interrogated/humiliated us instead".

29. We observed (at paragraph 223 to 226 of the reasons for the Reserved Judgment in the first claim) that the claimants had expressed misgivings about the conduct of the first meeting to Mr Hamilton. MAS' evidence before us in the second claim is that he was "nearly in tears and expressed my emotional state and feeling to Ian Hamilton". He says that Mr Hamilton spoke with Mrs Burkin and it was nonetheless resolved to proceed with the second meeting.

30. MAS said that the brothers decided to proceed with the second meeting after having received an assurance that the issues arising from the first meeting

would be resolved. The meeting was moved to a less noisy area of the respondent's premises but the flyer and job description were still not available.

31. MRS had prepared something to say at the outset of the second meeting. MAS' account is that MRS "was unable to speak as the rapid-fire comments and questioning started almost immediately after Ian Hamilton had said a few words". It appears from the evidence at paragraphs 85 and 86 of MAS's statement that Mr Bowgen had opened the second meeting before passing over to Mr Hamilton and MRS. MAS said in paragraph 88 that he (MAS) "had stayed quiet throughout and hid behind my brother". MAS gives an account that the second meeting very much followed the same pattern as the first. At paragraph 93 he says that, "the questions that were asked of us were not support worker related and there was no intervention or protection from the respondent's management to stop this. Instead we were subjected to a barrage of upsetting and degrading questions about our medical condition and no-one stepped in to stop it".

32. Following the second meeting, the claimants protested again to Mr Hamilton and also to Mr Bowgen. MAS says that the brothers felt that they had had "chunks taken out us".

33. Upon the issue of the conduct of the two meetings of 8 March 2018, the following (in paragraphs 33 to 43) arose from the cross-examination of MAS by Mr Sandeman:
(1) That the intention of the respondent and Mr Hamilton was that the claimants would not be present at the meetings but that they in fact wanted to be there. MAS said that he thought that the brothers would "add value".
(2) MAS did not accept that the respondent was concerned that comments expressed at the meeting may make them feel uncomfortable. He said that the respondent and Mr Hamilton said that this would be an open forum but not one where inappropriate things would be asked.
(3) MAS accepted that there was inevitably going to be some discussion of the impact of the brothers' condition upon their ability to return to work in their substantial roles.

34. A constant theme of MAS' evidence was that all of the staff would have benefited from diversity training. He complained that the lack of structure meant the staff had a lack of understanding of the support worker role.

35. MAS fairly accepted (under cross examination) that if they were able to return to their substantive roles then, given the restrictions upon them working daylight hours and working part-time, it would follow that a full-time worker would be displaced. (This aspect of the matter was dealt with comprehensively in the reasons for the Reserved Judgment in the first case). Similarly, a full-time worker would usually be expected to work upon the same machine (as indeed the claimants had done prior to February 2016). The normal expectation was that part-time workers would fill the gaps and may more readily be expected to move than would full-time workers. MAS fairly accepted this to be the case.

36. MAS also fairly accepted that some of his co-workers may have been influenced by the fact that reasonable adjustments had been made and the claimants had been given a safer job to do already.

37. Although MAS fairly accepted that co-workers may have concerns about what they (the co-workers) would be doing when supporting the brothers to perform their substantive roles he said that the respondent's failures had led to a lack of understanding upon the part of his colleagues about the support worker role to be performed.

38. It was suggested by Mr Sandeman that the claimants may expect blunt and forthright views from a shop floor meeting held in a South Yorkshire factory. MAS said that he found the experience demeaning, that he had been to shop floor meetings and "no-one has ever been abused like this in 18 years".

39. MAS accepted that he and his brother had not sought to put an end to the first meeting when they started to experience hostility. He appeared to indicate that this was part of Ian Hamilton's role.

40. MAS fairly accepted that the majority of those attending the first meeting listened quietly.

41. It was suggested therefore, that in the context of the 40 minutes meeting involving around 30 or so employees the claimants only found a very small number of comments to be offensive. MAS asked rhetorically, "isn't one enough?" He accused some of the participants of acting aggressively, lunging forwards and being aggressive.

42. MAS accepted that there was no issue with Ian Hamilton's conduct of the second meeting. He attributed this to the claimant's protestations about the conduct of the first meeting. In addition to the remarks that we cited above in paragraph 21 MAS complained of comments made by Mr Hamilton (at the first meeting) to the claimants' condition as being "horrible" and "like a cancer".

43. It was put to MAS that Mr Hamilton was, "at the first meeting, seeking to elicit sympathy for him and his brother". Reference was made to the documentation at page 880A. These are notes made by Mr Hamilton in preparation for the speech that he gave at the first meeting. It was put by Mr Sandeman that in essence Mr Hamilton was saying that the claimants had had a bad experience and were looking to co-workers for support. MAS said that Mr Hamilton had couched matters in negative terms during the course of the meeting referring to their condition as "horrible" and likening it to cancer. MAS said that this made him feel ashamed of his disability.

44. Kelly Wheatley was at the first meeting. The other three co-workers (mentioned at paragraph 10) upon the basis of whose comments the claimants pursue harassment complaints were at the second meeting. We shall deal with the comments attributed to each of them first before going on to deal with other aspects of their evidence.

45. Kelly Wheatley accepts (in her evidence at paragraph 17 of her witness statement) that she had asked "what's in it for us?" She says that she was not asking for monetary reward but rather, "was asking why we want the job with the added responsibility". Although her witness statement is silent as to the comment "why should we do the role?" we find as a fact that she did say this given that that was the essential gist of the question which she accepts asking about "what's in it for us?"

46. Mrs Wheatley also accepted that she said, "why do I get moved around?" She said that when asking this question, she was "referring to myself." At paragraph 18 of her witness statement she says that, "A lot of people in the factory work on only one machine. I'm one of the workers who will run most machines and that is why I said something about it … I have to run all the machines. Riaz said he only wanted to work on 0539. I like being moved around but it is annoying when there are some people who only want to work on one machine. I understand that sometimes this may because of a health problem". Mrs Wheatley denied that she had asked the question about being moved around angrily. She did however accept that she had raised her voice. She said that this was because there was a lot of noise and machines were running at the time of the meeting.

47. Mrs Wheatley accepted that she had asked why the claimants should stay in their old roles. She says in paragraph 19 of her witness statement that, "this was the same point. They had been off a long time and they could not just expect to go back to the same machines where they had been working before. This would affect other people. Also, they were expecting us to step aside and help them when they had been very secretive with us. I didn't understand all the secrecy".

48. Mrs Wheatley also fairly accepted that she had asked why the claimants should get "special treatment". She said in cross-examination that she could not understand why the claimants were wanting to move when the respondent had provided a safe job for them. As she put it in paragraph 20 of her witness statement, had she asked about "special treatment" for the claimants "it would have been because I felt at the time that the company had bent over backwards for Ali and Riaz and it was still not enough. They were given a safe job and they were still not happy. I just felt it was them asking us now when they had not been prepared to be open with people on the factory floor before they came back to work. They have continued to be very secretive".

49. Mrs Wheatley could not recall if she had received an answer to any of the four questions to which she refers in paragraphs 17, 18, 19 and 20 of her witness statement: (those referring to the matters about which she asked referred to in paragraphs 44 to 49 above).

50. Mrs Wheatley denied having asked why the claimants get assistive technology. She said she would never have used the words "assistive technology". She denies having made any reference to technology but accepts having questioned how MRS "could do the job on machine 0539 when he was having to use a magnifier on springs". Mrs Wheatley's concern appeared to be about the ability of MRS to accurately check the parts.

51. She accepts having asked why the claimants need to use taxis. She said that she could not see the problem with asking this question albeit that she fairly accepted that such was not relevant to the issue of the support worker role.

52. Mrs Wheatley accepted that these questions were directed at the claimants. She denied asking the claimants questions arising from her annoyance at what was being asked of her.

53. MAS fairly accepted that some at least of Mrs Wheatley's questions were reasonable. In particular, he accepted as reasonable her concerns that the claimants would be working part-time but affixed to a single machine in circumstances where she was expected to move around, particularly when the claimants had been absent from work for so long. MAS was however concerned by the manner and tone of Mrs Wheatley's questions.

54. Mr Scott accepted that he had asked questions about the claimants' past high-performance output and technical know-how. He says that he asked this in a "positive manner". In fact, he observed that, "I was the only one who had something positive to say about them".

55. Mr Scott said in his witness statement (in paragraph 11) that he remembered asking why the claimants had to work daylight hours. He says, "I asked this because it meant that they could not work any of the shifts. This meant there would be disruption when the brothers replaced someone on a machine during a shift. I thought the lighting in the factory should be sufficient to allow them to work at any hour of the day. Someone then explained to me that the lighting was not adequate for them to be able to work".

56. At paragraph 2 of his witness statement Mr Scott said, "My view of Ali and Riaz was that they were always about themselves. I had a conversation with Ali about five or six years ago. I don't remember exactly what the issue was, but we didn't agree. I said something along the lines that we were all supposed to work together as a team. Ali said that he would do whatever it takes and did not care about anyone else. This influenced my view of the brothers".

57. Mr Scott fairly accepted in cross-examination that he was annoyed when MRS spoke at the beginning of the second meeting and talked in terms of the brothers being team players. Mr Scott also expressed a view that this comment annoyed others as well. He said that there was a general feeling that the brothers were not team players. Mr Scott fairly accepted that it was this sentiment which prompted him to say that, "before going off work it was all about you. Now you're saying it's all about us". His evidence in cross-examination was that, "in the past they are about themselves and keep themselves to themselves. Now they were all wanting us to work together and I found that contradicting".

58. Mr Scott was taken to the minutes of an interview undertaken as part of the grievance investigation carried out by Katie Brookesbank. He was interviewed on 23 July 2018 (pages 1070A and 1070B). Here, he expressed similar sentiments about the claimants not being team players and observed during the course of the meeting that it was "one rule for one and not for the other".

He also said that people were "getting wound up about it" and that things were "getting out of hand" [*at the second meeting*].

59. Mr Scott fairly accepted that the questions that he was raising were directed at the brothers. MAS considered that Mr Scott was singling him out and was "slagging *[him*] off and speaking loudly". Mr Sandeman put it to MAS that in contrast to Karen Wheatley, the further particulars at page 41 do not make reference to Mr Scott speaking angrily. MAS said that Mr Scott was hostile.

60. Mrs Broadhead for her part denied making reference to "special treatment". She said in paragraph 9 of her witness statement, "I don't remember saying 'why are you getting special treatment?' I definitely did not say that on its own. If I said something like that there must have been some other context". She then went on to say that she is disabled and that she has a disabled son. It is significant, we think, that she does not deny using the words "special treatment." As we shall see, Mr Robson and Mr Littlefair both accepted that sentiments of the kind complained of by the claimants (including this one) were made by those attending the meetings. Taking into account that fair concession by them and that Mrs Broadhead accepted the possibility of her using the expression "special treatment" we find that she did make the remark alleged by the claimants (referred to in paragraph 10).

61. Mrs Broadhead went on to say that, "if they were expecting to return to work on the old machines that would be special treatment especially as they were only going to work part-time. There were people who wanted to know why the brothers should receive special treatment". From this, we infer that even if, contrary to our findings, Mrs Broadhead did not make reference to special treatment then somebody else at the meeting did so.

62. Mrs Broadhead accepted in evidence given under cross examination that she may have said words to the effect, "why can't you work full-time". Her explanation is that if the claimants had an expectation of working upon their old machines they would need to be at work at six o'clock in the morning to enable them to be upon the machines for all of the time. That would prevent the problem of displacement of others.

63. Mrs Broadhead accepted that she had said, "you are going part-time because you are getting disability benefits". She says that she had not said this in "a nasty way" and that Mr Bowgen had stepped in and stopped the discussion at that point. Mrs Broadhead said that had she been allowed to develop her point it would have been that they may work two or three full shifts each week (effectively still working part-time) and retain their benefit entitlement. She appeared to accept that there may be an imputation that the claimants wished to work part-time in order to maximise their benefit entitlement and Mrs Broadhead fairly accepted that she had asked a "stupid question".

64. Mrs Bell denied in her witness statement that she had said that the claimants were more dangerous following the development of their disability. Mrs Bell, under cross-examination, accepted that it was possible that she had raised a concern about danger in the workplace but had not said that the claimants were dangerous "as they weren't dangerous to start with". The point that she

was seeking to make was that the workplace had become more dangerous for the claimants by reason of the development of the eye condition. She said that someone (without admitting that it was her) had said words to the effect that it was now more dangerous for them to work around their substantive machines because of the eye condition. Nonetheless, we accept the claimants' case that Mrs Bell did say that the claimants were "more dangerous because [they] have the eye condition." Subjectively, she may have said this with a benign intention but objectively, we find on balance that the expression of concern about "danger" was couched by her in the terms reported by the claimants. Again, it is significant that Mr Robson and Mr Littlefair accepted that the comments complained of by the claimants were made.

65. Mrs Bell denied that she had advised the claimants to stay in their alternative roles. She said that she had said words to the effect that it would be better for the claimants to stay in their adjusted roles. In her witness statement she said that "this was for health and safety reasons. A job has been made for Alyas and Riaz which is clearly much safer". In our judgment, it is probable that in expressing this view she used the words attributed to her by the claimants. Again, it is significant that Mr Robson and Mr Littlefair accepted that the comments complained of by the claimants were made.

66. She denied having said that the claimants should be thankful for having a job. It was however her view that her employer had "done a good thing" by providing an adjusted role for the claimants. It is not a significant leap from this to a sentiment that the claimants should consider themselves grateful to have a job. Once again, it is significant that Mr Robson and Mr Littlefair accepted that the comments complained of by the claimants were made.

67. All four of the witnesses who made the impugned remarks gave similar evidence of their views of the claimants. While all fairly acknowledged the claimants to be good workers they said that they were secretive and very much kept themselves to themselves. Their evidence that the claimants were reluctant to share their condition with others is consistent with how the claimants approached matters in the early part of 2016. It will be recalled from the reasons for the Reserved Judgment (paragraphs 51 and 60) in the first case that the claimants were anxious to restrict the dissemination of the information about their condition. Hence, the evidence of the four witnesses (whose remarks are impugned in the harassment claims) of their sense that the claimants were not open and were somewhat secretive is credible as is the sentiment of them not being team players.

68. Mr Bowgen gave evidence (at paragraph 49 of his witness statement) that, "I do not believe that Alyas and Rias were subjected to harassment at the meetings attended by me on 8 March or 21 March *[that being the date of the third support worker meeting].* I did intervene to stop any questions or comments which were not relevant to the support worker role or the reasons behind it. When I felt the meetings became heated, I wound it up".

69. He goes on, at paragraph 50 to say that, "Ian Hamilton, the brothers' trade union representative said something about the brothers' eye condition, but nothing I would consider offensive. He may have said "it was horrible". People

already knew roughly what was wrong with the brothers as they had asked Richard Williams to go around and engage support. Only a general description of their condition was given, as being an eyesight problem. It appeared to me that Ian Hamilton was simply appealing to the sympathy of the operators. He did not go into detail. The brothers answered a question to say that they had problems with peripheral vision".

70. Then, at paragraph 51 he said that, "One of the operators did make comments that they did not see why they should be moved around to allow the brothers to work in their place. He was told that he was being asked to assist the brothers and that the company was trying to get them back into their substantive roles. He made no further comment. There were questions about why they needed taxis and assistive technology. They were told that this was due to the brothers' eyesight problems and that these are the adjustments being made. The answer was accepted. I did not understand the operators to be suggesting that the brothers shouldn't have these adjustments. The questions and comments were all in the context of understanding their conditions and what would be involved in supporting them". He goes on at paragraph 52 to say that, "No-one said anything to the effect that they should be grateful for having a job. There was a comment that they should appreciate the company making reasonable adjustments for them in adjuster springs. Someone asked why they were working part-time and was told that this was because the brothers had to work daylight hours. No-one said words to the effect that they were working part-time because they were receiving benefits".

71. The paragraphs from Mr Bowgen's witness statement that we have cited corroborate our findings about the comments that were made. Although Mr Bowgen does not attribute the comments to certain individuals, his evidence is corroborative of that of the other witnesses from whom we heard about the general tenor and gist of questions and comments from the shop floor.

72. The following evidence was given by Mr Bowgen under cross-examination:

    (1) He was aware, from the pre-meeting held on 7 March 2018, that the claimants were anxious that co-workers should use the "right terminology" (as it was put by Mr Morgan) about their eye condition.
    (2) Mr Bowgen's role at the meetings to be held on 8 March 2018 was to deal with questions and issues from the workforce about the practical aspects of the support worker roles.
    (3) It was suggested that because of Mr Bowgen's absence from the first meeting (through no fault of his) there was no-one from the management side to address those issues. Mr Bowgen said that Mr Hamilton and Mr Milton both "know of the day to day work". Mr Bowgen fairly accepted that neither had been involved in management discussions about the support worker role that had taken place prior to the meeting.
    (4) Mr Bowgen was challenged about his evidence at paragraph 43 of his witness statement. This evidence was that the third meeting was delayed until 21 March 2018 because of the claimants' unhappiness about how the first two meetings had gone. Mr Bowgen said in this passage of his witness statement that "when the questions and comments were irrelevant we

stopped them. The meeting I attended never got out of hand". Mr Bowgen said that he had intervened when Karen Broadhead had raised the issue of disability benefits.

(5) Mr Bowgen was taken to a statement that he gave as part of the investigation into the claimants' appeal against the rejection of their grievance: (we shall deal with the grievance issue in due course). This statement is at page 1028. There, Mr Bowgen said that, "The meetings were cut short because the questions were starting to become inappropriate". In evidence before us Mr Bowgen said that this was a reference to Mr Scott's comments about the claimants not being team players. This was the essence of Mr Bowgen's evidence in chief at paragraph 54 of his witness statement in which he said that, "Someone did say something about the brothers exceeding their shift quotas. The context was that it was being suggested that, in the past, the brothers had overachieved on targets and not been co-operative with other members of the team, for example in keeping the place clean and tidy".

(6) Mr Bowgen was also taken to a statement prepared by Jayne Burkin as part of the grievance investigation. This document is at page 932. Here, Jayne Burkin records Mr Bowgen telling her that "people had got quite heated as they couldn't understand why the brothers wanted another job when they already had one or why they were receiving what they perceived as special treatment". He had also told Jayne Burkin that Mr Scott had been "quite fiery as he had accused the brothers of previously not being team players which was ironic as they were asking for the team's help".

(7) Mr Bowgen was taken to page 41 of the supplemental bundle (being the further particulars of the claimants' claims which we have cited in paragraph 10 above). Mr Bowgen fairly accepted that Mr Scott had said the words attributed to him in that table. Mr Bowgen was unsure whether it was Mr Scott who had made reference to the claimants' wish to work daylight hours but accepted that somebody had raised that as an issue.

(8) Mr Bowgen was taken a statement that he had prepared in connection with the grievance investigation. This is at pages 949 to 954. The document has been signed by Mr Bowgen on 20 April 2018. He refers in the second paragraph of page 951 to the mood of the meeting becoming "passionate". In evidence before us Mr Bowgen said that he felt that the meeting was "getting to the point where people were asking the same questions. After Jamie Scott said what he did I brought it to a halt".

(9) Mr Bowgen accepted that at least two of the questions from the floor had been inappropriate: those were the *"team players"* questions or comments from Jamie Scott and the "*benefits"* question or comment from Karen Broadhead.

(10) Mr Bowgen said that he did not recognise the brothers' account of the meeting as including aggression, finger pointing and shouting. He did however accept that there had been raised voices and that people were being assertive. He attributed this to a need for the employees to understand the support worker roles.

73. As we said, Mr Bowgen fairly accepted that he had an understanding from the meeting of 7 March 2018 that the claimants were sensitive to the need for sensitive and appropriate language by reference to their condition. In this context, we note the contents of Mr Bowgen's grievance witness statement

commencing at page 949. There, he says that after he had given his short introduction at the start of the second meeting held on 8 March 2018 he had handed over to Mr Hamilton. Mr Hamilton, according to Mr Bowgen, said about the claimants that, "unfortunately, they had a disease which has affected their eyesight". At page 953, Mr Bowgen said that an employee named Dave Widows asked about the claimants' "actual disease".

74. At page 951 Mr Bowgen said that he spoke to Mr Hamilton and the claimants after the second meeting. He said that, "the brothers said they felt as if they had had lumps knocked out of them. They did not like the questions about their medical conditions and said that the meetings should have been purely about the role of the support worker. I told them that, in order to understand the role, the operatives needed to understand something about their condition and that people needed to understand what they were volunteering for. The brothers said that they weren't happy. I said the meeting was a conversation and people were invited to ask questions. It was not possible to control exactly how a meeting will be if it is a conversation".

75. Mr Hamilton's evidence is that prior to the meetings of 8 March 2018, he prepared some notes of what he was going to say at the shop floor meetings. Mr Hamilton's notes are at page 880A. This is helpfully transcribed at paragraph 10 of his witness statement. His account, at paragraph 14 of his witness statement, is that after Mrs Burkin left the first meeting (as had been planned) he spoke to the workforce along the lines of his pre-prepared note. He said he did not read the note out and spoke from memory but that the note contained the essential gist of what he said when addressing the first meeting. After speaking for about 10 or 15 minutes MRS then addressed the meeting.

76. At paragraph 15 of his witness statement Mr Hamilton says that, "When I reached the end of what I prepared, I concluded by saying that the brothers' condition was "horrible" and words to the effect of "no-one would wish it upon anybody else". Mr Hamilton justified his remarks by saying that they were "not intended to reflect badly on Ali and Riaz, or to make them feel uncomfortable in any way. The context was that I then went on to say that they deserved credit for the way they were getting themselves into work and trying to get back on their original roles. I also said that we all needed to work together and that Ali and Riaz deserved our support. It never occurred to me that the brothers or anyone else could take offence at what I said. I would not have used these words if I thought they could take offence. My only intention was to encourage people to volunteer to be support workers. I have since apologised to the brothers (in front of Richard Bedford Unite regional rep) if my words had caused offence, or upset them, that certainly wasn't my intention."

77. Mr Hamilton gives evidence at paragraph 21 of his witness statement that at the end of the first meeting the claimants were unhappy. He says that they told him that they felt that they had been "through the ringer" or "had a good kicking". For his part Mr Hamilton "did not feel that anything unusual had happened at the meeting which could justify them feeling that way". He also says that MAS had said to him, "what did you just say at the meeting? You described it as a horrible condition". Mr Hamilton says that he replied that, "it was a horrible condition and that I would have used the same description for

a condition like cancer. I apologised if I'd upset them and said that it wasn't my intention to cause offence. I did not use the same expression at the other meetings".

78. Mr Hamilton's evidence is that Kelly Wheatley did ask (at the first meeting) "what's in it for us". However, he says that she did not do so angrily or with a loud voice. Mr Hamilton did not remember Kelly Wheatley "specifically asking why she got moved around or why the brothers should remain in their own roles or get special treatment". However, he did accept that she may have made reference to moving around. He said that, "she could have been referring to herself being moved around and that it was expected of her and so what was the problem with the brothers being expected to do another job."

79. He said that he could not imagine Kelly Wheatley referring to "assistive technology". He said that this is not something that she would say. He also had no recollection of her asking why the claimants needed taxis "although she may have". He went on to say that, "the magnification equipment is bulky and it would have to be installed on the machines. It was understandable that people who knew the machines would ask about the equipment and why it was needed".

80. Mr Hamilton saw no reason to intervene as in his view "these were all valid questions. He says that the context was the workers trying to gain an understanding of the claimants' limitation and what being a support worker would mean.

81. Mr Hamilton discussed the claimants' concerns following the first meeting with Jane Burkin. She also could not attend the second meeting and suggested a postponement. However, because Mr Bowgen was able to attend, the conclusion was reached that it should go ahead. Mr Hamilton said that, "based on my experience of 30 years it is bad practice to only inform one shift or part of the workforce about any issue as this can create potential rumours or misinformation".

82. The second meeting took place in the Reset area. This was because of the claimants' concerns about the noise in the area where the first meeting had taken place. Mr Hamilton's evidence is that the second meeting followed the same format as the first meeting except that Mr Bowgen introduced the second meeting in Jane Burkin' stead.

83. Mr Hamilton said he could not recall Jamie Scott asking questions about the claimants working daylight hours. However, he fairly accepted that Mr Scott had said "something about the brothers' attitude in the past being all about themselves and that they were now asking their workmates to help them out". He went on to say that, "Jamie's view of the brothers is shared by some others in the KS section". He also could not recall Mr Scott saying anything about the claimants' technical competence.

84. Mr Hamilton's evidence is that he could not recall Karen Broadhead asking about the claimants' "special treatment" or why the "could not work full-time". He went on to say that, "people at the meeting wanted to understand why the

brothers could not work full-time because this was relevant to the support worker role and was potentially disruptive to them. It was obvious to everyone that it would be easier to accommodate the brothers on their original machines if they could fit in with the shift pattern". He went on to say that employees were finding it "difficult to understand why so much effort was being made to get the brothers back to their original machines". He observed that "part-time workers are not normally allowed to work on just one machine". He considered these to be legitimate concerns and questions on the part of the workforce.

85. Mr Hamilton says that Karen Broadhead did say "something about the brothers receiving benefits". Mr Hamilton's evidence is that he stepped in as did Mr Bowgen at this point.

86. Mr Hamilton has no particular recollection of Rachel Bell speaking at the second meeting. He says that "she was going round in circles and was mainly concerned about who would be responsible if the brothers had an accident. She commented on the dangers for someone with restricted vision and suggested that it would be safer if the brothers stayed in the adjusted role. The manner in which these comments and questions were put were not aggressive or argumentative".

87. The following evidence emerged from Mr Hamilton's cross-examination:

(1) The claimants were sensitive to the possibility of inappropriate remarks hence them drawing to the respondent's attention the document commencing at page 879(a) (which deals with such matters as disability awareness training) and the need for awareness of language (by reference to page 879(d)).
(2) Mr Hamilton accepted that Mrs Burkin was sympathetic to the claimants' request hence the reference at the top of her notes (on page 881) to be *"mindful of mentioning disability"* and as to how much could be shared with colleagues".
(3) Mr Hamilton accepted that some of the workforce could be blunt. He said, *"this is South Yorkshire".*
(4) He accepted that the claimants had been upset about the conduct of the first meeting. They had voiced those concerns immediately afterwards. They expressed similar sentiments following the second meeting.
(5) Mr Hamilton denied comparing the claimants' condition to cancer. He said, "I never said that. I never would. As the meeting finished I said "listen it could be you tomorrow. I said it's a horrible condition and the lads deserve credit for coming to work and that I wouldn't wish it on my worst enemy". He said that the reference to cancer occurred in a discussion with the claimants afterwards. After MAS had said to him "what did you just say at the meeting? You described it as a horrible condition". Mr Hamilton said that he remarked "I'd describe cancer like that. That's what I'm trying to say. I didn't say this in front of 30 people". He fairly accepted having made the comparison between the claimants' condition and cancer but in a private conversation with the claimants and not in front of the workforce. He apologised to the claimants for any offence he may have caused.
(6) Mr Hamilton fairly accepted that the issue of the provision of taxis for the claimants was not relevant to the support worker role. When asked why it

was reasonable to allow such a question Mr Hamilton said that, "at the end, MRS put himself forward to answer questions".

(7) Like Mr Bowgen, Mr Hamilton accepted that the questions were directed at the claimants.

(8) Mr Hamilton accepted that when Jane Burkin absented herself from the first meeting there was no management presence.

(9) Mr Hamilton accepted that in the discussion following the first meeting MAS had said that he and MRS had almost been in tears because of the conduct of the meeting.

(10) Mr Hamilton accepted being concerned enough about the claimants' reaction to the first meeting to have a discussion with Jane Burkin as to whether the second meeting should go ahead.

(11) Mr Hamilton accepted that the second meeting got heated. However, he denied that it had got out of hand and said that there was no gesticulating, shouting or swearing.

(12) Like Mr Bowgen, Mr Hamilton considered that it had been appropriate to bring a second meeting to an end because they were "going round in circles".

(13) Mr Hamilton accepted that the claimants are not "team players" and "keep themselves to themselves". When asked about Jamie Scott's remarks along those lines Mr Hamilton said that "the claimants are certainly not team players". He denied that Mr Scott was "fiery".

(14) Mr Hamilton was taken to the statement that he prepared for the grievance investigation. This is at page 941 and is dated 29 March 2018. In this statement, he gave an account similar to that recounted to us in evidence as recorded in paragraph 87. He was also taken to the statement he prepared for the grievance appeal at page 1027. This document is dated 19 June 2018 and again is in a similar vein (to that evidence recorded in paragraphs 81 and 87(8) in particular). He said that both of these statements were given to Katie Brookesbank.

88. We have already referred to Mr Milton's evidence in the first Judgment (in particular at paragraphs 224 and 231). The following evidence emerged from his cross-examination:

(1) When giving his statement for the grievance investigation (at pages 944 to 947) he had made reference (at the bottom of page 945) to "one of the brothers becoming upset by the questions". He expanded upon this before us and said that the brother to whom he was referring was MRS. He said that MAS said nothing during the meeting. He was making notes.

(2) He denied that the employees were shouting although he accepted that the meeting was passionate.

(3) He agreed with the perception that the claimants are not "team players".

(4) He accepted that Kelly Wheatley did ask "what's in it for us" and "why should we do the roles". He also said that she had asked why she should be "moved around".

(5) He accepted the questions from the floor were directed at MRS and Mr Hamilton.

89. The claimants raised a grievance about the meetings of 8 March 2018. The grievance is at pages 882 to 889. Although dated 9 March 2018 it is common

ground that it was not received by the respondent until 15 March 2018. Receipt by the respondent of the grievance was preceded by a meeting held on 12 March 2018. This was attended by the claimants, Jane Burkin and Joanne Spink. Handwritten minutes of that meeting are at pages 893 to 899. The handwritten notes are those of Katie Brookesbank who was there in the capacity of notetaker.

90. At the meeting of 12 March 2018, the claimants complained about the conduct of the meetings. At page 898, we see reference to the claimants saying that it was their prerogative if they wished to raise a grievance. Mrs Burkin said that she could not be involved in investigating it if the grievance was about her. One of the claimants then said that a letter had been written straightaway while events were still fresh in the claimants' minds. From this we infer (as indeed appears to be accepted) that the grievance had not in fact been raised at this point. This accounts for the delay between 9 March (being the date of the grievance letter) and 15 March (being the date upon which the grievance was lodged).

91. It emerged during the course of the hearing that there are in fact two iterations of the grievance. The grievance that was lodged with the respondent is in the bundle, as we say, commencing at page 882. This is in fact the second iteration. The first was introduced during the course of the hearing and was put into the bundle at pages 889A to 889J. The first version is in a little more detail as it attributes some of the comments to individual employees. We refer in particular to the third paragraph on page 889H. This contains attribution of the comments made at the second meeting. These attributions are consistent with the claimants' pleaded case in the further particulars. This document is very persuasive corroboration of the claimants' case as it was written contemporaneously. Indeed, as the claimants said at the grievance meeting of 12 March 2018, the letter had been written straightaway while matters were fresh in the claimants' minds. The first version of the grievance at pages 889 A to 889J was not given to the respondent. In closing submissions Mr Morgan made it clear that the first iteration of the grievance was never served on the respondent. The claimant's evidence is that the second version was prepared upon the advice of the trade union. This omitted specific attribution of comments (although the comments themselves were included: see in particular page 888).

92. We make similar observations about the attributions of the remarks made by Kelly Wheatley at the first meeting. We refer in particular to pages 889A and 889B. In the second iteration of the grievance the remarks attributed to Kelly Wheatley were retained but her name was omitted.

93. The claimants' grievance was investigated by Katie Brookesbank. She met with the claimants on 27 March 2018 as a first step in the handling of the grievance investigation. Copies of the handwritten notes of this meeting are at pages 919 to 928.

94. Mrs Brookesbank prepared a plan for dealing with the grievance. The plan itself is at pages 916 to 918. It was decided that Mr Robson would hear the claimants' grievance.

95. The plan was a *"living document."* By this we mean that Mrs Brookesbank prepared some of the plan before the meeting with the claimants and then did further work on it afterwards. At page 917 she attempted to summarise the claimants' grievance. This appears on the document in black font. She then prepared some questions for claimants ahead of the meeting. This is in red font. After the meeting she then completed the document at page 916. The plan was to interview those named at "step two" of the plan. These individuals were identified to her by the claimants during the course of the meeting of 27 March 2018. She then prepared questions to ask the witnesses at the subsequent interviews that she was proposing to hold. The questions are set out at page 918.

96. There is reference in Mrs Brookesbank's grievance plan at page 916 to Mrs Burkin being involved. She says in the penultimate paragraph that "we (JB) will continue to assess the responses received for support worker". Mrs Brookesbank denied that Mrs Burkin was involved in the grievance other than as a witness.

97. As we have said, Mrs Brookesbank prepared a series of questions ahead of the meeting of 27 March 2018. The questions are at pages 917 in red font. In cross-examination, she was taken to the passages indicating an intention to ask the claimants why they had not sought to remove themselves from the meetings. It was suggested to her that her focus was therefore upon the conduct of the claimants rather than the co-workers. Mrs Brookesbank said that the purpose of the questions at page 917 was to act as a starting point for the discussion at the meeting of 27 March 2018 because the claimants had not named any of the co-workers in the grievance letter.

98. We have in fact already seen that the first iteration of the claimants' grievance letter did name those whom the claimants held culpable. The claimants' evidence before us was that the names were removed upon the advice of their trade union representatives. Mrs Brookesbank said that the claimants did identify some of the individuals at the meeting held on 27 March 2018 and the grievance plan at page 916 indicates an intention to interview them.

99. We can see from paragraph 7 of Katie Brookesbank's witness statement that she interviewed 10 witnesses. Paragraph 7 identifies them and the pages at which their interview notes may be found.

100. We have already made reference to some of these (by reference to the interviews of Mr Hamilton (page 941), Mrs Burkin (pages 930 to 934) and Mr Bowgen). Mrs Brookesbank also interviewed Kelly Wheatley (page 943), Karen Broodhead (page 942), Darren Milton (pages 944 to 947) and Rachel Bell (page 937).

101. Mrs Brookesbank says at paragraph 8 of her witness statement that by oversight she omitted to interview Jamie Scott. He was identified as one of those to be interviewed upon the plan at page 916. Mrs Brookesbank says that she "spoke to Jamie Scott on 24 July 2018 to obtain his statement. This has not changed anything; therefore, I have not asked Greg Littlefair,

managing director, who heard the appeal to reconsider his decision. I very much doubted that his evidence would change the outcome because, as can be seen, I interviewed a large number of witnesses".

102. Mrs Brookesbank was cross-examined about the failure on her part to explore with the individuals what they had said during the course of the meetings. There is merit in the claimants' case that she did not do so. In none of the interview notes were the witnesses asked about what they had said at the meetings.

103. However, Mrs Brookesbank justified her approach upon the basis of her understanding of the claimant's grievance. It was her position that the main focus of the grievance was about the respondent's handling of the meetings (and the preparation for it) which the claimants say led to the workers not understanding the support worker role. Consequently, this resulted in a reluctance on the part of the workforce to volunteer for the support worker role and ultimately to the failure of the meetings. Mrs Brookesbank's understanding was that the claimants did not wish her to investigate the inappropriate comments as part of the grievance.

104. Mrs Brookesbanks' plan (in particular page 917) summarises her understanding of the claimants' grievance as including that inappropriate questions were asked. It was the claimants' position before the Tribunal that the grievance could not be properly understood and dealt with unless the respondent investigated whether inappropriate remarks were said. This was an issue pursued in cross-examination with Mr Robson and Mr Littlefair. Mrs Brookesbank said that she wanted to explore the employees whether they had understood the support worker role and what it entailed. She said that she did not feel "that it would make any difference to the outcome to determine what was actually said." She said in evidence "even if people did ask inappropriate questions, whether they had or hadn't, didn't affect the understanding of the support worker role. "

105. It was also part of the claimants' case that the grievance was in addition about an alleged failure by the respondent to protect the claimants from inappropriate remarks. It is plain that the grievance raised by the claimants is in part about this. We refer in particular to the final paragraph of page 888. That this formed part of the claimant's grievance was recognised by Mrs Brookesbank in her plan: the summary page 917 includes this element of the grievance. Mrs Brookesbank took the view that management has stepped in to protect the claimants when questions had become inappropriate.

106. The grievance meeting took place on 24 April 2019. The claimants were present and were accompanied by two trade union representatives. The notes are at pages 961 to 966.

107. In cross-examination, Mrs Brookesbank was questioned about some of the entries in these notes. We can see (for example at paragraphs 1.2 and 1.3 on page 962) what appear to be comments or annotations in square brackets. Mrs Brookesbank said that these were her comments or annotations with a view to assisting Mr Robson. She justified the taking of this step upon the basis that it would "save him having to refer to all of the notes and to anticipate

what the other side may say". She was then taken to a similar entry in square brackets at paragraph 2.2 upon 963. She denied making that entry. This appears to be a comment to the effect that none of the co-workers thought that the meetings were negative. She made a similar remark about an entry in square brackets at page 964 (at paragraph 3.1). Mrs Brookesbank said that the entries at pages 963 and 964 were those of Mr Robson (or at any rate, she thought that they were). She said that ultimately, she was not the decision maker. We observe that Mrs Brookesbank's evidence about the provenance of the comments and remarks in the square brackets in the meeting notes commencing at page 961 was unclear and uncertain. She could not be certain who had made them, when and why. For his part Mr Robson was also unclear about the provenance of the comments in square brackets. He had no recollection of them.

108. At the outset of the meeting it is recorded that the respondent sought to clarify the scope grievance and that it remained as understood at the meeting of 27 March 2018. The main points were summarised that, "in summary in your letter [of grievance] you say you made it clear to management that you did not want the support worker information meetings to get "out of control" and therefore required the support of management. Management and the union failed in their duty by not intervening at the two meetings held on 8 March 2018 regarding the line of questioning relating to your disability. This left you feeling vulnerable and stressed." There was no disagreement upon the claimants' side with this summary. It was not said that the claimants wished there to be an investigation into the conduct of the employees.

109. The notes record (at page 965) that Mrs Brookesbank asked the claimants what would be a satisfactory outcome for them upon the conclusion of the grievance. The claimants' trade union representative said that they wanted the respondent to "communicate by letter to all employees making them aware of the condition and the support worker role /job description." When taken to this passage of page 965 in cross-examination MAS said that the claimants were not "blaming our co-workers that the respondent made the environment happen leading to the questions. The blame is on the respondent. "

110. Mr Robson wrote to the claimants on 8 May 2018 with the outcome of the grievance. His grievance outcome letter is at pages 968 to 977. Mrs Brookesbank said that Mr Robson had typed this letter himself. In evidence before the Tribunal, Mr Robson said that he had written the grievance outcome letter in conjunction with Mr Sandeman. It was evident to the Tribunal from his demeanour when asked about this that Mr Robson was somewhat uncomfortable about the circumstances in which the letter had been prepared. Mr Robson did not uphold the claimants' grievance.

111. The claimants appealed against Mr Robson's decision. The appeal letter is dated 18 May 2018 and is at pages 982 to 1002. The claimants did not appeal upon the basis that the respondent had not dealt with the issue of what remarks had been made by the employees at the meetings. If this had been raised as an issue by the claimants in the grievance but not dealt with by the respondent then it may have been expected to feature as a ground of appeal. The Tribunal has little doubt that the claimants would have been alive to such a failure if

such it be. Further the appeal letter did not specifically attribute comments to any co-worker. Upon this basis and upon the basis of our findings in paragraphs 103, 108 and 109, the Tribunal finds that a complaint about what the co-workers said formed no part of the claimant's grievance.

112. These findings are reinforced by MRS' evidence in cross-examination. Mr Sandeman asked him to confirm that the claimants were not wishing to pursue a claim against their co-workers but rather the claimants just wanted the respondent to take responsibility for what happened. This question was prefaced by an observation from Mr Sandeman that the respondent accepted at the time that the kinds of comments of which the claimants complained had been made and, that being the case, there was no need for the respondent to investigate precisely what had been said. MRS agreed that the claimants were not wishing to pursue a claim against their co-workers. MRS did not dispute the premise of Mr Sandeman's question.

113. The matter was referred to Mr Littlefair who had not been previously involved. Again, Katie Brookesbank was charged with the investigation of the matter. She obtained statements from those identified at paragraph 15 of her witness statement. Statements were obtained by her by from: Jayne Burkin, Kevin Robson, Ian Hamilton and Richard Bowgen. We have referred to some of these documents (which are at pages 1022 and 1028 inclusive) already.

114. The grievance appeal hearing took place on 5 July 2018. The claimants attended and were accompanied by Richard Bedford and Phillip Tarrey, another union representative. Mr Littlefair conducted the hearing. Katie Brookesbank took notes. Her notes are in the bundle at pages 1035 to 1061.

115. Mr Littlefair wrote to the claimants with the grievance appeal outcome decision. His letter dated 13 July 2018 is at pages 1064 to 1067. Mr Littlefair rejected the claimants' grievance and did not uphold their appeal. He says at paragraph 13 of his witness statement that, "I knew that the brothers had complained of discrimination and brought Tribunal proceedings against the company, but this did not influence my consideration of their grievance appeal at all. My aim was to resolve the grievance and to progress the recruitment of support workers if this was reasonable and practicable. This would be very much in the interests of the company".

116. In the grievance outcome letter, Mr Littlefair acknowledged that managers conducting the meetings could have been better briefed. However, he considered that this did not have a detrimental effect upon the meetings and that management had stepped in appropriately when required.

117. In cross-examination Mrs Brookesbank was taken to the witness statement which she obtained from Jayne Burkin for the purposes of the appeal. This is at pages 1022 to 1025. There is reference in the first paragraph at 1023 to Mrs Burkin's belief that the meetings were not a catastrophic failure and that that belief was shared by others. In support of her belief she refers to "witness statements". She also makes reference to witness statements at page 1024 which was concerned with the issue of there being no management presence (at least at the first meeting) and the lack of structure. She says that, "witness

statements support that the union and the managers who were present stepped in to stop any repetitive questioning".

118. Mrs Brookesbank was therefore asked whether, as at 18 June 2018 (being the date of her grievance appeal witness statement) Mrs Burkin had been shown the witness statements of others. Mrs Brookesbank said unequivocally that Mrs Burkin had seen them. This may be contrasted with Mrs Burkin's own evidence when asked about these entries in her witness statement. She said that reference to the witness statements "does not mean that I have gone through them. I have spoken to people. I know generally what people have said." She went on to add that she had discussed matters with Mr Hamilton and Mr Bowgen but "I have not seen their statements". When asked why she had not couched her statement in terms of having discussions with Mr Hamilton and Mr Bowgen as opposed to making a reference to having seen witness statements she confessed that she did not know. Upon the basis of Mrs Brookesbank's fair and unequivocal evidence and the somewhat unsatisfactory nature of Mrs Burkin's replies when about her grievance appeal witness statement, we find that Mrs Burkin was privy to the witness statements before the claimants' grievance appeal was heard.

119. We shall now set out the evidence that emerged during the cross-examination of Mr Robson and Mr Littlefair. We shall start with Mr Robson's evidence.

120. He said that he was aware of the first claim when he dealt with the claimants' grievance. The grievance meeting took place on 24 April 2019. The first effective day of the hearing of the first claim took place on 30 July 2018. However, the hearing of the first claim has been due to commence in February 2018. (The hearing was adjourned upon the first morning of the hearing in February 2018). Mr Robson said that he had been told about the first claim during the course of management meetings. It is entirely credible that Mr Robson would have known of the first claim before he dealt with the claimants' grievance and indeed he did not deny knowing of the first claim. He denied knowing the details of the first claim. He was not familiar with the detailed history of the matter. That said, he was aware of the respondent's wish to recruit support workers to help the claimants return to their substantive roles.

121. As we said in paragraph 104, Mr Robson was questioned about the failure to obtain evidence about what the co-workers had said that the meetings. Mr Robson said that the respondent had not been asked to investigate specific comments. His view was that the comments were "the type of things that would be raised at a meeting." Mr Robson said that his understanding of the scope of the grievance was about the negative impact of the meetings (and the preparation for the meetings) upon support worker recruitment and that the claimants had been upset by the comments that had been made. He accepted that the issue of the protection of the claimants was within the scope of the grievance.

122. Mr Robson accepted that some of the alleged comments were unacceptable. It was put in by Mr Morgan that the "*disability benefits", "dangerous",* and *"thankful for having a job"* comments allegedly made (and referred to in paragraph 10) were inappropriate. Mr Robson fairly agreed with that proposition.

123. Mr Robson accepted that the comment attributed to others and referred to by the claimants in their grievance letter (in particular, at page 888) were in fact made. He also accepted (by reference to what was said by Mrs Burkin in her statement at pages 932 to 934 and by Mr Bowgen at pages 949 to 954) that matters had got heated during the course of the meetings. However, he maintained that whether or not any individuals had crossed a line of acceptability was not part of the claimants' grievance. There is corroboration of the claimants' case in the evidence of Mr Bowgen (paragraphs 72 and 73) and Mr Hamilton (paragraphs 78 and 83-85).

124. For the reasons given in paragraph 111 we accept Mr Robson's account upon the issue of the scope of the grievance. That said, we agree with the claimants that Mr Robson's conclusion in the grievance outcome letter that nothing inappropriate was said (or at any rate he could not see why the claimants had been offended by the remarks) is an unsustainable conclusion in the light of his concession that some of the remarks were inappropriate and his acceptance that they were made. He sought to defend his position upon the basis that the meetings were an open forum and the comments were the kind of thing that one may expect the workforce to say. He did fairly accept under cross examination that it was reasonable for the claimants to have found some of the comments to be hurtful.

125. It was also put to Mr Robson that a key issue for the claimants was management's failure to stop the inappropriate questioning. Mr Robson said, "I would have thought they would be highlighted more if that's a key complaint." However, the Tribunal finds that the failure to stop inappropriate questioning was a key component of the claimants' grievance: see paragraphs 103,105 and 108 above. Furthermore, in the introductory notes of the grievance hearing (at page 961) the respondent referred to the claimants' letter of grievance as including that management "failed in their duty to protect *[the claimants]* by not intervening at the two meetings held on 8 March 2018 regarding the line of questioning relating to [*the claimants']* disability. This left *[the claimants]* feeling vulnerable and stressed."

126. It was suggested to Mr Robson that his conclusion (about the first meeting) that there was adequate management presence was unsustainable. Mr Robson fell back upon the presence of team leaders at the first meeting held on 8 March 2018. The Tribunal prefers the claimants' case upon this issue. We refer to the findings of fact in the Reserved Judgement upon the first claim, in particular around paragraphs 223 to 226.

127. In paragraph 226 of the Reserved Judgment upon the first claim, we noted that a third works meeting was held on 21 March 2018. Mr Robson maintained that similar remarks had been made at that meeting to those that have been made of the first two. The claimants sought to draw a contrast between how the third meeting had been conducted on the one hand and the first two been conducted on the other. Their case was that because the third meeting had been better organised it passed off without incident. Mr Littlefair said that nothing was mentioned about the third meeting to him. The claimants led no evidence about the third meeting save for a brief mention of it in paragraph

148 of MAS's statement. We can make no findings about the conduct fo the third meeting in view of the paucity of evidence about it.

128. It was suggested to Mr Robson that he had reached unsafe conclusions and that he had been influenced so to do by the fact that the claimants were pursuing the first claim against the respondent at the material time with which Mr Robson was dealing with the claimants' grievance. Mr Robson did not accept this to be the case.

129. We now turn to the evidence given by Mr Littlefair under cross examination. He was aware of the first claim when he came to deal with the claimant's appeal against Mr Robson's findings. Mr Littlefair acknowledged that he was aware when dealing with the grievance appeal that the claimants were intending to pursue a claim before the Tribunal of harassment arising out of the 8 March 2018 meetings. (This must follow given that the claimants' solicitors had presented further particulars of the first claim on 26 March 2018 which included complaints of harassment: see further paragraph 172 below). He denied that he had ruled against the claimants because of that. He fairly pointed out that the respondent had in fact upheld a grievance and an appeal raised by the claimants about the actions of Ruth Gilmore: see paragraphs 30 and 31 of the Reserved Judgement upon the first claim. (There was of course no claim before the Employment Tribunal at the time of the Ruth Gilmore grievance)

130. Mr Littlefair said that he too was not concerned that there had been no investigation into who had said precisely what at the meetings. His view was that was not the subject of the grievance or of the grievance appeal. For the reasons given in paragraph 111 we agree with Mr Littlefair's approach.

131. Mr Littlefair accepted that comments of the kind complained about by the claimants were made. He said that he accepted that the claimants found them hurtful and that "this is what is expected with a shop floor of this nature. They are interested in what's in it for them." He also said, "everyone knows that employees can be sharp at town hall meetings." He agreed that some of the comments were inappropriate. He said that he assumed that the comments were made as they are "typical of what I hear at these meetings."

132. Mr Littlefair did not accept that there was an inadequate management presence at the meetings. He spoke highly of Mr Hamilton and Mr Bowgen. He also said that team leaders were present who may be expected to step in as the first line of management. The Tribunal cannot accept Mr Littlefair's evidence upon this issue around the meetings that day for the reasons set out in paragraph 126 above.

133. Mr Littlefair was then asked about the use of an employment agency from whom the respondent (at the time) recruited agency workers. We touched upon this issue in paragraphs 232 to 235 of the Reserved Judgment upon the first claim. We accept that he was genuinely confused over dates when he said in evidence that at this time (in 2018) he had ceased the use of agency workers. Cessation of use of the agency did not take place until 2019. We accept that the respondent was seeking to pursue the support worker issue

through the employment agency when Mrs Burkin contacted the agency on 9 March 2018.

The issues in the claim

134. As we said in paragraph 4 of these reasons, in this (the second) claim the claimants pursue complaints of harassment and victimisation. Upon the first day of the hearing of the second claim, the Tribunal clarified the issues with the parties.

135. The complaints of harassment concern:

    (1) The comments made by four of the claimants' work colleagues. Particulars of the comments in question and their attribution are set out in paragraph 10.
    (2) The handling by the respondent of the claimants' grievance that was received by the respondent on 15 March 2018. The harassment complaint extends to the respondent's handling of the grievance up to and including the grievance appeal outcome. (The ambit of this part of the claim is the alleged failure by the respondent to investigate; which of the employees' made which comments, the impact of the meetings upon the claimants, the appropriateness of the comments, and the issue of the adequacy (or otherwise) of the management presence at the meetings).

136. The victimisation claim covers much the same ground as the second limb of the harassment complaint in paragraph 135(2). It is not in dispute that the protected act for the purposes of the victimisation claim is the presentation of and pursuit by the claimants of the first claim (which pursuit included the particularisation of the harassment complaints in the first claim*: these were not heard as part of the first claim but it is of course sufficient if the putative discriminator believes there to have been a protected act by the complainant or that the complainant may do a protected act. The respondent was aware of the claimants' intentions to pursue harassment complaints from 26 March 2018 when the particulars were presented to the tribunal*). The detriment alleged to have arisen because of the victimisation are the dismissal of the grievance and the grievance appeal.

The relevant law and conclusions

137. We shall now turn to look at the relevant law. We shall then set out our conclusions by application of our findings of fact to the relevant law in order to determine the issues.

138. The statutory provisions as to prohibited conduct are to be found in Chapter 2 of Part 2 of the 2010 Act. The relevant sections for the purposes of the second claim are: section 26 (harassment); and section 27 (victimisation). The prohibited conduct is made unlawful in the workplace by provisions to be found at Part 5 of Chapter 2 of the 2010 Act. Victimisation and harassment are made unlawful in the workplace pursuant to sections 39(4) and 40 of the 2010 Act respectively.

139. Upon each claim the claimants bear the burden of proof to establish a *prima facia* case that there are facts from which it could reasonably be inferred, absent an explanation, that there has been victimisation and harassment. Should the claimants do so then the burden will shift to the respondent to show an adequate explanation which excludes the relevant prohibited conduct: (section 136 of the 2010 Act).

140. To succeed with a claim of harassment the claimants need to show a *prima facie* case that three elements have been shown. The first of these is that there was unwanted conduct. Secondly, the unwanted conduct must relate to the relevant protected characteristic of disability. Thirdly, the unwanted conduct relating to the relevant protected characteristic must be shown to have been done with the purpose or must be shown to have the effect of violating the claimants' dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them: we shall refer to this as *'the proscribed effect.' (From time to time we shall abbreviate this statutory wording to 'intimidating etc').*

141. The *Equality and Human Rights Commission's Code of Conduct* says (at paragraph 7.8) that the word *"unwanted"* has the same meaning as *"unwelcome"* or *"uninvited".* The Code also provides that *"unwanted"* does not mean that express objection must be made to the conduct before it is deemed to be unwanted.

142. The unwanted conduct must be shown to have the purpose or effect of violating the claimants' dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Accordingly, conduct that is intended to have that effect will be unlawful even if does not in fact have that effect. Conduct that in fact does have that effect will be unlawful even if that was not the intention.

143. Therefore, a claim brought on the basis that the unwanted conduct had that purpose involves an examination of the perpetrator's intention. A claim brought upon the basis that that was the effect of the alleged perpetrator's behaviour involves a consideration of the perception of the claimants and all the circumstances of the case including whether it was reasonable for the conduct to have that effect. The test for the effect of the conduct therefore has both subjective and objective elements to it.

144. The objective aspect of the test of the effect of the conduct (by section 26(4) of the 2010 Act) is intended to exclude liability where a claimant is hypersensitive and unreasonably takes offence. Importantly however the Tribunal must consider whether it was reasonable for the conduct to have that effect on the particular claimants.

145. In his helpful written submissions, Mr Sandeman drew the Tribunal to cases in which these provisions have been considered. In **Grant v H M Land Registry** [2011] EWCA Civ 769 Elias L J said that, "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caused by the concept of harassment".* By *"these words"* Elias L J was referring to the provisions in section 26(1)(b)(i) and

(ii) of the 2010 Act: that is to say, that the conduct must have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

146. In **Betsi Cadwaladr University Health Board v Hughes and Others** (UK EAT/0179/13) Langstaff J (P) agreed and endorsed the approach in **Grant**. He said at paragraph 12 that, "*we whole heartedly agree [*with **Grant***]. The word violating is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."*

147. In **Weeks v Newham College of Further Education** (UK EAT/0630/11) Langstaff J (P) highlighted that section 26(1)(b)(ii) refers to an *"environment".* He said (at paragraph 21) that, *"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must proceed in context; that context includes the other words spoken and the general run of affairs within the office or staff room concerned. We cannot say that the frequency of use of such words is irrelevant. For example, if the conclusion of the Tribunal here had been that the words were used all the time, in effect, in regular conversation, one would have expected the ultimate conclusion to be very different and have required the respondent as employer of the other staff concerned to have given some explanation as to its actions or inaction about it".*

148. The provisions in section 26(4) are aimed at the mischief of an individual complainant's hypersensitivity. If in any case the complainant is unreasonably prone to take offence or to believe that dignity has been violated then harassment will not have taken place. The context of the conduct is therefore relevant and can include whether the conduct was intended to cause the proscribed consequence.

149. In this case, we do not understand that the claimants are seeking to run their case upon the basis that the respondent's conduct was intended to have the proscribed effect. In paragraph 11 of his closing submissions Mr Morgan says that, *"regardless of the purpose of the comments, it is clear that they had the effect of violating the claimant's dignity and/or creating a hostile etc environment for them."* There was no cross-examination of any of the respondent's witnesses that these remarks were said with the intention of bringing about the proscribed effects.

150. The Tribunal therefore proceeds upon the basis that the harassment claim must be considered from the perspective only of whether the impugned conduct had the proscribed effect of violating the claimants' dignity or creating an intimidating *etc* environment for them. It is necessary therefore to look at the context in which the comments were made in order to determine the perception of the claimants and whether it was reasonable for the conduct to have the proscribed effect in question of violating dignity and creating an intimidating *etc* environment.

151. In order to constitute unlawful harassment, the unwanted and offensive conduct must relate to a relevant protected characteristic which in this case is of course disability. The Tribunal must identify the real reason or motive for the impugned conduct. The context in which the conduct occurred is therefore of crucial importance.

152. The EHRC Code says, at paragraph 7.9, that *"unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic. It includes the following situations:*

(A) Where conduct is related to the worker's own protected characteristic.
…

(B) Where there is any connection with a protected characteristic."
…

153. It is not enough for the claimants to show that but for the disability they would not have been subjected to the conduct in question. It is true that but for the disability the claimants would not have found themselves in the situation with which we have been concerned. There would have been no need, but for the fact of their disability, to call a meeting of the workforce in order to recruit support workers. A *'but for'* analysis is however inapt. What must be considered is whether the impugned conduct related to the claimants' disability.

154. An employer is liable for acts of discrimination, harassment and victimisation carried out by its employees in the course of employment. For an employer to be liable for the discriminatory conduct of one of its employees it must be established that: there was an employment relationship between the employer and the alleged discriminator; that the conduct occurred in the course of employment; and that the employer failed to take all reasonable steps to prevent the conduct in question.

155. There is no issue that the impugned remarks were made by employees of the respondent and that the conduct occurred in the course of employment (being the workplace meetings). The respondent has not raised a defence that it took all reasonable steps to prevent the employees from committing the discriminatory acts in question.

156. Mr Sandeman drew the Tribunal's attention to the case of **Unite the Union v Nailard** [2018] IRLR 730. In this case, the suggestion was made by Underhill LJ (at paragraph 98) that an employer innocent of any discriminatory motive and where there is only a negligent failure to prevent discriminatory acts upon the part of a third party ought not to be liable for the acts of that third party. The **Nailard** case concerned the acts of two workplace union officials who were employed by a private sector employer but worked full-time upon union business and were held to be agents of the union. They were not employees of the union. They were thus a third party to the relationship between the complainant and the trade union.

157. This authority, it seems to us, is of no application in this case. In **Nailard** the discriminators were not employees of the union whereas in this case all of the impugned conduct was committed by individuals who unquestionably were employees of the respondent and whose conduct was clearly linked to their employment. The impugned conduct took place at a works meeting, in working time, upon the employer's premises and to discuss an issue linked with work. The respondent is therefore vicariously liable for any harassment or victimisation of the claimants as found by the Tribunal to have been committed by the respondent's employees.

158. We now turn to victimisation. It must firstly be shown that the claimants have done or may a protected act within the definition of section 27(2) of the 2010 Act. In this case, there is no dispute that the claimants have done a protected act: the protected act in question was the pursuit by them of the first claim (including the attempted pursuit of the harassment claim within the first claim) and that in addition they intended to pursue the harassment claim. It must then be shown that the claimants were subjected to a detriment because they had done the protected act in question or the respondent believed that they had done it or may do it.

159. The EHRC Code says that a detriment is anything which the individual concerned might reasonably consider makes their position for the worse or puts them at a disadvantage.

160. To succeed in a claim of victimisation the claimant must show that he or she was subjected to the detriment because of the protected act. If there has been a detriment and a protected act but the detrimental treatment was due to another reason then the claim will not succeed. The EHRC Code provides (at paragraph 9.10) that the protected act need not be the only reason for detrimental treatment for victimisation to be established. Indeed, it is not necessary for the protected acts to be the primary cause of a detriment so long as it is a significant factor.

161. Detriment cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly brought about the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred the claim for victimisation will fail. This issue does not arise in this case because both Mr Robson and Mr Littlefair fairly accepted that they knew that the claimants were pursuing the first claim at the time of their involvement: see paragraphs 120 and 129. In Mr Littlefair's case, he was also aware that the claimants intended to bring a complain to harassment arising out of the 8 March 2018 meetings.

162. The victimisation claims cover the same ground as the second limb of the harassment claim set out in paragraph 135(2) above: that is to say, the claimants contend that the respondent did not conscientiously and properly deal with claimants' grievance because they had brought and were pursuing the first claim.

163. It is accepted by the claimants that, by virtue of section 212(1) of the 2010 Act, should the second limb of the harassment claim succeed then the victimisation

claims will fall away. This is because (as provided in section 212(1)) a *"detriment does not…include conduct which amounts to harassment."* It is however permissible for the Tribunal to determine there to be no harassment in relation to the respondent's handling of the grievance and yet find there to be a detriment (by reason of victimisation) consequent upon the claimants bringing the first claim.

164. In paragraph 59 of his submissions, Mr Sandeman says about the victimisation claim that*, "The key issue is whether the grievances were dismissed because the claimants had done a protected act. The test is a subjective one of why did the respondent act as it did? What consciously or unconsciously was the reason?"* (*per* Lord Nicholls in **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830 HL).

165. A further issue arises in this case in connection with the first limb of the harassment complaint (set out in paragraph 135(1)). This concerns any acts which the Tribunal determine to be one off-acts and which occurred on 8 March 2018. The claimants did not contact ACAS pursuant to the Employment Tribunals Act 1996 until 29 August 2018. (Contacting ACAS is a requirement pursuant to the 1996 Act and has the effect of 'stopping the clock' for limitation purposes).

166. By section 123 of the 2010 Act complaints of discrimination must be presented to the Employment Tribunal within the period of three months beginning with the date of the act complained of. Conduct extending over a period is to be treated as done at the end of that period. Failure to do something is to be treated as done when the person in question decided upon it. In the absence of evidence to the contrary, a person is taken to decide on failure to do something is taken to occur either when the person does an act inconsistent with deciding to do something or, if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it.

167. No time issue arises in relation to the second limb of the harassment claim in paragraph 135(2) or the victimisation claim. This is because there was a course of conduct dating from the lodging by the claimants of their grievance on 15 March 2018 until the dismissal of the grievance appeals on 13 July 2018. That continuing course of conduct ended within three months of the date upon which contact we made with ACAS on 29 August 2018. The claim has therefore been made in time. Upon the claimants' case there was a continuing act of harassment or victimisation up to a date falling within three months of the day upon which they contacted ACAS. That has been made out on the facts as Miss Brookesbank, Mrs Burkin, Mr Robson and Mr Littlefair were involved in the matter (to varying degrees) following 15 March 2018 in dealing with the grievance and the appeal against the grievance outcome.

168. Plainly, the contact with ACAS was more than three months from 8 March 2018. On the face of it therefore the claimants' claims arising out of the conduct of the workplace meetings of that day (being the first limb of the harassment allegation) are out of time. (It forms no part of the claimants' case that the acts of the fellow employees that day was part of a continuing course of conduct). Therefore, the incidents of 8 March 2018 are specific and isolated

acts which occurred upon that day and it is upon that day that time started to run in respect of the first limb of the harassment claim.

169. We observe in passing that had the claimants sought to argue that the co-worker's comments of 8 March 2018 formed part of a continuing course of conduct then the Tribunal would have held against the claimants upon this point so far as concerns the remarks of Karen Wheatley, Karen Broadhead and Rachel Bell.

170. The first limb of the harassment claim related purely to the comments of the fellow employees. There is no complaint about any other discriminatory acts upon their part after 8 March 2018. However, it is the case that the co-workers identified at paragraph 169 did have further involvement in the matter as they were interviewed by Katie Brookesbank. The interviews with Kelly Wheatley (held on 29 March 2018), Karen Broadhead (also 29 March 2018) and Rachel Bell (28 March 2018) took place more than three months before the date upon which the claimants approached ACAS pursuant to the 1996 Act in any event. Therefore, in so far as it may be suggested there to be a continuing course of conduct upon the part of those three co-workers that continuing course of conduct ended when they were interviewed by Katie Brookesbank. They had no further involvement in the matter. Any impugned conduct after the end of March 2018 was that of others. Upon any analysis therefore the first limb of the harassment claim has been brought outside the time limit provided for by section 123 of the 2010 Act.

171. The interview with Mr Scott was on 24 July 2018 (pages 1070A and B). This is within three months of 29 August 2018. There is no evidence that Mr Scott had any involvement in the matter after 8 March 2018 until 24 July 2018. In our judgment, this gap of time renders the conduct of Mr Scott on 8 March 2018 a specific act. The claim in respect of it has been brought out of time. However, Mr Scott, when interviewed on 24 July 2018, repeated the sentiment of which the claimants complain (expressed on 8 March 2018) to the effect that *"..it was all about you.."* We hold that this part of the claimants' complaint has been presented in time. (It is not necessary for the complainant to be present when the act complained of occurred). It follows that the harassment complaints in parts 1, 3 and 4 of paragraph 10 above (related to the conduct of Karen Wheatley, Karen Broadhead and Rachel Bell) have been presented out of time but that in part 2 (related to the conduct of Jamie Scott) has been presented in time.

172. The three months' time limit for bringing a discrimination claim is not absolute. Tribunals have discretion to extend the time limit for presenting a claim where they think it is just and equitable to do so. However, there is no presumption that the Tribunal should extend time. It is for the claimants to convince the Tribunal that it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

173. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other. The prospective merits of a claim may be taken into account in weighing the balance of prejudice. The prejudice to the respondent must be more than simply having to answer the claim. If that were to be a decisive factor then the discretion vested in Tribunals as to whether or not to extend time upon just and equitable grounds would largely be devoid of content. The other side of the coin is that the complainant must point to factors other than the loss of the opportunity of pursuing the case: again, if loss of such an opportunity were to be sufficient then the Tribunal's discretion would be emasculated.

174. In exercising discretion to allow out of time claims to proceed Tribunals may also have regard to the check list contained in section 33 of the limitation Act 1980. This provision deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all of the circumstances of the case. In particular, regard may be had to the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the parties sued has co-operated with any request for information, the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action, and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. However, the section 33 factors are not to be adopted as a checklist and the Tribunal does not need to go through all of the factors in each and every case. The Tribunal will however err if a significant factor is left out of account.

175. The Tribunal should not focus solely upon the question of whether the claimant ought to have submitted his or her claim in time. The Tribunal's task is to weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other.

176. The second claim covers the same ground as the proposed amendment to the first claim. As we said in paragraph 278 of the Reserved Judgment of the first claim, the complaint of harassment (sought to be added to the first claim by way of amendment) was presented by the claimants' solicitors to the Tribunal as part of the further details of claim on 26 March 2018. There was no reference to wishing to make an application to amend the claim to include that of harassment and it is difficult to understand why the claimants' solicitors did not make such an application. As it was, the application was made upon the first morning of the effective hearing of the first claim on 30 July 2018. This was refused for the reasons given in the Reserved Judgment for the first claim: (paragraphs 278 to 285).

177. In our judgment, it is just and equitable to extend time to enable the Tribunal to consider those parts the first limb of the harassment claim that are out of time. Firstly, it is well established that defaults upon the part of a party's solicitor should not be visited upon the party for otherwise the other side to the action would be in receipt of a windfall. It is no fault of the claimants that their solicitor failed to make an amendment application in the first claim to include in the first claim the events with which we are now concerned in the second

claim. Indeed, the first limb of the harassment claim was presented to the Tribunal in the course of dealing with the first claim but was unaccompanied by an application to amend the first claim to include harassment. Had an amendment application been made at that time then it would have enjoyed very good prospects of succeeding given that at that time the claimants would have been in time for pursuing the first limb of the harassment claim anyway.

178. Secondly, we agree with Mr Morgan that notwithstanding the claimants' solicitor's failures the fact is that the respondent was then placed on notice that they would be facing a claim arising out of the matters with which we have been concerned in the second case. There has been no suggestion upon the part of the respondent that the cogency of the evidence has been in any way affected by the claimants' delay in pursuing the second claim. The respondent has been able to call all relevant witnesses. The delay has not been significant in that it has not affected the recollection of any of the witnesses (at least to a significant degree). The respondent was unable to point to any prejudice to them other than the fact of having to answer the claims. On the other hand, the prejudice to the claimants of not extending time is to bar them out from pursuit of the action which in unjust given that the second claim could have been made in time or added by way of amendment to the first claim had it not been for the default of their solicitors. In these circumstances upon any view the balance of prejudice favours the claimants. The Tribunal's judgment therefore is that time is extended upon just and equitable grounds in order to vest the Tribunal with jurisdiction to consider the out of time harassment claim.

179. We now turn to our conclusions upon the merits of the issues before us. We shall start with the first limb of the harassment claim in paragraph 135 which relates to the comments attributed to the claimants' four colleagues referred to in paragraph 10.

180. The Tribunal finds as a fact that all of the comments complained of by the claimants were made. We set out in tabular form the relevant paragraphs:

Kelly Wheatley

Comment/action	**Findings of Fact**
"What's in it for us" and "why we should do the role" in a loud voice	Paragraph 45
Kelly said angrily "why do I get moved around?"	Paragraph 46
"Why should you remain in your old roles!"	Paragraph 47
"Why do you get special treatment!"	Paragraph 48
"Why do they have assisted technology?!"	Paragraph 50
"Why do they have taxis?"	Paragraph 51

Jamie Scott

Comment	**Findings of Fact**
"Asked question about our past, our high performance and our technical know-how, and our team performance".	Paragraph 54
"Why we were working daylight hours".	Paragraph 55

"Before going off work it was all about you. Now you're saying it's all about us".	Paragraphs 57 and 171

Karen Broadhead

Comment	Findings of Fact
"Why we were getting special treatment?"	Paragraphs 60 and 61
"Why we could not work full-time?"	Paragraph 62
"You are going part-time because you are getting disability benefits!"	Paragraph 63

Rachael Bell

Comment	Findings of Fact
"You are more dangerous now you have the eye condition".	Paragraph 64
"You should stay in your alternative role".	Paragraph 65
"Be thankful for having a job".	Paragraph 66

181. We agree with Mr Morgan that, with one exception, all of the comments were about the claimants' disability, the consequences of it and the adaptations in place for the disability. There is a clear connection with the claimants' disability because that was the whole purpose of the meeting. The nature and extent of the claimants' disability was therefore central to the meeting and plainly it was in the minds of the four individuals in question when they raised the questions that they did. The one exception is the comment from Jamie Scott about the claimants' high performance and technical know-how. It is difficult to see how this is connected with the claimants' disability or in any way related to it. We agree with Mr Scott when he said in evidence that this was a complimentary remark made by him about the claimants.

182. Subject to paragraph 181, we therefore find as a fact that the comments were made and that they were all related to the claimants' disability. The next issue therefore is whether the conduct in question was wanted or unwanted. Upon this issue, we refer to our findings in paragraph 222 of the Reserved Judgment for the first claim and which are summarised in paragraphs 17 of the reasons for this Judgment. It is plain from these findings that the respondent had reservations about the wisdom of the claimants attending the meetings. That the claimants felt the same way is evident from the fact that they presented Mrs Burkin with the literature at pages 879 (a) to (n). The nature of this literature is summarised in paragraph 16 of these reasons.

183. Notwithstanding each party's reservation the claimants resolved to be present at the meetings. The claimants wished to be present at the meeting in order to speak following management and Mr Hamilton's presentations. They wanted to be available to answer any questions which members of the workforce may have had of them. They thought they may be able to "add value" (*per* paragraph 33 above).

184. It is with these observations in mind that Mr Sandeman's submission that the words spoken must be seen in their context have force. The context is of course the preparation for the workforce meetings, the apprehension on both

sides that the meetings may be difficult and the claimants wishing to participate in the meetings against the better judgment of the respondent. The claimants positively wished to be present in order that they could address their colleagues' concerns. In these circumstances it is hard to see how at least some of the remarks made may be judged as unwelcome or uninvited. As MAS accepted, there was inevitably going to be some discussion about the claimants' condition and of the impact of the claimants' condition upon their ability to return to work in their substantial roles. The claimants were there to answer questions about their needs. In the circumstances it seems difficult to understand how at least some of the remarks made by their four colleagues could be said to be unwelcome or uninvited. On the contrary, the claimants anticipated questioning and therefore by inference invited it.

185. We accept that the claimants did not invite intrusive questioning into their condition. However, they must readily have anticipated questioning from the workforce about the impact of the recruitment of support workers upon the roles being carried out by colleagues. That being the case, the Tribunal's judgment is that the following comments cannot be said to be unwanted:

Kelly Wheatley
- *"What is in it for us"* and *"why should we do the role."*
- *"Why do I get moved around?"*

Jamie Scott
- *"Why we were working daylight hours".*

Karen Broadhead
- *"Why we could not work full-time?"*

186. In the Tribunal's judgment, the remaining remarks attributed to the four co-workers were unwanted. The following remarks in our judgment objectively crossed the line of acceptability:

Kelly Wheatley
- *"Why should you remain in your old roles!"*
- *"Why do you get special treatment!"*
- *"Why do they have assisted technology?"* [We accept that Kelly Wheatley did not use these precise words but that is the gist of what she was asking].
- *"Why do they have taxis?"*

Jamie Scott
- *"Before going off work it was all about you. Now you're saying it's all about us".*

Karen Broadhead
- *"Why we were getting special treatment?"*
- *"You are going part-time because you are getting disability benefits!"*

Rachael Bell
- *"You are more dangerous now you have the eye condition".*
- *"You should stay in your alternative role".*
- *"Be thankful for having a job".*

187. In our judgment, these remarks in paragraph 186 were all unwanted in the sense of being unwelcome and uninvited. None of them were said in an attempt to gain an understanding of the claimants' condition, the impact of the claimants' condition upon the respondent's system of work or the impact upon the co-workers of the recruitment of support workers to assist them. That was the purpose of the claimants being present: in order to give the co-workers a better understanding of their condition and the consequences of it for the workplace. These remarks were all directed to the claimants in the meetings. The impugned comments in paragraph 186 appeared indicative of antipathy to the claimants and to some degree resentment that the respondent had made adjustments for the claimants to come back in their adjusted role and that further adjustments were being proposed by the respondent in order that the claimants could attempt to return to their substantive roles.

188. It is, in our judgment, no answer for the respondent to pray in aid the fact that these remarks were made *at "town hall meetings*" (as Mr Littlefair described them) in South Yorkshire. The Tribunal takes judicial notice of local mores in this part of the world. Mr Harker's and Mrs Robinson's experience of local industrial relations practices has been of particular value upon this issue. Therefore, we have sympathy with the respondent's position that plain speaking may be expected in a South Yorkshire factory. However, the remarks in paragraph 186 above were in our judgment objectively indiscreet and gratuitous (even making due allowance for social norms in such a setting) and were not said, it seems to us, with the purpose of advancing an understanding upon the part of the workforce of the claimants' situation.

189. It is significant, we think, that Mr Bowgen brought the second meeting held on 8 March 2018 to an end in the circumstances described in paragraph 72 of these reasons and that Mr Hamilton felt compelled to "step in" (per paragraph 85). This is a clear acknowledgement, in our judgement, that the respondent's management recognised matters had gone too far. This corroborates our finding that objectively a line of acceptability had been crossed. Mr Robson, during the course of cross-examination, fairly accepted some of the remarks to be inappropriate.

190. The respondent's actions and fair concessions are factors which persuade the Tribunal that it was reasonable for the claimants to perceive the remarks as in violation of their dignity and/or of creating an intimidating *etc* environment for them. As was said in **Weeks**, an environment is a state of affairs which may be created by an incident the effects of which are of longer duration. The environment for these claimants was created by what was said at the two meetings of 8 March 2018. The effects are of longer duration as the claimants have eloquently described. In context, while some of the remarks made by the workforce were not unwanted (in the sense of being unwelcome or uninvited) for the reasons that we have given those that we have identified in paragraph 186 were. It follows therefore that the first limb of the complaint of harassment succeeds in part.

191. The Tribunal has some sympathy with the position of the respondent's management. It appears to us that it was very much against their instinct to

allow the claimants to be present at the meetings. Mr Robson's and Mr Littlefair's evidence was very much to the effect that what transpired was entirely predictable. (This reinforces our findings of fact in paragraph 186 that the comments were made, there being no issue raised by the respondent that the claimants' complaints about what was said is simply not credible. Our summation of the corroborative evidence supportive of the claimants' case lay be found in paragraph 123). We also accept that at the second meeting Mr Bowgen exercised his judgment to stop the meeting in order to prevent matters getting worse. That said, the respondent was in our judgment ill-advised in proceeding with the first meeting in the absence of any meaningful management presence. We agree with Mr Morgan that effectively there was no management presence given that Mr Hamilton and Mr Milton in particular were there in capacities other than to represent the respondent's interests. Mr Hamilton was there in his capacity as a trade union official and Mr Milton was simply there as an attender.

192. The respondent is vicariously liable for the conduct of its employees: see paragraphs 154-157. The respondent has no raised the defence open to it that it took reasonable steps to prevent the harassment.

193. We now turn to the second limb of the harassment complaint set out in paragraph 135 which concerns the handling by the respondent of the grievance process. The first part of this claim is the alleged failure by the respondent to investigate the attribution of the comments that were made on 8 March 2018. Upon this, we agree with the evidence given by the respondent (and in particular by Mrs Brookesbank, Mr Robson and Mr Littlefair) that the claimants were not pursuing a grievance against fellow employees. There was therefore no failure upon the part of the respondent to investigate that aspect of the matter. The respondent's case as to the limits of the grievance is also corroborated by Mr Bowgen in paragraph 74 and by Mr Hamilton in paragraph 78. The first iteration of the grievance had been watered down upon trade union advice in order to retain the comments complained of but which removed the attributions to individuals. The trade union was rightly concerned about industrial relations implications of attributing comments to individuals given that the object of the exercise was for the respondent to promote the recruitment of support workers. Plainly, this would not have been assisted by pointing the finger of blame at individuals (as MRS fairly recognised).

194. Mr Robson and Mr Littlefair each proceeded upon the basis that the comments had been made. Therefore, we agree with Mr Sandeman that the failure upon the part of the respondent to ascertain from each individual interviewed by Katie Brookesbank information as to what they had said is immaterial and does not represent a failure upon the part of the respondent to properly manage this aspect the grievance process. No purpose would have been served in eliciting that information given the acceptance by the respondent that inappropriate remarks had been made and that was not the purpose of the grievance in any event. In so far as the harassment complaint is pursued upon the basis of an alleged failure by the respondent to investigate which of their employees said what, that complaint fails upon the facts.

195. There was no unwanted conduct in failing to investigate the issue of the attribution of the comments as the respondent identified with the claimants the scope of the grievance. That is what the respondent investigated. The failure to investigate the attribution of the remarks and the remarks themselves is not unwanted conduct as the claimants did not ask the respondent to investigate this. There was no failure upon the part of the respondent to investigate what remarks were made as that simply did not form part of the grievance raised by the claimants. As Mr Sandeman says in paragraph 74 of his submissions, … "*the fact of the comments and questioning was never in dispute and neither was the fact that this had upset and offended the claimants*".

196. The respondent acknowledged the upset caused to the claimants by the remarks. Acknowledgement of the upset caused to the claimants was not unwanted conduct. There was no need for the respondent to investigate that which they acknowledged anyway.

197. What the claimants wanted, pursuant to the grievance, was an investigation into the process that had been carried out, the impact upon them (which was acknowledged) and the impact of that process upon the success or otherwise of the recruitment for the support worker role. The respondent conducted an investigation into these matters.

198. By way of reminder, the second limb of the harassment complaint set out in paragraph 135(2) comprises of four parts. We have found (in paragraphs 193 to 197) upon the first two parts: that the acknowledgement of the impact upon the claimants was not unwanted- it was in fact very much wanted by the claimants; and the failure to investigate the comments made by the co-workers was not unwanted- it was not part of the respondent's remit. However, upon the third and fourth part of the second limb of harassment complaint, the Tribunal's judgment is that the respondent's conduct of the grievance process was unwanted.

199. In our judgment, there was a failure upon the part of the respondent to reach objectively safe conclusions about the issues of management presence and the inappropriateness of the remarks made (as opposed to the attribution of the remarks). Mr Robson and Mr Littlefair reached unsafe conclusions regarding the management presence. Mr Robson, although recognising what had been said by the fellow employees, reached an unsafe conclusion in the grievance that the remarks were not inappropriate. Plainly, the comments were inappropriate for the reasons that we have given around paragraphs 186 to 189. Mr Littlefair endorsed Mr Robson's views in the appeal. In contrast, each recognised in evidence before us that the remarks were in fact inappropriate. (We refer to paragraphs 124 to 132 above). It must follow therefore that their conclusions in the grievance process were unsafe and therefore unwanted.

200. Having established unwanted conduct (at least upon the third and fourth parts of the second limb of the harassment complaint) we move on to consider the issue of whether the unwanted conduct could reasonably be considered as having the effect of creating the proscribed consequences. Mr Sandeman submits that it is difficult to see how the respondent's handling of the grievance and the grievance appeal could reasonably be said to create the proscribed

consequences. Objectively, as we have said, it seems to us that Mr Robson and Mr Littlefair reached conclusions which were unsafe. However, in the context of the workplace can those conclusions in and of themselves reasonably be said to have had the effect objectively of violating the claimants' dignity or creating an intimidating *etc* environment for them?

201. In our judgment, the conclusions were genuinely made upon the basis of the respondent's understanding of the grievances. The outcome letters were written with care in conjunction with Mr Sandeman. Further investigations were undertaken by the respondent at appeal stage. These are not the actions of an employer not conscientiously setting about the task of dealing with the grievance. The claimants wanted the respondent to investigate the failures in the process. The respondent did just that and then sought to learn lessons from the process and move matters on with a view to achieving the desired outcome of recruitment: see paragraphs 245 and 246 of the Reserved Judgment for the first claim and 133 of this judgment).

202. In our judgment, the intimidating *etc* environment was created by the remarks made by the co-workers at the meetings held on 8 March 2018. These remarks were made in the context of an inadequate management presence at the first meeting and the reaction of management to what was being said. The intimidating *etc* environment was not caused by the respondent's management's handling of the grievance process but was caused by the conduct of the co-workers. It is the case that the evidence of MAS (in paragraph 142) was that the rejection of the grievance was a continuation of the harassment. However, his focus in that paragraph (and in paragraph 156 when it came to the appeal) is upon the failure of the respondent to elicit detail of what had been said. For the reasons given in paragraphs 193 to 196, that was not the purpose of the grievance and thus the respondent's failure to consider or investigate that issue was not unwanted conduct. The claimants never sought an investigation into the issue as to who said what.

203. MAS's evidence around paragraphs 142 to 160 of his witness statement focusses very much on the conduct of the co-workers as having caused the intimidating *etc* environment and the respondent's failure to get to the bottom of this as opposed to its cause being deficiencies in the handling of the grievance by the respondent. In paragraphs 167 *et seq* he complains of the failure of management to step in and stop the fellow employees' conduct at the meetings. We have found that the respondent made unsafe findings upon this issue. However, the intimidating *etc* environment was in our judgment created by the co-workers' conduct and management's handling of the meetings and not by the failure upon the part of the respondent to properly investigate as part of the grievance process. Indeed, that is very much the gist of MAS' evidence in the relevant part of his witness statement. In our judgment the claimants have not shown upon the evidence a *prima facie* case that the conduct of the grievance had the proscribed effect of creating an intimidating *etc* environment (as opposed to the conduct of the co-workers which on our findings did so). They have not done enough for the purposes of section 136(1) of the 2010 Act to show a *prima facie* case upon this issue such as to shift the burden to the respondent to explain its conduct. It is therefore possible

to divorce the effect of the co-workers' and management conduct of the meetings of 8 March 2018 on the one hand and the effect of the respondent's handling of the grievance upon the other.

204. A further difficulty for the claimants is to relate the allegedly proscribed conduct to the protected characteristic of disability. The claimants' disability was of course the setting for the meetings and the aftermath of those meetings. The claimant's disability was the context in which the grievance arose. However, we agree with Mr Sandeman that there was insufficient connection with the protected characteristic of disability and the respondent's handling of the grievance to amount to harassment. The conclusions the respondent reached in the internal process is not (unlike the remarks themselves set out in paragraphs 10 and 186 above) inherently linked to the claimants' disability.

205. The conclusions the respondent reached were objectively unsafe. However, there is no evidence that the conclusions somehow related to the claimants' disability. There was no suggestion made to Mr Robson or Mr Littlefair that their conclusions were not genuine. In our judgment, the conclusions were genuinely made upon the basis of the respondent's understanding of the grievances. The outcome letters were written with care in conjunction with Mr Sandeman. Further investigations were undertaken by the respondent at appeal stage. These are not the actions of an employer not conscientiously setting about the task of dealing with the grievance. It is difficult to relate the handling of the grievance with the claimant's disability in circumstances where the respondent set about the task of looking at the claimant's grievance in good faith, did so in conjunction with their solicitor and expressed a willingness to improve upon the support worker recruitment process.

206. The Tribunal has determined that the respondent's conclusions upon the grievance were unsafe only after hearing many days of evidence and the respondent's evidence being tested by way of skilled cross examination by Mr Morgan. The respondent's determinations were in our judgment genuinely held. Given that the respondent had upheld the claimants' grievance about Ruth Gilmour, had reached the decision upon the grievance of 15 March 2018 with care and was willing to react positively to what had occurred in the quest for support workers we find the respondent's actions in their handling of the grievance were not related to the claimants' disability nor did it have the effect of creating a hostile *etc* environment for them.

207. In summary, upon the second limb of the harassment complaint there was no unwanted conduct upon the issues of which of the employees' made which comments and the impact of the meetings upon the claimants. However, there was unwanted conduct upon the respondent's handling of the claimants' grievance upon the appropriateness of the comments and the issue of the adequacy (or otherwise) of the management presence at the meetings but that unwanted conduct did not have the proscribed effect of creating an intimidating *etc* environment and was not related to disability.

208. We reach a similar conclusion upon the victimisation claim. There is much cross over between the second limb of the harassment claim and the

victimisation claim. The same factors as in paragraphs 193 to 206 are pertinent. There is simply insufficient evidence that Mr Robson and Mr Littlefair were motivated in their handling of their parts of the process by the fact that the claimants had brought the first claim. The thrust of the cross-examination was to the effect that Mr Robson and Mr Littlefair had deliberately overlooked a component part of the claimants' grievance. This centred upon the failure to properly interview the witnesses as to what had been said at the meetings. However, this was not because the claimants had brought a claim or may bring a claim but rather because of the respondent's reasonable understanding of the scope of the grievance in the first place. It was that understanding that formed the basis of Mr Robson and Mr Littlefair's actions and not because the claimants had done or may do protected acts.

209. It cannot be a detriment for the respondent to not investigate a matter outside the scope of the grievance (that being the issue of the co-workers' comments). It also cannot be a detriment to not investigate the impact of what happened upon the claimants in circumstances where that was acknowledged by the respondent.

210. It is a detriment for the employer to have reached unsafe conclusions upon the issue of management presence and the inappropriateness of the remarks. However, again we find there to be insufficient evidence led by the claimants to establish a *prima facie* case of a link between the protected acts on the one hand and the detriment on the other. MAS gave no evidence to that effect in his witness statement. We find that the respondent genuinely reached the conclusions that it did and, upon the same basis as set out in paragraphs 205 and 206 can see no link between the respondent's rejection of the grievance on the one hand and the protected acts on the other.

211. Upon this basis the second limb of the harassment complaint and the victimisation complaint stand dismissed.

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Employment Judge Brain

Date 3 March 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNALS