EMPLOYMENT TRIBUNALS

Claimant:	**Ms T Bond**
Respondent:	**Mrs J Large T/A Lads and Dads Barbers**
Heard at:	**Mold** **On: 2 – 6 December 2019**
Before:	**Employment Judge R Powell** **Members:** **Ms C O Peel** **Mr B Roberts**
Representation:	
Claimant:	In person
Respondent:	Ms Zakrzewska, litigation consultant

JUDGMENT having been sent to the parties on 11 December 2019 and reasons having been requested by the respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. This is the unanimous judgement of the employment tribunal in case number 1600490/2018 between Miss T Bond, the claimant, and Mrs J Large trading as Lads and Dads Barbers.

Preliminary Matters

2. The Ms Bond, the claimant, commenced employment with Mrs Large, the respondent, in August of 2016. The claimant attended work regularly until the 8th February 2017, thereafter through to her dismissal on the 11th July 2018, she remained an employee though absent through ill health.

3. The claimant commenced early conciliation in respect of this matter on the 5th February 2018 and that period concluded on the 5th March 2018. The claim was presented to the tribunal on the 29th March 2018.

4. The claimant's employment was relatively short. Her claims assert that she was subject to a continuing course of discriminatory conduct by Ms Leanna Large, the daughter of the respondent, and the respondent herself.

5. It is the claimant's case that by the 13th October 2013, her protected characteristic of race, which is described in Employment Judge Ryan's Order, as Greek and Yemeni background was known to the respondent. Thereafter, she says that on 21st January 2017 she expressed in the presence of the respondent's employees that she was a Muslim.

6. The claimant describes herself now as being of a Muslim background, but for the purposes of the Equality Act 2010, her case is brought on the basis of perceived faith.

7. The claimant asserts, and the respondent admits, that she suffered a long-term mental impairment which, at the relevant time amounted to a disability for the purposes of section 6 of the Equality Act 2010. We note that the recorded admission in Judge Ryan's Order was limited to depression but that was amended, on a further admission at this hearing, to depression and anxiety.

8. The claimant tells us that she has the condition of dyslexia and that affected her ability to read and assimilate information and sometimes to the formulation of written communications, which we fully accept. For instance, we have noted that on occasion, dates on letters have not been correct. We hope that we have given the claimant sufficient additional time to accommodate her need for more time to assimilate information and to express herself. This was our intention in the degree of allowance we made during cross examination for that purpose.

<u>The claims</u>

9. The claims are succinctly, and for our purposes, definitely set out in the order of Judge Ryan at page 61 to 62 of the bundle to which we have referred at all times. We have treated this summary as an accurate reflection of the claimant's case. Neither respondent nor claimant has indicated to us that they take any issue with that description. The respondent denies all of the claims.

10. We will summarise them briefly.

11. Firstly, that contrary to Section 15 of the Equality Act 2010, the claimant was subject to the following unfavourable treatment.

12. That she was accused of lying about the reason she was unwell/the reason for her absence from work by Leanne Large who is the daughter of the respondent and an employee of the respondent.

13. Secondly, that she was filmed on a mobile phone by Miss Leanne Large whenever the claimant walked past the respondent's salon. The dates of the filming are set out on page 71 of the bundle. They are asserted to be the 14th and 17th February 2017, the 16th October 2017 and 23rd August 2018.

14. We note that the respondent has accepted that on two occasions the claimant was filmed. We shall return to that in more detail.

15. Thirdly, that the claimant was dismissed; the dismissal is admitted.

16. The second characteristic of the claim are two matters of alleged breaches of Sections 20 to 21 of the Equality Act in that:

17. The respondent failed to make reasonable adjustments. The PCP (Practice Criterial or Provision) is said to be the conduct of the respondent of filming absent employees and the substantial disadvantage is said to be the aggravation of the claimant's mental health symptoms. is admitted by the respondent in this context; that the claimant suffered from anxiety and depression, and that those circumstances amounted to a disability within the meaning of Section 6 of the Equality Act 2010.

18. The second reasonable adjustment is whether there was a practice or provision of refusing to allow employees to return to work from a period of sickness on a phased return to work. As we highlighted to the parties before they concluded their submissions, we were concerned that the practice or provision was actually that of a requirement that an employee attend work to provide their services; that's a matter we shall return to.

19. The balance of the claims are assertions of direct race and religious discrimination.

20. The first allegation of less favourable treatment is that the claimant's work duties were altered when she was instructed to take out rubbish from the respondent's salon, and to clean up dog excrement in the car park. From the claimant's statement, we have identified those incidents are said to have occurred on 28th January and 4th February 2017.

21. Secondly, that she was given a shorter than usual notice of her shifts. This conduct is alleged to have occurred on occasions after 13th October 2016 up until the date of her last occasion of work in February 2017.

22. Thirdly, she was not paid accrued holiday pay due up the termination of her employment on 11 July 2018.

23. Fourthly, that allegations were made against her of sexual impropriety with a minor. This is an allegation that Miss Leanne Large exaggerated or misstated the content of an anonymous letter to the claimant implying that the letter identified her precisely as the person who was accused of the conduct and secondly that the letter, whilst stating that subject of her alleged improper conduct was a minor., Leanne Large said the child was fifteen, therefore a minor, making the allegation a more serious as well as more precise.

24. Fifthly, that Leanne Large's attitude changed towards the claimant; that she became less talkative, more distant and no longer requested that the claimant would style or cut her hair.

25. Sixthly, the dismissal of the claimant on 11th July 2018.

26. We note that the decisions with regard to the payment of holiday pay and the decision to dismiss were those of Joanne Large, the respondent, rather than Leanne Large, her daughter.

27. There were two matters arising pleaded as breaches of the Employment Rights Act 1996.

28. Firstly, a claim for accrued holiday pay claim, which asserted to be a failure to pay properly payable sums; Sections 13 to 27 of the Employment Rights Act 1996.

29. Secondly, there is an assertion of a failure to provide a written statement of employment particulars to the claimant under Sections 1 to 7 of the Employment Rights Act 1996.

30. Finally, the claimant asserts that the respondent failed to comply with the ACAS Code of the conduct of grievances. The pleaded case alleges that the claimant "was not given an opportunity to appeal", a reference to the outcome of a grievance raised by the claimant on 15th March, a subsequent letter to the respondent dated 26th June 2017 in which the claimant disputed the grievance conclusions. A claim under Section 207A of the Trade and Labour Relations (Consolidation) Act 1992.

The Evidence

31. All of those matters are, except the holiday pay claim, have remained disputed issues throughout this hearing. We have heard evidence from the claimant on her own behalf; she was cross examined, she was supported by two witnesses, the first was her daughter Miss J. Bone who confirmed that on 23rd August 2018 that she and the claimant were filmed, or at least appeared to be filmed, by Leanne as they walked near the salon. The second was Mr Robert Halden who gave evidence that in or around the summer of 2017, having been for a haircut at the respondent's salon, Miss Leanne Large said that she "had recently learned that Toni (the claimant) was a Muslim and that "she couldn't have that and that she also told me that Toni had been flirting with younger customers".

32. That statement is clearly pertinent to the issue of the religious discrimination and the allegation of the conduct of Miss Large in respect of events on 1st and 2nd February 2017.

33. The respondent gave evidence on her own behalf, and was cross examined.

34. Miss Leanne Large did not give evidence. In cross examination of her mother it was stated that Miss Large had not provided a written statement or attended as a witness because as she was suffering a degree of mental vulnerability. Further, Mrs Large, as the respondent, perceived that she was the person accused of all the breaches of the various Sections of the Equality Act and therefore she was the only pertinent witness. We note that this is obviously not correct, and the absence of Miss Large as a witness has had a significant influence on the findings of fact we have made in this case.

35. We have considered those pages in the bundle to which we were referred. Those pages that we have not either discussed with the parties or referenced by the parties in their evidence or submission have not been necessarily read or taken into account.

The Legal Matrix

The claims of discrimination arising from disability

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

36. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe** [2016] I.C.R. 305, EAT. Langstaff P cautioned against a "deliciously vague" approach to causation and concluded that the Act requires Employment Tribunals to approach causation in two stages:

> "26 The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something"—and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B".

In **Pnaiser v NHS England** [2016] I.R.L.R. 170, Simler J summarised the proper approach to section 15:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the

unfavourable treatment, and so amount to an effective reason for or because of it.

37. In **Hall v Chief Constable of West Yorkshire** [2015] IRLR 893, Laing J approached the test by asking: what was the "effective cause" of the unfavourable treatment?

38. The concept of "because of" in section 15 is no different from the concept in section 13. To determine this particular question (in a non-obvious case) therefore requires a consideration of the motivation of the decision-maker, and whether the "something" in the particular case materially influenced them. See: **City of York Council v Grosset** [2018] ICR 1492 (CA) at paragraphs 36 – 37; **Dunn v Secretary of State for Justice** [2018] EWCA Civ 1998, at paragraph 18.

39. As noted by the claimant the "something" does not need to be directly linked to the disability; there is a loser causation test under section 15: **University of Edinburgh v Shiekholeslami** [1018} IRLR 1090.

40. The term unfavourable is synonymous with the term detriment for these purposes is to be broadly defined; it will protect against any disadvantage and should be found to exist if "a reasonable worker would or might take the view that the treatment in issue was, in all the circumstances, to his detriment: **Jeremiah v Ministry of Defence [**1979] QB 87 CA and **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 HL, at paragraphs 104 to 105.

The Defence

41. The burden of proof is on the respondent to prove:

42. Any proven unfavourable treatment was for a legitimate aim and

43. It acted proportionally.

44. In **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 per Lord Sumption: "20 … the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (I) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community…"

The claims in respect of alleged failure to make reasonable adjustments

45. Sections 20 and 21 of **Equality Act 2010**. set out three requirements. Materially (s20(3)) there is a duty on an employer, where a PCP puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

The Employer's Knowledge

46. During the hearing the respondent was asked to identify the date on which it accepted that it had the requisite knowledge, to enable the tribunal to understand the scope of dispute, if any between the parties.

47. The respondent accepted that it had the requisite knowledge throughout the material time frame. Consequently, neither party addressed this issue in submissions.

The elements of the prohibited act

48. Once the employer has such knowledge, then the tribunal considers the questions posed by HHJ Serota QC in **Environment Agency v Rowan** at paragraph 27:

> "In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify:
>
> (a) the provision, criterion or practice applied by or on behalf of an employer, or
>
> (b) the physical feature of premises occupied by the employer,
>
> (c) the identity of non-disabled comparators (where appropriate) and
>
> (d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.

> In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters, we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."

49. The words of **Rowan** may however insufficiently emphasise the need to show, or to understand, what it is about a disability that gives rise to the substantial disadvantage, and therefore what it is that requires to be remedied by adjustment. Without knowing that, no assessment of what is, or is not, reasonable by way of adjustment can properly be made**: Chief Constable of West Midlands Police v R Gardner** EAT/0174/11/DA paragraph 53

50. **Royal Bank of Scotland v Ashton** [2011] ICR 63, which drew attention to the fact that the Act where it speaks of making adjustments is concerned with outcome and not with the process by which the outcome is reached.

51. In **Salford NHS Primary Care Trust v Smith** EAT/0507/10 noted that a reasonable adjustment is one which prevents or ameliorates a PCP placing the claimant at a substantial disadvantage in comparison with persons who were not disabled. Reasonable adjustments are primarily concerned with enabling the disabled person to remain in, or return to, work with the employer. Matters such as consultations and trials, exploratory investigations and the like do not qualify as reasonable adjustments.

    The statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission. Courts are obliged to take it into consideration whenever it is relevant: section 15(4). Chapter 6 is concerned with the duty to make reasonable adjustments. Paragraph 6.2 states:

    > "The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers … unfavourably and means taking additional steps to which non-disabled workers … are not entitled."

    Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps" and paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is

reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage. So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness: ***Paulley v First Group plc*** [2015] 1 WLR 3384, paras 44-45.

52. In circumstances where a number of adjustments had been made, it was perfectly natural and entirely appropriate' to consider the adjustments as a whole: **Burke v College of Law** *[2012] All ER (D) 29*.

53. Considerations of the respondent's operational needs are relevant considerations for the tribunal: **Chief Constable of Lincolnshire v Weaver** UKEAT/0622/07 and **O'Hanlon v Commissioners for Inland Revenue & Customs** [2007] IRLR 404 in which it accepted that the Employment Tribunal was entitled to have regard to the overall cost of altering sick pay rules in favour of the disabled when assessing whether an adjustment in a particular case was reasonable.

54. Section 13 Equality Act 2010 (EqA) defines direct discrimination.

'13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

55. Section 136 EqA sets out the burden of proof provisions.

56. "(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) an employment tribunal;"

The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ. 33, stated at paragraph 56.

*"The court in **Igen v Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination). It was confirmed that a Claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed."*

The burden is therefore on the Claimant to prove, on the balance of probabilities, a prima facie case of discrimination.

57. In respect of comparators, the Tribunal referred to the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11, HL. This requires that valid comparators be people where there are not material differences in circumstances. This is relevant when considering a hypothetical comparator when there is no actual comparator.

Findings of fact

58. We remind our self that in this case there are two burdens of proof. The first lies upon the claimant to establish what we will call a prima facia case, that is a case which an employment tribunal could conclude amounts to proof of the discriminatory act and if that burden is discharged then the burden falls on the respondent to disprove the allegation, essentially to prove that the act as alleged facts proven was not related to the alleged discriminatory conduct.

59. Turning then to the evidence. Firstly, we deal with the respondent and her employee's knowledge of the claimant's relevant protected characteristics; there are three elements that are pertinent here:

60. Firstly, we will recall for the purposes of Section 20 and Section 15 of the Equality Act 2020, the duty, or liability, of the respondent depends on her actual or imputed knowledge of the claimant's disability.

61. In short form, we will set out the law thoroughly if written reasons are requested. We must at first identify the date on which the respondent was

aware that the circumstances of the claimant amounted to the criteria of Section 6 of the Equalities Act, that is that the claimant suffered from impairment that had substantial adverse effect on day to day activities and that the impairment had or was likely to last for a year, that being the definition of long term. And we must also consider at what time the employer should have understood that the claimant had an impairment. Those are important considerations because they trigger the legal duties under Section 20/21 and they are also relevant for Section 15 for establishing a date on which an employer can be liable. With regard to Section 13, direct discrimination, you need to look at the state of knowledge of the respondent and Miss Leanne Large in respect of their understanding of the claimant's protected characteristics of race and perceived religion.

62. Turning to that first, Mrs Large, on the evidence before us, was not party to the verbal exchange between the claimant, the customer and Miss Leanne Large when there was discussion prompted by a racist comment by the customer between the claimant and customer, where the claimant objected to the offending comment and stated that she was a Muslim.

63. On the claimant's case, shortly after that, Miss Large asked the claimant whether she was a Muslim and the claimant confirmed that it was so.

64. There is direct evidence of Miss Large having knowledge of the statement that the claimant was a Muslim. Miss Large has not attended to give evidence so there is no opposite evidence to suggest otherwise.

65. Therefore, we conclude on the balance of probabilities that Miss Large was aware of and perceived the claimant as being Muslim prior to all of the incidents of alleged direct discrimination.

66. Secondly, we have Mr Hordon's evidence. Mr Hordon was challenged with two questions to say that his evidence was not true, no other matter was put to him.

67. We therefore find that, at a time in the summer of 2017, Miss Large made a comment to the effect that the claimant was a Muslim and "we can't have that". In summary, there was clear evidence from the claimant's case, which is not opposed by evidence from the respondent's case, that Miss Large knew and perceived the claimant to be a Muslim.

68. There is evidence in the claimant's witness statements that in a discussion on 13th October 2016, concerning the claimant's brother, she alerted Miss

Large to the fact that she was at least partially of Greek origin. In the absence of Miss Large there is no evidence to contradict the claimant's account so we find proven that this was a matter known to Miss Large.

69. For these reasons we have concluded, on the balance of probabilities, that Miss Large was aware of the claimant's race and perceived faith. We note in the judgment and reasons of Employment Judge Ryan, that the claimant described her ethnic origin as having Yemini as well as Greek ethnic roots, but looking at her witness statement paragraph 2 on her own case, it was only the Greek aspect of her origin that she announced to Leanne Large. We don't think that is of any material difference in terms of our conclusions.

70. We now turn to Mrs Large's knowledge of the claimant's ethnic origin. There is no evidence before us that Mrs Large was present on the 21st January. No document or witness has asserted that Mrs Large was informed of the content of that conversation with her daughter or that it was conveyed to her in any form. It was not put to Mrs Large that she was at the material time aware of the claimant's faith background or that she perceived the claimant as having the faith of Islam.

71. There is no evidence that Mrs Large was a party to the conversation on the 13th October or that that information was conveyed to her and the matter was not put to her in cross examination

72. On the evidence before us, (the evidence of the claimant, her two witnesses, the respondent and the documents),we have concluded that there is insufficient evidence for us to conclude that Mrs Large had knowledge of either the claimant's ethnic origin or that she had any perception that the claimant was of a Muslim faith.

73. We turn then to the question of the date on which the respondent knew or should have known of the claimant's disability. The respondent has not given evidence on this issue and it was a matter on which neither party made submissions, but it is incumbent on us to reach a decision.

74. What we know of the claimant's contemporaneous degree of impairment is reflected in the medical certificates which she supplied, doctor's reports and those elements of her health which are touched upon in the grievance hearing and subsequent reviews which took place in April and July of 2018.

75. We have noted. on review of the medical certificates, the following, that the initial self-certificate dated the 9th February 2017 referred to the claimant having a trapped nerve in the right shoulder, that the medical certificates between the 15th February and that expiring on the 20th April 2017 were solely to neck pain, however from the 20th April 2017, [page 199 of the bundle], and thereafter the medical certificates consistently refer to a depression or anxiety or anxiety with depression. We noted that grievance which the claimant raised, which was reviewed and conducted by a third party, when it reached a decision acknowledged that there was a need for a resolution of the difficulties with personalities appears on point 1 of 345 and we noted that the claimant had written on 26th June, page 348, to say that she did not accept the outcome of the grievances.

76. We noted that between that date forward and the receipt of the medical report in March of 2018, the circumstances of the claimant's health do not appear to have materially changed so far as the respondent was informed. We had the benefit of looking at the claimant's medical records, but were concerned about what the respondent knew.

77. We note that undoubtedly the case that the medical report which begins at page 386, and is dated 13th March 2018, it is clear in cautious terms of expressing the view that the claimant met the test for disability under the terms of the Equality Act (387 last question) however by the 13th March the claimant had been absent for more than a year and as we have noted she had been absent since late April consistently with depression and/or anxiety.

78. So, we turn to the question, of when this employer should have understood that the claimant was likely to be absent for a year or more due to her mental health impairment. We take into account the sophistication of the respondent. She is a small employer with three or four staff. She runs a barber's salon. We have come to the conclusion that she had little training or experience or understanding of employment law or duties, not least the evidence that she had not prepared for any employee in terms of conditions of employment, until prompted to do so by the claimant's grievance.

79. Taking that into account we have concluded as follows. By September 2017 the claimant had been absent for seven months, five of which had been consistently with a condition of depression/anxiety or a combination. There was nothing before the respondent which indicated any improvement in the claimant's condition. We also note that by the 11th September the respondent was writing to the claimant to commence

enquiry into the health and the reasons for the claimant's absence with a view to managing it. In those circumstances using our combined industrial experience of these matters, we think this employer should have realised the claimant was likely to be absent for a year or more by September 2017. Thus, for the purposes of the duty to make reasonable adjustments we have fixed the date at the date of the letter to the claimants GP of the 11th September 2017, and that is date for the purposes of our consideration of Sections 15 and 20/12 of the Equality Act 2010.

80. We turn then to the acts of direct discrimination. The first alleged act of unfavourable treatment, is the altered work duties in that the claimant was instructed to take rubbish out of the workshop and to clean up dog excrement in the car park.

81. The claimant gave direct evidence of that conduct [at paragraph 7 and paragraph 9 of her witness statement] The contrary evidence was from Mrs Large who could not speak to the interaction between her daughter and the claimant, but gave evidence as to the fact that it was quite unnecessary for rubbish to be taken out and that there was another party who would be responsible for clearing up the car park. We do not doubt that, but of course that does not address whether or not Miss Large instructed the claimant to undertake such unnecessary tasks.

82. As we have noted, Miss Large has not attended, or given a written statement to simply state that she denies those matters.

83. On the balance of probabilities, we have concluded that it is more likely than not that the statements of paragraph 7 and 9 of the claimant's statement are correct. We therefore find as a matter of fact that those acts were undertaken.

84. We next consider whether those acts were incidences of less favourable treatment. On Mrs Large's evidence they are acts which would not be required of any of her employees of the claimants standing. We also inspected the draft terms and conditions of the claimant's employment which were prepared for the claimant by the respondent's solicitors, these refer to light cleaning duties and to cleaning duties around the claimant's station. We considered the evidence of the treatment of the cited comparator Sue Williams; a mature stylist working in the salon with the claimant. There was no evidence to suggest that Miss Williams was treated in the same way and there was no evidence before us to suggest that Ms Williams's circumstances were materially different to those of the claimant. For these reasons we are satisfied that the instructions were

less favourable treatment for the purposes of section 13 of the Equality act 2010.

85. The second matter is that the claimant was given shorter than usual notice of her shifts. We compared the claimant's evidence with an analysis of that which we could glean from the WhatsApp document which we understand was presented by the claimant, it commences at page 240 and goes through to page 247 of the bundle. It covers the dates of these messages from 19th August 2016 through to the 8th February 2017. This is clearly not a complete picture of all communications, but we are satisfied that this is a candid and reliable reflection of the character of the communications.

86. We noted that the exchanges on the 4th September at 9:11, on the 6th September at around 5:57 and on the 9th, 11th, 18th and 20th of September and on other dates, reflects consistently the claimant being asked to work at short notice, not being given her shifts promptly and sometimes there being delays in being able to inform the claimant of her shifts due to the absence of Mrs Large for personal reasons which we need not set out but are reflected in the body of at least one of those messages. We do not accept that the provision of short notice of shifts or changes to shifts was a matter which was limited to the claimant. In our view it was something which was characteristic of the respondent's' practice.

87. We find, that there is insufficient evidence to conclude, on the balance of probabilities, that the claimant was less favourably treated by the respondent in this respect.

88. But more importantly because the behaviour prior to the date on the claimant communication with the respondent notifying her of her Greek origin and certainly prior to the notification to the respondent of her Muslim faith there appears to be no difference in any substantial sense. So, we conclude that there is simply no basis for us to consider that there is a causal link between the protected characteristic and this action. In this circumstance we have concluded, applying Section 136, that the burden of proof has not shifted onto the respondent and there was no less favourable treatment on that particular point.

89. Turning next to the issue that the claimant was not paid her holiday pay. That is admitted by the respondent and we have been invited and will set out a judgment in the claimant's favour in a sum which has been calculated and agreed by the parties.

90. We have already have found, that Mrs Large was unaware of the claimant's ethnic origin or her faith; the two alleged protected characteristics which are alleged to be the cause of this less favourable treatment. As only Mrs Large is accused of the conduct in respect of holiday pay, we do not find that that her conduct was, consciously or unconsciously tainted by knowledge of those characteristics. For these reasons we have concluded that her failure to pay the claimant accrued holiday pay was not "because of" those protected characteristics. For this reason, this claim is not well founded and is dismissed

91. Turning then to the allegation of alleged sexual impropriety with minors. On reading the claimant's witness statement we have taken this principally to be the act of the 1st February 2018 wherein, at paragraph 8, the claimant states that "Leanne had told me she had received a letter of complaint alleging that I had been inappropriate with a fifteen year old boy".

92. We note in the WhatsApp exchange of the 2nd February, [page 246 to 247], that at 11pm the claimant is asking questions of Miss Large saying;

" did you manage to discuss this horrendous allegation against me with your mother on Sunday as you said you would".

93. The response from Leanne Large was:

"I have discussed the issue with my mother as I have stated to you the complaint was against a fifty-year old woman and did not mention any names it was an anonymous letter and my mother has dismissed it".

94. Promptly the claimant replied;

" you said the letter had more content than that, you said the person had said the new girl with dark hair you said the letter is about me you do not realise how upset I am about the allegation and the implication that has been made".

95. The dispute between Leanne and the claimant is repeated with Leanne Large saying "no I told you that the letter was about a fifth-year old woman" and the claimant asserting Leanne Large had said it was about the new lady with dark hair.

96. So, to clarify, the allegation is that Leanne has exaggerated the content of the anonymous letter. We have the letter at page 274, it says;

"my sixteen-year-old son is a regular customer of yours, on his recent visit he was seen by a fifty-year-old lady who made very improper comments to him. My son was very embarrassed by this and when he told me what was said I was utterly disgusted".

97. Again, it is quite apparent from the documents that Miss Leanne Large denies that she misled the claimant, and that is not only reflected in the messages read out but also in the grievance report which concludes that it was impossible to distinguish the merit of each ladies' perception of the informal discussion.

98. Miss Large has not attended to confirm the accuracy of her statements to the grievance investigation nor the accuracy of the statements in her WhatsApp messages. We have therefore no evidence before us of sufficient substance to displace the direct evidence of claimant's account. For those reasons we have concluded that Miss Large exaggerated the content of the anonymous letter.

99. Miss William is the cited comparator. She was described by the claimant as being around fifty. She worked in the salon undertaking the same work as the claimant and dealt with young male customers. There is no material difference in their circumstances for the purposes of this allegation.

100. There is no evidence that Miss Large spoke to Ms Williams or exaggerated the content of the anonymous letter to Ms Williams.

101. On the evidence before us there is clearly evidence that the claimant was less favourably treated than Ms Williams.

102. The claimant has established that she was less favourably treated than the comparator, that Ms large had knowledge of her protected characteristic at the time of the less favourable conduct, based on the evidence of Mr Hordon who refers to the claimant as making a negative comment about the claimant's faith we are satisfied that the claimant has established the "something else" necessary to establish require an "a non-discriminatory" explanation for that conduct for the purposes of section 123 of the equality act 2010.

103. There is therefore, on the examination of the respondent's case, no evidence to contradict the claimant's case. The explanation for the absence of that evidence is far from compelling when we understand that Miss Large is available and could have been called. We place some

weight on the document that we have referred to but little because it has not been confirmed and Miss Large has not been available for cross examination. So, in those circumstances we find that, on the grounds of perceived religion, the respondent's conduct was an act of direct discrimination.

104. Going back to page 62, and returning to the working duties, to follow through the same process that on the ground of perceived religion the burden being upon the respondent to disprove that the less favourable treatment was related to the perceived religion. No evidence whatsoever has been advanced by the respondent. And although we have had caution, to which we will return, about the credibility and reliability of the claimant in some regards. What I will say is this; that it has struck us that the claimant did not raise these issues in a text conversation or a WhatsApp message, these are not matters which the claimant raised in her grievance, these are not matters which the claimant referenced in her capability interview on the 9th July even though she did raise lesser concerns in both of those environments. Despite some reservation of the claimant as a witness, the absence of any contrary evidence we find on the balance of probabilities that the direction to take out the rubbish and clean up dog excrement were acts of direct discrimination on the grounds of perceived religion.

105. Turing lastly to to the allegation that the attitude of Miss Leanna Large changing due to the protected characteristics of the claimant being known to her. This change is said to have occurred after the 13th October 2016. Again, we looked at the WhatsApp messages and we noted the way in which the claimant and Miss Large were writing to each other. We do not intend to go through each and every element, but it is quite apparent to us that the way in which Leanne Large was communicating with the claimant is anything other than distant. For example, on the 29th November; "I've not known you long, but I adore you. You are a lovey person and I look up to you. You deserve all the happiness in the world" and other similar messages and the introduction of messages with "Hello sweet". We therefore do not accept that the evidence reflects that there was a change in Miss Large's attitude towards the claimant. Again, just for notes sake, this was another matter which concerned us about the claimant's credibility, but we are judging matters on the balance of probabilities and Miss Large has not been here to contradict statements made by the claimant.

106. With regards to the allegations against Mrs Large, we have already reached a conclusion that she was not aware of the Greek/Yemeni aspect

of the claimant's ethnic origin and she did not have any grounds or information which would lead her to perceive the claimant as a Muslim. In those circumstances we cannot conceive how Mrs Large could have consciously or unconsciously have taken into account the claimant's protected characteristic and so we find that those allegations related to holiday pay and dismissal do not amount to direct acts of race discrimination.

107. We turn then to Section 15 and 20 of the Equality Act. We are going to deal with these in the following ways; one of the assertions of failure to make reasonable adjustments is a phased return and a phased return to the claimants work is a matter that is pertinent to the allegation that the dismissal arose from the claimant's dismissal so we are going to deal with those two together and look at the other assertion of a reasonable adjustment and arising from separately. Albeit that our overall conclusions in this case we have thought about all the matter as a whole before reaching our final decisions.

108. So, turning back to identifying the next issue, we deal with the allegation that at 6.111 that the claimant was accused of lying by Leanne Large. We noted that in the further and better particulars of the allegation of lying the detail pleaded by the claimant is set out on page 70. Whereas the allegation is against Leanne Large, the further particulars do not reference Miss Large, they reference the respondents request to the claimant for copy of her medical records, the request for access to her medical report, the respondent's questions to the claimants General Practitioner, the respondents request to claimant for copies of fit notes which were already provided on the claimant's case and the request from the respondent for the self-certificate which the claimant is adamant that she provided and the respondent was adamant that she had not. So the particulars do not identify any conduct by Leanne Large, however it is apparent in paragraph 25 of the claimants statement where she speaks of attending the grievance hearing on the 11th May and her evidence is this "when I was leaving the grievance meeting a customer approached me and told me that Leanne had been calling me a liar and that I was scamming them as I was not sick" she then goes on to refer to an issue regarding faith which we have already addressed. What is the evidence before us of Miss Large making such a comment?

109. Mr Hordon who is a customer, did not give any evidence of such a comment being made. The claimant was not privy to such a comment and she is effectively relying on hearsay from a customer who is not named, and who has not produced witness statement or attended as a witness.

110. We have noted that, in correspondence with the respondent, the claimant has indicated that she has multiple statements from “friends and customers” upon which she was to rely.

111. We noted that in the meeting of the 9th July the claimant said to the Croner employee that she had decided not to provide these statements to the internal investigation and that she was saving them for the tribunal.

112. We have evidence which we can reasonably consider as being a reliable statement to the hearsay account set out in paragraph 25. For those reasons we simply cannot find that it is more likely than not that Miss Large made that statement. So, in that respect we do not find that Miss Large made the alleged comment to a customer.

113. Turning to the second point, that Leanne Large, recorded the claimant when she walked past the salon. We have already identified that the full particular dates were the 14th and 17th February 2017, the 16th October 2017 and the 23rd August 2018. Again, we have no evidence from Miss Large as to her conduct and we have no evidence from Miss Large as to the rationale of her conduct.

114. We are well aware that the respondent has pleaded that it had an objective justification; to deter the claimant from allegedly making faces or being intimidating and that was articulated by Mrs Large. But Mrs Large cannot speak for the mind of Miss Large and Miss Large has not attended. So, in terms of the justification, the burden of proof of which lies on the respondent, the evidence before us is inadequate to discharge that burden.

115. What then turns as to our findings about the four incidents? Well, taking them in reverse order, the incident of August 2018 is a matter which is witnessed by Miss J Bone and again that corroborates her mother’s evidence. The incident of the 16th October 2017 is potentially corroborated by the video of a few seconds which we are told was a copy of that which had been recorded by Miss Large on or around the time of the 23rd October 2017.

116. Mrs Large is relying on the information provided by her daughter. We have noted in correspondence that in a letter marked the 20th November (which we find is really referring to the 20th October) that the claimant objected to being filmed and asked the respondent to desist. We

therefore have concluded that it is more likely than not that the video which we were shown is the incident of 16th October 2017. Regarding the two incidents that occurred in February 2017, we again have the claimant's evidence and have no evidence to contradict her account.

117. Did those matters arise from the claimant's disability? Firstly, the claimant puts it thus, the only reason they were filming me is because I was walking by when I was absent, I was not making faces or laughing at staff. And that evidence is not contradicted because Miss Large because she is not present to explain her motive. The best that can be said, taken at the highest is a verbal statement on the recording in October where Miss Large is heard to be saying words to the effect "of laughing at me again".

118. Even if hypothetically we were persuaded that the events in the period were potentially for the reason of trying to deter the claimant from harassing the respondent we would accept in principal that that could be a legitimate reason, but we are not persuaded that recording that employee would be a proportionate way of treating a current employee, less intrusive ways existed; speaking to the employee, writing courteously to the employee, or to raise such alleged behaviour informally at a meeting with the employee.

119. So in those respects we (a) find that the conduct of the respondent arose from the claimant's disability, and we (b) find that the events were not for a legitimate aim and (c) even if it had been for a legitimate reason we would find that that was not a proportionate means of achieving such an aim.

120. Consequently, with the events that post date September 2017, i.e. the 16th October 2017 and the 23rd August 2018, the claim for discrimination arising from disability are well founded.

121. Turning then to the same issue, that is filming, in the context of Section 20 of the Equality Act; the failure to make reasonable adjustments. The provision criterion or practice asserted is the conduct of filming the claimant. The claimant and the respondent accept that the filming took place on two occasions.

122. The claimant asserts, and we have found there were four occasions over a period of some months and the asserted reason for the filming by the respondent is consistent across the period; it was the same person who filmed the claimant on each occasion.

123. For these reasons we consider that there was a practice established on the claimant's evidence, and that the respondent would film the claimant as she passed the salon.

124. Would that put the claimant at a particular disadvantage compared to a person who was not so disabled? Well, we have noted the claimant's correspondence of the 4th April 2017 when she expressly informed the respondent of the stress that the filming caused, and we have noted the claimant's evidence to that effect that it exacerbated her mental health condition.

125. We do find that filming a person who is disabled by reason of anxiety and depression is an act of the respondent which is likely to put the claimant at a particular disadvantage compared to those who are not so disabled.

126. The next question is then, what would be a reasonable adjustment, assuming that, for the argument, there would be a permissible rational reason for the conduct. We have in part answered this already. We can see that in order to deter a person from intimidating an employee it might be appropriate to take certain steps, if it was perhaps a stranger and it was a significant matter you might video as evidence. But this was a current employee and we have already considered that there was no justification in relation to Section 15. Whilst the test is not identical, if the employer is to establish that an adjustment was not reasonable the rationale and logic are certainly connected. And we think that it would have been more than practical and reasonable for the employer to have sought to communicate with the claimant in other ways than by filming. Therefore, it was clearly a matter which could have been dealt with in another way.

127. We must decide to what extent the proposed reasonable adjustment would have achieved the aim of the statute. The purpose of the Statute is to enable an employee to enter into work, retain work, return to work, or be able to function in work without substantial disadvantage. With regard to the first two incidents we have concluded that the date on which the employer, in principal, becomes responsible in this case for making adjustments is September, so the February dates are outside the time frame. The 23rd August matter is after the claimant had been dismissed and the conduct at that time cannot logically be perceived to be a matter which the adjustment would have possibly helped.

128. However, with regard to the October incident, taking a step short of filming the claimant would have avoided the adverse effect upon her mental health; which was the cause of her absence from work. We therefore find that there was a failure to make the reasonable adjustment with regard to the conduct of the respondent on the 16th October 2017.

129. That leaves the related matters of the asserted discrimination arsing from disability which is the dismissal and the failure to make reasonable adjustment which again is related to the dismissal because it is asserted that the respondent failed to make a reasonable adjustment phased return to work.

130. We turn first to the issue of a reasonable adjustment. The first point that we have noted is that, as we alerted the parties before the submissions were completed, we do not consider that the way in which the claimant has expressed the provision criterion practice is correct. The proper statement of the provision (PCP) is the requirement for the claimant to attend work. We note that in discussion that there was no objection to our formulation upon that point when the parties were invited to address this issue.

131. So, the PCP is as stated; does the requirement to attend work regularly put the claimant at a particular disadvantage? We note that the claimant had been continuously absent through depression from April through to the date of dismissal and beyond on the medical certificates we have which run through to October 2019. We also note that with regard to the proposed reasonable adjustment, that every single medical certificate signed by the claimant's General Practitioner from April 2017 onwards have in the middle section under the title 'If available and under your employer's agreement you may benefit from a phased return to work' is crossed through. So, at no time has the medical advice been that a phased return to work was appropriate for the claimant. We have also noted that the way in which the claimant put her case before the tribunal was more akin to how the following adjustment (1) that the respondent should put in its window facing the street a notice saying, I paraphrase, that they exonerate the claimant of the allegation raised in the letter, i.e. speaking inappropriately to a sixteen year old boy and (2) that Leanne Large should apologise for the way in which she had asserted that the claimant was responsible and for something worse than the allegation that was contained in the letter. That is not the pleading allegation on which the respondent is on notice. We must address the case that is before us, but we will as a matter of courtesy deal with the case put as an obiter comment.

132. So firstly, we have looked at the medical advice provided to the claimant in the revised opinion from occupational health. We note that the respondent first wrote to the claimant's General Practitioner asking for an assessment of the claimant's ill health and its causes and the claimant's Practitioner replied, about two months later in December, stating that the medical practice was not qualified, or contracted to provide such information. That led to a substantial delay. The eventual advice [pages 386 to 387] of the bundle in response to the question " When will they be able to return to work/return to normal hours/duties?" was; "If there is no resolution of the work issues, it will be very difficult to rehabilitate this lady back into the current role".

133. The second question asked was; "Is this employee likely to be able to provide regular and effective service in the future?" The advice was; "There is no foreseeable return to work date. A significant improvement in her symptoms and a period of stability would be needed prior to recommending a return to work."

134. The tribunal has also noted elements of the claimant's medical records, [page 115]. An entry dated the 7th November 2017 records that, the claimant stated that she felt that she could not go back to the job and her General Practitioner agreed that it was damaging to her mental health to be in that specific environment.

135. On the 20th December the doctor noted that the claimant; "says cannot resign as would then not be eligible for ESA but also not fit enough to look for a new job at present".

136. The entry on the 10th May refers to; "works as a hairdresser and employer not keen to have her back till she feels better. Patient feels uncomfortable working there due to allegations is looking for other jobs but thinks mood needs improving".

137. We have also noted in correspondence that the claimant had indicated that she considered the conduct of the respondent to be close to constructive dismissal some months before the report was prepared. And we have also noted that in the claimant's impact statement that she was considering resigning as of the 2nd February 2017.

138. So the question that we must address, in respect of the proposed reasonable adjustment of a phased return, is whether it was reasonable

for the employer to have done so or has the respondent proved that it was not reasonable for it to offer the opportunity for a phased return.

139. It is clear that the medical advice consistently given to the respondent suggested that the phased return was not an appropriate step. The second thing is that the medical advice suggested that the claimant needed a period of stability before she could come back to work at all. The third point which we have considered is the fact that in the notes of the meeting of the 9th July make no reference to phased return but do refer to the fact that the claimant would not come back till her GP advised it, which is natural and sensible, and that in her own perception it was conditional upon the adjustments which she had put in cross examination, i.e. a notice being displayed in the respondent's salon window that the anonymous allegations (against the claimant as she believed) were untrue and an apology.

140. We have noticed in correspondence that the claimant attended a review to discuss, amongst other things, her reasonable adjustments. This took place in April. We have noted that the initial page of the 11th July report from Croner states as follows of it previous contact with the claimant; "a case review meeting was arranged and held by myself on the 20th April with the claimant, at this meeting we discussed the ongoing work related issues and it was made clear by TB, [the claimant], that she could see no future return to work due to the related issues and the occupational health report was confirmed. There was a discussion of a settlement agreement and was advised that she would take this back to the business. TB and the salon were unable to agree on the terms of an agreement, and therefore a further case review meeting was arranged and was held on the 9th July".

141. We then also noted that on the 9th July on the minutes where the claimant was supported by her solicitor Mr Roberts, there was discussion on the terms on which she would be prepared potentially to leave or that which the respondent offered, and it was four weeks pay, holiday pay, an apology, notice in the window, and there was discussion but clearly it did not lead to a result.

142. What does that cumulative information lead us to conclude? Firstly, we think on the balance of probabilities that the claimant was not going to return to work with the respondent in any event. From her perspective the damage caused by the accusation made by Mss Large had made the working relationship untenable. In our judgment, had phased return been offered, it would have made no material difference.

143. Secondly, we have concluded that phased return could only happen when the claimant's mental state made her well enough to do so and that the medical evidence before the respondent said that there was no immediate foreseeable time that that would occur and the medical opinion suggested that there was a further period of stability needed before return in any circumstances.

144. Thirdly, the conditions which the claimant stated as being necessary to improve her mental health, sufficient for an eventual return, included the display of a notice in the salon window so that it was visible to people passing in the street stating to the effect that the claimant was exonerated from misconduct in relation to the alleged incident with a sixteen year old boy.

145. We noted the opinion of the Croner employee who was asked give an opinion as to [page 408] whether it would be an appropriate step to take to put such a notice in the salon window. He expressed the view [page 408 to 409] that to do so would be more likely to raise public interest and gossip than quell it, and that it was also likely to have potential reputational damage to the respondent by announcing to the community that an allegation had been made against their staff.

146. It also noted that within the claimant's account of her effort to mitigate her loses she stated that she had been turned down for a job because the potential employer perceived that there was a risk to its reputation, at least until "gossip had died down".

147. A further issue is this; would it be a reasonable adjustment for the employer to require an apology from Miss Large?

148. It is clear from the WhatsApp messages of the 2nd February 2017 and the grievance investigation that Miss Large was adamant that she had not described the letter or the content in the way that the claimant said. We of course have found, in the absence of Miss Large's evidence, that that was well founded. But at best, it seems that any apology that Miss Large would have given would have been made without any contrition or genuine change of heart because within a few hours of the conversation she was disputing what was said and she continued to do so. So the true value of an apology, in terms of repairing the relationship or improving the claimant's mental health, would, in our judgment been minimal when the claimant would be aware that it was nothing more than an empty apology.

149. The restorative value of further publicising to the community that somebody within Lads and Dads salon had been accused of serious misconduct with a young man we do not think could possibly have any prospect of improving the claimant's prospects of returning to work, even on a part time basis.

150. So, for three distinct reasons we do not find the reasonable adjustments claim in this respect well founded. The first is that we do not believe that the claimant would have returned in any event. The second is the phased return was clearly not practicable in the circumstances and it was advised against by the GP continuously and it could not have been implemented till the claimant's mental state was such that she could countenance going to work at all. And the third is that while we have addressed the issue of the notice and the apology, that is not the pleaded case that the respondent had to answer.

151. We then turn to the last and substantive issue in this case, which is the dismissal. There is no dispute that the claimant was dismissed and although there was a lack of admission by the respondent that the dismissal arose from the claimant's disability, we are in no doubt that it did so. The claimant was absent and it was her absence which led to the decision to dismiss her. The cause of her absence from April 2017 onwards her depression and anxiety conditions and by the time of her dismissal they had lasted for some seventeen or so months.

152. The burden therefore falls upon the respondent to demonstrate that its unfavourable conduct of dismissal was justified, i.e. it was for a legitimate aim and it was achieved in a proportionate manner.

153. The legitimate aim is to have an employee there to fulfil the role for which she was employed.

154. The respondent employed three persons in the salon to cut hair across six days a week, one of whom had been absent for seventeen months. On the medical evidence, there was no identified time period in which her health would recover to allow her to return to work in any capacity.

155. What steps could an employer take to achieve its legitimate aim which were less intrusive or damaging to the claimant? Save for employing another person on a temporary basis to cover the claimant's work whilst the claimant continued to be "on the books" we could not conceive what else the employer could have done short of dismissal.

156. If Mrs Large had retained the claimant she would have no concept of how long she would be employing another person or whether they would be able to practicably be able to employ someone on what would be an interim basis. But most compelling of all, is the medical evidence which described that there was simply no clarity as to when the claimant would be well enough to commence a period of stability prior to becoming well enough to perhaps consider returning to work in some capacity.

157. In the case of ill health absence, it is always a balance between two unhappy circumstances for both employer and employee, but for a small employer, the degree of tolerance that the respondent had shown was equal or beyond that which this tribunal experiences with much more sophisticated and better resourced employers. A small employer which has been without one third of its contracted workforce for seventeen months, is in our judgement, justified in dismissing the absent employee when there is no evidence before it to indicate whether the claimant will be able to return to work.

158. And so, for those reasons we are of the unanimous view that that the claim is not well founded.

159. The Tribunal then halted the judgment to raise with the parties addressing the matter of the “time point”. We were grateful to the Claimant for reminding us that there were two issues upon which we had not given Judgment.

160. The first is whether the Respondent had provided to the Claimant a document which satisfied the duty upon it to give an employee a statement of terms and conditions within the first 8 weeks of employment.

161. In this case we have evidence that, following the 15 March 2018 grievance, the Respondent sought advice of a solicitor and we have evidence from a letter from a firm of solicitors that demonstrate that as of 11 April 2017 the solicitor had written to the Respondent at her home address and enclosed a proposed draft of written terms and conditions and a draft proposed staff handbook. We also had on the subsequent page in the bundle 2017 a photograph of an envelope which showed the Respondent’s professional address in the address window and we could just discern the date also as being 11 April of the same year. On that envelope there is a hand annotation “Thursday” crossed through and then “FRI” for Friday 14 April 2017 contracts given posted through door by… and we are not able to read the next word. That is consistent with the account given by Mrs Large that she delivered the documents by hand to the

Claimant's house from her salon and we note as the parties agree that the Claimant's house and salon were on the same road in Colwyn Bay.

162. We have seen 296 which is a written statement of employment particulars which would comply with the statutory duty upon the Respondent. The Claimant denies that she received those documents and she points to the content of the grievance report which is based on interviews with Mrs. Large. She highlighted pages 343 and 345 and two comments which she relied upon; 343 records "the failure to provide a contract of employment is a concern as an employee should be issued with a contract of employment within the first two months of joining. Joanna (the Respondent) confirmed that she was not aware of this and has instructed an HR Consultancy firm to assist on completing the employment documentation for the salon so she can issue to employees and be in line with employment legislation" and then at 345, under the recommendations; "I agree a written contract of employment and any other supporting documents need to be issued". We note that in the letter from Mrs. Large at 347 she confirms she agrees with the recommendations. The Claimant says that demonstrates that Mrs. Large was in the process of providing, but did not actually provide them.

163. We were caused to give considerable thought to this issue because we acknowledge that it is evident that Mrs. Large had gone to time, effort and expense to obtain advice and obtain documents ready for provision, but we note that the investigation meeting and the report for the grievance, which post-date 14 April and we note that Mrs. Large agrees with the recommendations and we note that the account of what Mrs. Large said to the investigation is recorded by an independent person. For these reasons, we think on the balance of probabilities that it is more likely than not that Mrs. Large is wrong in remembering that she provided them on 14th April. It is more likely than not that the account she gave in May was an accurate reflection of events; that she was in the process of doing so and had the intention to do so, but no alternative date is evidenced to us, so in those circumstances we find that the allegation is proven that the Respondent failed to provide the particulars required under Part 1 of the Employment Rights Act 1996.

164. The other issue we were asked to determine is whether or not the Respondent had acted in breach of the ACAS Code in relation to grievances. This, in our Judgment, is a matter of fact. We have looked at the letter to which the Claimant has referred. Before us she argues that she requested the right to exercise her right to an appeal. We note that the Respondents handbook does not include a grievance procedure and therefore the default would be the ACAS Code. That Code entails an employee's right to have an appeal upon request albeit it does not expressly

include a duty on the employer to notify of the right of appeal, but in any event the question is whether the Claimant did request the appeal.

165. The letter of 26 June was a matter that was dealt with in questions to the Claimant by the Tribunal. There is a material distinction between expressing a clear dissatisfaction with the outcome of a grievance hearing and the expression of a request for the employer, as against the employment Tribunal, to address the matter again; on appeal.

166. In our judgment the claimant's letter fell into the former category. In the absence of a request for an appeal we do not consider that the claimant acted in breach of the ACAS code. For this reason, this claim is not well founded.

Time issues

167. The Tribunal having given Judgment on the Findings of Fact and the majority of its decisions on Liability we raised with the parties that time issues were a matter for us to decide but we were not satisfied that the parties had addressed the matters in sufficient detail to us before we began our deliberations and we thought it better, particularly in light of the Claimant's inexperience in these matters, to allow the submissions to take place when they knew the factual findings upon which the time point might be determined.

168. In this case we have concluded that incidents of discrimination which occurred on 28 January, 2 and 4 February 2017 along with 16 October 2017 and an incident on 23 August 2018 are matters which have been proven. The question is whether those matters or any of them are within the Tribunals jurisdiction.

169. It is not contested by the respondent that he incident of 28 August 2018 was one which was within our jurisdiction.

170. The real issues are whether or not the proven incidents prior to that event are, as asserted by the Claimant from the outset, part of a continuing course of conduct.

171. The case law which guides us in this matter are the following: **Hendricks -v- Metropolitan Police Commissioner** [2002] which tells us that the Tribunal must determine whether there was an ongoing situation or a continuing state of affairs in which the acts of discrimination occurred as opposed to a series of unconnected or isolated incidents. The case of **Southern Cross Health Care -v- Olawe** [EAT 0056/2011] stated that where allegations are linked by a common personality, they are not likely to

stand in isolation. We have also taken into account **Viola Environmental Services -v- Gumms** [EAT 0487/12].

172. In every case whether there was a continuing course of conduct is a matter of fact of the Tribunal to determine. We find follows: that the person who was responsible for the acts of discrimination which we have found proven was the same person throughout the entire period we are considering. Secondly, the discriminatory act of 16 October 2017 was of exactly the same character of the discriminatory act of 23 August 2018.

173. For these reasons we find the respondent's conduct amounted to a continuing course of conduct. For these reasons we find that proven acts of discrimination are within the Tribunal's jurisdiction.

_____

Employment Judge R Powell
Dated: 24th March 2020

REASONS SENT TO THE PARTIES ON

……28 March 2020……

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS