# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Miss X** | | |
| **Respondent:** | **Y** | | |
| **Heard at:** | **Leeds** | **On:** | **3 to 5 February 2020** |
| **Before:** | **Employment Judge Little** | | |
| **Members:** | **Mrs L J Anderson-Coe** | | |
| | **Mr J Howarth** | | |

**Representation**

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| Claimant: | In person |
| Respondent: | Mrs A Niaz-Dickinson of counsel (instructed by Capsticks Solicitors LLP) |

# RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. The complaint that there was discrimination because of a failure to make reasonable adjustments fails.
2. The complaint that there was discrimination arising from disability also fails.
3. The complaint of unlawful victimisation fails.
4. The claimant was not constructively dismissed and accordingly her unfair dismissal complaint also fails.

# REASONS

1. **The complaints**

1.1. Miss X presented her claim to the Tribunal on 18 February 2019. It referred to complaints of unfair dismissal, disability discrimination and sexual harassment.

1.2. At a case management hearing conducted by Employment Judge Davies on 23 April 2019 the complaints were clarified as follows:-

- Disability discrimination – failure to make reasonable adjustments.
- Discrimination arising from disability.
- Victimisation.
- Unfair dismissal (constructive).

At that hearing the claimant had been permitted to amend her claim to include a complaint of victimisation.

1.3. With regard to the complaint of sexual harassment, it was noted at the April hearing that that complaint appeared to have been presented out of time. In those circumstances Employment Judge Davies made arrangements for a further preliminary hearing so that that issue could be considered. That hearing was conducted by Employment Judge Shore on 27 September 2019. He decided that the sexual harassment complaint had not been brought in time and that it would not be just and equitable to extend time. Although it was not necessary for him to make a ruling on the reasonable prospects of the sexual harassment complaint, he did note in paragraph 67 of the reasons issued on 20 January 2020 that had he not struck the complaint out because it was late, he would have found the complaint to have had no prospect of success.

2. **The issues**

These had been discussed at both the April and September hearings. Those issues can be recorded here as follows:

<u>Disability discrimination – reasonable adjustments</u>

2.1. Did the respondent's grievance, disciplinary or harassment policy/process (the relevant provision criterion or practice) put the claimant at a substantial disadvantage because she could not fully participate in meetings concerning her grievance and the third party's disciplinary hearing and because she had problems reading, processing and understanding questions?

2.2. If so, did the respondent know of that substantial disadvantage or could it reasonably be expected to know?

2.3. If the answers to 2.1 and 2.2 above are 'yes', would the following have been reasonable adjustments?

2.3.1. Allowing the claimant's son, Mr Leonard, to support the claimant at meetings and hearings? or;

2.3.2. Providing a support worker to ensure that the claimant could understand the questions and so could fully participate in the meetings?

Discrimination arising from disability

2.4. Was the claimant treated unfavourably because the respondent repeated questions or questioned the claimant's truthfulness?

2.5. If so, was that done because of something arising in consequence of the claimant's disability – that is her difficulty in understanding and processing?

2.6. If the respondent did treat the claimant unfavourably, was that treatment a proportionate means of achieving a legitimate aim?

Victimisation

2.7. It is common ground that the claimant's grievance submitted on 27 August 2018 was a protected act because it referred to allegations of sexual harassment.

2.8. Was the claimant subjected to detriments if her colleagues, Abraham, Almus, Vicki Hayley and/or Ms C, ganged up on her, ignored her and ceased to have chats and cigarette breaks with her.

We should add that there has been some confusion as to when the claimant says this alleged treatment began. When the matter was discussed at the two earlier case management hearings the claimant said that this occurred after 12 December 2018 (which was the date of the third party's disciplinary hearing) but in the claimant's witness statement she says that it was from 24 October 2018.

2.9. If these detriments did occur, was that because the claimant had done the protected act?

Constructive unfair dismissal

2.10. Did the respondent commit a fundamental breach of the contract of employment – the implied term of trust and confidence – because:

2.10.1. the claimant's colleagues referred to above treated her as set out above either after 12 December 2018 or 24 October 2018?

2.10.2. someone told those colleagues about the claimant's grievance?

2.10.3. the claimant was made to feel everyone was against her and did not believe her?

2.10.4. the claimant was not provided with a safe place of work?

We should add that at the April 2019 hearing Employment Judge Davies confirmed that the claimant was not complaining about the outcome of her grievance or the way that had been dealt with in the context of fundamental breach. Instead it was about what the claimant believed was the relationship changing.

We should also add that we have not been required to make any specific findings about an incident which occurred on 17 July 2018, which the claimant contended was sexual harassment of her. However we have heard evidence about that matter because it is relevant to context.

3. **Reasonable adjustments for the claimant at this hearing**

3.1 The claimant's disability (which the respondent has conceded) is in respect of what are described as learning difficulties. The adjustments which the claimant would require at the final hearing were discussed at the case management hearing in April 2019 when it was agreed that at the final hearing either Mr Leonard, the claimant's son, or another suitable person would sit next to the claimant and support her as she gave evidence. It was noted that the claimant might need help with finding and understanding documents and it was said that she could not read well. There might also be the need for help so she could understand questions. The Judge directed that the questions should be short and simple.

3.2 Mr Leonard was not able to accompany the claimant to the September 2019 hearing and Employment Judge Shore described that as very unfortunate. Nor was there anybody else to support the claimant. Nevertheless the Judge expressed the view that he was satisfied that the claimant had been able to fully participate in the hearing.

3.3 At 10.54 on 3 February 2020, the first day of this hearing, during time set aside for the Tribunal to read, Mr Leonard sent an email to the Tribunal in which he said that the claimant decided today that she wanted to represent herself. He went on to say that the claimant had an opening statement that she would like to read out. As we understand it, Mr Leonard lives in Sweden.

3.4 At the beginning of the hearing we asked the claimant about her opening statement which she produced to us and which I summarised in open Tribunal. She noted that her son had helped her a lot but said that she felt that she had put stress on to him during his move from the UK to Sweden and she had therefore that morning asked him not to attend or represent her. The claimant also said in this statement that she did not want to be at the Tribunal when it gave it's decision on the outcome of her case and said that she would prefer it if that could be sent to her via email. She explained that that was in case her claim was unsuccessful and it was to avoid her becoming further upset or distressed whilst the Judgment was read out. As the Tribunal considered that it would not be appropriate to give Judgment in open Tribunal with only the respondent present we decided that instead we would reserve our Judgment so that it could be sent out to both parties at the same time.

3.5 Additionally, in the opening statement the claimant said that she would not be asking any of the respondents any questions "which may save the Employment Tribunal and the respondent any unnecessary time and costs". We were concerned about that. We explained to the claimant that she was not obliged to ask questions. We explained how the hearing would proceed and pointed out that there may well be things in the statements of the respondent witnesses with which the claimant did not agree and which she might want to challenge them about. We went on to explain that, whilst the Tribunal must remain independent and cannot be regarded as representing one party or the other, the Tribunal would nevertheless ask such questions of the respondent's witnesses as it thought were necessary in order to get the information it needed to make a decision.

3.6 This led to a discussion about the witness statements, both of the claimant and of the respondent witnesses. The September case management orders had provided that witness statements would not be exchanged until 30 January 2020. We do not know why that date was given. Disclosure would have been completed it seems by the end of November 2019. It transpired that exchange of witness statements had in fact taken place a little earlier, 20 January 2020. However we were further concerned when the claimant told us that she had only read the respondent's witness statements and possibly her own witness statement that morning (3 February 2020). It seems that that was because whilst her son would presumably have received the statements on 20 January (not least because he had access to his mother's email account) he had not for some reason sent those statements to his mother until the day of the hearing. We explained to the claimant that the first day and quite likely a good part of the second day of the hearing would be concerned with hearing her evidence which would mean that she would be asked questions by the respondent's barrister. We suggested to the claimant that she should in the intervening period carefully re-read the respondent's statements and then write down any points where she disagreed with what they were saying and any questions she would like to ask them. In the event the claimant asked questions of two of the four respondent witnesses. The Employment Tribunal endeavoured to ask all the respondent's witnesses the questions which they felt were necessary.

3.7 Our impression of the claimant was that she is a quite a good reader and had no difficulty in reading out certain documents and sections from witness statements. When asked about a particular paragraph in her own witness statement for instance she was able to readily see what page that was on. The claimant probably does have difficulty with longer words. Respondent's counsel has treated the claimant sympathetically, whilst having due regard to her duty to her own client to properly challenge the claimant's evidence. On the whole the questions asked of the claimant by counsel have been short and straightforward and we were satisfied that the claimant was able to understand those questions and answer them.

3.8 The claimant was, perhaps understandably, somewhat confused about the legal issues in her case and did not seem to entirely understand what complaints she was bringing. In so far as the claimant got confused in her evidence that appeared to be because she did not understand certain parts of her own witness statement. For instance, in paragraph 16 of the claimant's witness statement she refers to discrepancies within some hearing minutes. When the claimant was asked about this in cross-examination she said that she did not know what discrepancies meant. The claimant also accepted that whilst that paragraph and some others in her statement referred to the minutes of the third party's disciplinary hearing and made comments about them, the claimant herself had not actually read those minutes.

4. **Evidence**

The claimant has given evidence by reference to a witness statement running to eight pages but has called no other witnesses. The respondent's evidence has been given by Ms J A Howgate, bank staff disciplinary investigator (she investigated both the claimant's grievance and the third party's disciplinary

matter); Ms C, team leader; Ms S V Hayley, domestic assistant and Mr I M Barkley, housekeeping and domestic services manager.

5. **Documents**

There was an agreed trial bundle running to 481 pages.

6. **The relevant facts**

6.1. The claimant gives 1 December 2016 as the start date of her employment with the respondent. However it appears that that may just represent the date when the claimant was transferred to the respondent under a TUPE (Transfer of Undertakings) transfer from a private sector organisation. Somewhere in the papers it is suggested that the claimant actually had eight years' service.

6.2. The claimant's job title was domestic assistant or cleaner and she was one of five cleaning staff employed at FM which we understand to be part of the respondent's provision for community mental health services.

6.3. On or about 4 July 2018 the claimant was unfit to attend work because she had had an accident with a cup of tea which she spilt on herself causing quite serious scalding.

6.4. By mid-July 2018 the claimant was apparently fit to return to work and on 17 July 2018 a return to work meeting was conducted. Present were Ms B (monitoring team manager) and Ms C (domestic team leader). During that meeting Ms B asked if she could see the scald. We understand that she was concerned that the claimant should not return to work if she had an open wound. Apparently when this request was made Ms B and Ms C believed that the scald had been on the claimant's lower legs and that she would show them by simply rolling up her trousers. There would however subsequently be a dispute within the grievance and disciplinary process which resulted, whereby the claimant contended that she had been instructed by Ms B to remove her trousers to show the wound. The explanation which Ms B and Ms C would subsequently give during the course of what turned into a disciplinary investigation was that no such instruction had been given and they were both surprised when the claimant, they say voluntarily, got up and removed her trousers. There is also a dispute as to whether in that state of undress the claimant was approached by Ms B who then touched her thigh area.

6.5. On 27 August 2018 the claimant raised a grievance about this issue and a copy is at pages 178 to 180 in the bundle. In that letter the claimant set out her recollection of the return to work meeting, although seems to have given the date for that as 18 July. She went on to describe the incident as being sexual harassment which was "demeaning, distressing, humiliating and traumatic, made me feel sick and extremely disgusted. To be left standing with my knickers on show was outrageous. My son, family and friends are extremely angry that I have been taken advantage of". The claimant went on to describe herself as a 65 year old woman who

suffers from learning disabilities and was classed as being vulnerable.

6.6. There was some delay in the respondent receiving that grievance because, in error, the claimant had sent it to a different NHS Trust.

6.7. On 31 August 2018 the claimant had a further accident. This time it was an accident at work when she broke a thumb.

6.8. It was not until 7 September 2018 that the respondent received the claimant's grievance. It was decided that as the grievance was against Ms B, who was the claimant's line manager, line management arrangements would be changed whilst the matter was investigated. Ms Whittam, a facilities manager, was appointed as interim line manager of the claimant.

6.9. It was also on 7 September 2018 that the claimant made a further complaint about Ms B. That was set out in her email of that date to Helen Cherry of HR. A copy is at page 181. The claimant alleged that during her absence from work because of the thumb injury she had been harassed by Ms B "where she has asked me to go into work on several occasions whilst signed off, also that she wanted to look at my bandages from this injury".

6.10. On 10 September 2018 the respondent commissioned an investigation into the claimant's grievances. The commissioning was done by Ms Whittam. Ms Cherry wrote to the claimant on 10 September (page 184) confirming that the investigation had been commissioned and that the investigation was to be undertaken by a Jackie Howgate, described as Trust investigator, together with Susan Glass, a senior HR advisor. In that letter Ms Cherry informed the claimant that whilst she would be allowed to have a union representative or fellow work colleague with her at any investigation meetings, she would not be able to be accompanied by her son, at least in the meeting proper. It was said that the son could come along as an 'advocate'. This was a reference to something which the claimant had requested in her 7 September email when she wrote as follows:

*"My son has helped and supported me throughout this ordeal. I would ask that he could attend any meetings to carry on this vital support I need. He is a member of the trade union"*.

6.11. Arrangements were made for Ms Howgate to interview the claimant about her grievance and a date of 14 September 2018 was arranged. When the claimant wrote to confirm that she would be able to attend that meeting (page 385) she stated "I would ask again due to the severity of what has happened that my son accompanies me during the meeting. This will help me feel more relaxed and at ease to give the information you require. This whole ordeal has really upset me. Also I suffer from a learning disability which my son can help me understand any questions that you ask. My son attending would therefore be the benefit of both of us (sic)".

6.12. The investigation meeting duly took place on 14 September 2018 conducted by Ms Howgate who was accompanied by two HR advisors. Although the claimant attended with her son, who was involved in a pre-meeting, it was confirmed that the son, Mr Leonard, could not be present during the grievance investigation meeting itself. Instead the claimant was provided with what is described as an employee's representative or advocate and this was a Deborah Walton.

6.13. The minutes of this meeting are at pages 191 to 206. When the claimant was asked by Ms Howgate what had happened at the return to work meeting, the claimant is recorded as giving this answer:

"*Ms B needed to see me to do a return to work. Ms B was here on that day in the little room and then Ms C was there as well. Ms B had a computer and she asked me questions about my injury, she asked me if it had healed or not and I said that it was fine. She asked me if I could stand and pull my trousers to see my injuries so that's what I did because I had to, she came close up and had her hand there around my thigh and she came in and looked closely at it and then said that's fine X"*.

The minute then explains that the claimant demonstrated where Ms B had allegedly placed her hand and that was the top of her left thigh area. (page 194). At a later point in the meeting Ms Howgate asked how far down did the claimant take her trousers and she replies "right down actually" (page 200). Asked what happened next the claimant replied:

"*Ms B came around from the table when I was stood up showing her and put her hand on the top of my thigh. She was like bent over and then had a good look".* (page 201).

The claimant went on to record that when she had told her son about what had happened he had said that something had to be done about it and he rang the police who apparently told him that it was sexual harassment. The claimant explained that her son had written her grievance for her and that was because the claimant couldn't use a computer. She was not very good at that at all and could not even send an email so her son did all that for her (page 203).

6.14. Ms Howgate conducted a second investigation meeting with the claimant on 3 October 2018. The minutes of that meeting are at pages 209 to 216. This meeting was also conducted by Ms Howgate, but on this occasion the employee's representative/advocate was Laura Oates, an operations manager. On this occasion the HR advisor was Susan Glass. The claimant was again asked to explain what had happened at the return to work meeting and the claimant gave an account which was similar to the one that she had given at the earlier meeting. She was asked further questions as to whether she had actually been asked to take her trousers down, which again was a matter that had been covered at the earlier meeting. Ms Howgate's evidence to us was that she

believed that the overlap between the two investigation meetings was very limited. However she felt that it had been appropriate and important to go over some of the points again. She did this in part because on this occasion the claimant's advocate was a different person and for that matter the HR advisor was different from the 14 September meeting. She went on to say that the majority of that meeting related to obtaining further information about the allegation the claimant had made about harassment during her thumb absence. Ms Howgate's evidence was that, as in the first meeting, she felt that the claimant had needed very little support because she had understood and answered the questions that were put to her.

6.15. The claimant complains that she is recorded as having difficulty answering question 22 at the 3 October meeting. The claimant was asked whether she understood that the questions that Ms B had asked her about her thumb injury had been so that Ms B could understand it and report it for her. The claimant begins her answer by saying "she said she was going to put it in the accident book, I can't remember much my mind is going blank". In her witness statement the claimant says that the advocate (Ms Oates) "did not intervene to help or explain the question so I could better answer it". (paragraph 9). However when one looks at the full answer at page 213 it can be seen that after referring to her mind going blank the claimant then continues with a fairly detailed answer, although she does refer to having learning difficulties and that she doesn't "understand the big stuff". It seems that was a reference to a form which she might have had to fill in. The claimant also says that when asked about recording phone calls received from Ms B the claimant had trouble dealing with her phone and she says that Ms Oates did not help her with that.

6.16. On 23 October 2018 a meeting took place between Ms Howgate and the claimant. Laura Oates was also present. There are no minutes of this meeting but the emails that were sent to arrange it are at pages 395 to 398. The purpose of the meeting was to go through the minutes which had been taken of the two earlier grievance investigation meetings to ensure that the claimant understood and agreed them. It transpires that she did and she signed those minutes accordingly.

6.17. Ms Howgate compiled an investigation report and the first draft of that report was dated 30 October 2018. Subsequently and for reasons which we will explain below, the report was revised and it is that version of the report that we have in the bundle at pages 254 to 276. There are then various appendices. The revised report is dated 27 November 2018.

6.18. The reason for the revision was that it was pointed out to Ms Howgate (probably by a member of the panel which was to deal with the next stage of the process) that the claimant had not been given the opportunity to comment on the accounts which Ms B and Ms C had given of the 17 July return to work meeting. That was

important because as we have noted, the accounts given by those two differed considerably from the account given by the claimant.

6.19. So it was that a third grievance investigation meeting took place on 20 November 2018. Again the claimant was accompanied by Laura Oates as her representative/advocate. Notes of that meeting are at pages 344 to 346. Ms Howgate explained to the claimant that Ms B, when she had been interviewed, had denied that she asked the claimant to pull her trousers down. The claimant's response was to confirm that she had done that and that if Ms B had not asked her to do that then why would she do it? She was then asked what the wording was and replied that it was "*I'd like you to pull your trousers down X so I can see your injuries*". The claimant said that she had definitely said that. Ms Howgate then explained that Ms C had also said that Ms B had not asked the claimant to take her trousers down. The claimant's reply was that Ms C had been there when it happened and that she had said 'hang on a minute' and then went to pull the blinds down because she didn't want anyone to see in.

It was also put to the claimant that both Ms B and Ms C denied that Ms B had then come close to the claimant and touched her thigh. The claimant explained the layout of the room and that there was a table there and that when the touching was taking place Ms C may not have been able to see that because Ms B was blocking the area. The claimant was clear that Ms B had touched her thigh. The claimant was then informed that Ms C had said that Ms B did not touch her at all and had not therefore touched her thigh. The claimant was asked to comment on that. Her reply was:

"*Ms B did every single thing that I said she did*."

6.20. In the conclusions section of Ms Howgate's investigation report (page 276) she simply records or summarises the evidence which had been obtained during the investigation, contradictory as parts of it were. Ms Howgate therefore did not actually reach any conclusions, quite properly as clearly she was simply investigating the matter. However, nor did she make any recommendations in the report as to what should happen next.

6.21. What did happen was that the respondent decided that the matters which the claimant had raised as a grievance against Ms B should proceed as a disciplinary case against Ms B. We have not seen the charge letter directed to Ms B but we have been told about the disciplinary hearing which took place for Ms B on 12 December 2018, not least because the claimant gave evidence at that hearing.

6.22. However in the meantime, on 7 November 2018, the claimant, with help, prepared a letter of resignation which was delivered to the respondent on that date and subsequently came to the attention of Mr Barkley, who at that stage had taken over from Ms Whittam as the claimant's temporary line manager. The assistance which the claimant had received in respect of that letter of resignation had come from her colleague and team leader Ms C. The claimant had asked for Ms C's help and Ms C in turn and on the claimant's behalf sought advice from another colleague, Tony Lilac. That resulted in

the document which is now to be seen as a copy at page 221. It reads as follows:

"*Dear Sir/madam*

*I X am writing to inform you that I wish to resign from my position at FM on 31 December as I am retiring on this date.*

*X*".

In the bottom right hand corner the letter is also signed by Mr Lilac, Ms C and Ms Hayley. Ms C told us that that had been done because Mr Lilac had advised that that was necessary for a letter of resignation (clearly it wasn't). Ms C's evidence was that she had had conversations with the claimant when the claimant explained that one of her sons had told her that she needed to slow down due to her health problems and as a result of that the claimant was considering retiring and taking her pension. She believed that she would get a good pension if she retired early. (Paragraph 9 of Ms C's statement).

6.23. On 22 November 2018 the claimant went on sick leave and in fact never returned to her work.

6.24. It then came to Mr Barkley's attention that, contrary to instructions, the claimant might have been speaking to other people about the investigation that was being undertaken in respect of the grievance/disciplinary matter. To that end there was a meeting on 26 November 2018 between the claimant, Mr Barkley and Mr N Phillips, head of estates and facilities. Ms Oates did not accompany the claimant to this meeting. Mr Barkley's evidence to us was that towards the end of that meeting the claimant indicated that she may wish to withdraw her resignation. Mr Barkley subsequently took advice on the procedure and was informed by HR that the claimant would need to write to confirm that. He then telephoned the claimant to let her know that that was what was required.

6.25. Mr Barkley had a telephone conversation with the claimant on 4 December 2018. Nothing further had been received from the claimant in writing by then. The claimant told Mr Barkley that she remained unsure whether or not she wanted to withdraw her resignation.

6.26. There was then a further telephone conversation between the claimant and Mr Barkley on 7 December 2018 and a note of this conversation and the 4 December conversation is on page 232. Mr Barkley has recorded the claimant saying that she would not be coming back to work. In those circumstances Mr Barkley's evidence was that the respondent continued to process the claimant's retirement for the end of that month.

6.27. As we have mentioned, Ms B's disciplinary hearing took place on 12 December 2018. The claimant had been invited to attend as a witness and she did so, although she was still signed off work. The

claimant was again provided with the services of Ms Oates as her representative/advocate.

6.28. In paragraph 13 of the claimant's witness statement she refers to only have received the advocate's support between 11am and 12pm, whereas the hearing had lasted for around four hours. However when giving evidence before us during her cross-examination, the claimant explained that she had not been present throughout the whole disciplinary hearing but only whilst she was giving her evidence. She confirms during that time Ms Oates was accompanying her. Accordingly we find the claimant's witness statement somewhat misleading, suggesting as it does, that firstly the claimant had to attend a very lengthy meeting and that for three hours she did not have any support.

6.29. We anticipate that this inaccuracy is because this part of the claimant's witness statement represents, in effect, a commentary, and an inaccurate one, by someone who has read the minutes but who was not actually at the meeting – in other words the claimant's son Mr Leonard.

6.30. The disciplinary hearing took place in Wakefield, whereas all other meetings the claimant had attended were conducted at her place of work at FM. The minutes of the meeting are at pages 234 to 246. The notes of the part of that meeting where the claimant gave her evidence and was asked questions are between pages 240 and 243/244. The claimant was again asked what had happened on 17 July and the minutes record that she gave a clear account which accorded with the accounts she had given previously during the course of the grievance investigation. However in the middle of that explanation and for reasons unknown, the claimant referred to an incident of what appears to be serious domestic violence that does not seem to have any bearing on the matter that was being considered by the disciplinary panel. The account included the claimant having to tie towels together to escape from her home.

6.31. Later in the interview Mr Phillips pointed out that in the statements which had been taken from other individuals in the investigation process they had recounted that the claimant had a history of relating incidents that had not happened. Mr Phillips gave the example of the claimant having told somebody that someone had been shot (in fact one of her sons) when in fact they had not been. The claimant's reply to that question was "that has nothing to do with this". Mr Phillips also pointed out that the claimant had told somebody that one of her sons was in prison, but he had then been seen in town. The claimant had also said that she had had to leave work early because her grandchildren had got meningitis. The claimant's reply was that it wasn't meningitis. When she was asked about the prison incident the claimant said that she couldn't remember. When the claimant was asked a question by the person representing Ms B, the claimant said that she had not shown her burns to anybody else and in particular not to Vicky Hayley. Prior to this the panel had heard evidence from Vicky Hayley who had said that on the same day as the incident, 17 July, in a different

location to the incident under investigation, the claimant without prompting had dropped her trousers to show Ms Hayley her burns. Ms Hayley was asked in the disciplinary hearing whether she had asked to see the burns and she said she had not.

6.32. We have not seen any correspondence between the disciplinary panel and Ms B as to the outcome of the disciplinary hearing but we do have a copy of the rationale of the panel which is at pages 247 to 248. They explained that they had not taken into account the allegations that the claimant had a habit of telling stories. They were critical of Ms B in that they did not think she had been justified in asking to see the claimant's scars. If there were doubts as to whether the claimant really had injured herself (apparently in the context that her illness absence coincided with a period of time when she had asked for, but not been given, leave) the matter should have been referred to occupational health or HR advice should have been sought. However the panel found that Ms B had not sexually harassed or sexually assaulted the claimant. They rejected the allegation that the claimant had been asked to drop her trousers or that Ms B had got inappropriately close or touched the claimant's thigh. It appears therefore that there was no disciplinary sanction applied to Ms B other than that Mr Phillips would feed back to her that it was not part of her role to inspect wounds of staff before they returned to work.

6.33. On 13 December 2018 Mr Phillips as chair of the panel wrote to the claimant. A copy of that letter is at page 249 to 250. The claimant was informed that one of the complaints she had made against Ms B (harassment during her period of absence because of the thumb injury) had not been proceeded with after an independent review by a senior manager on receipt of Ms Howgate's investigation report. However that same senior manager had agreed that the allegation of sexual harassment on 17 July should proceed as a disciplinary matter. The outcome of the disciplinary and the panel's findings were recorded in that letter in these terms:

*"Having considered all the facts and circumstances the panel concluded that it was more likely than not that Ms B did not sexually harass or assault you at the return to work meeting on 18 July 2018. Specifically, we did not hear evidence to support your assertion that Ms B asked you to lower your trousers or that she came uncomfortably close to your thigh to inspect your wounds or touch your thigh with her hand".*

The letter concluded with the following:

*"I have to say that the panel were extremely concerned that your account of this incident was completely different and contrary to that of the three witnesses who gave evidence to the hearing on 12 December 2018. The accusations you have made against a colleague of sexual harassment, which we now believe to be unfounded, do not fit with our Trust's values and had you not been working your contractual notice, I would have instructed the investigating officer to explore this matter further".*

6.34. Mr Barkley had made arrangements with the claimant to conduct a stage 2 absence meeting on 18 December 2018, despite the fact that the respondent apparently believed at that stage that the claimant had already resigned and was on sick leave during her notice period. However, that meeting never took place because the claimant sent her own email to the respondent on 18 December 2018 in which she confirmed her resignation.

6.35. A copy of that email addressed to Ms Howgate and Ms Glass is at page 251 in the bundle. The claimant says that she is terminating her contract with immediate effect as of that day. She gave the following reasons for that step:

*"My workplace is no longer harmonious nor friendly. Before the incident occurred in respect of my recent grievance, all staff were very friendly and very talkative with me. Since my grievance has been ongoing, I have felt that this has changed and staff no longer are willing to speak to me. This has made me extremely* (un) *comfortable and felt like I have been walking on eggshells (sic). I further feel that someone has informed other staff about my grievance. This is extremely unfair for this to be allowed to happen.*

*I also feel as my employer, you are unable to keep me safe due to the recent incident and that as my employer, you have not taken my learning disability seriously nor offered support that would benefit me. Whilst my grievance has been ongoing, I have had to carry on working with one of my colleagues whom is part of my allegation. This has put me at further risk of harm.*

*Whilst I have enjoyed my time working at FM, I feel I have no option but to resign immediately in order to protect myself from further instances of harm and sexual harassment."*

## 7. The parties submissions

At the conclusion of the evidence in our hearing (the end of day two) we explained to the claimant that she had the right to make closing submissions to us and we explained what those would normally cover. It was envisaged that we would receive the parties' submissions on the following day. We explained that the claimant was not obliged to make submissions but it was her right to do so. There was also a discussion about the written submissions which Mrs Niaz-Dickinson intended to rely upon and arrangements were made for a copy to be sent to the claimant's son so that he could discuss them and the claimant's submissions with her in the meantime.

7.1. <u>Claimant's submissions</u>

The claimant had written out what she wanted to tell us and at our suggestion her written submissions were copied. We read those submissions before starting the third day's hearing and so relieved the claimant of the need to read those submissions to us. The claimant wrote that prior to 18 July 2018 she had been extremely happy in her job and had performed well. The claimant explained that her son Jonathan Leonard had helped her with the case and had only done the same job that a legal representative would have done. Miss X then went on to refer to what she described as the

derogatory statements about her mental health that had been made by various witnesses who had given evidence in the grievance process. One of those witnesses had referred to the claimant as not being wired up right.

(Whilst we would agree that using such a term was inappropriate, the allegedly derogatory comments by witnesses to the grievance hearing have not been part of the claimant's claim before this Tribunal.)

The claimant was concerned that she had been made out to be a liar. The claimant's learning disability should not mean that she should be treated differently or be punished. The claimant then made a reference to her statements of terms and conditions under the TUPE Regulations, which we have to say is a further new allegation and is not a matter before the Tribunal.

The claimant also referred to the notes of the 12 December disciplinary hearing not having been signed by her as an accurate record. This was not an issue which the claimant had raised with us or within these proceedings, although we would add that as the disciplinary proceedings were not about the claimant but about a third party it would be unusual if a witness (which is what the claimant was in that context) had been asked to, or would have had the right to, sign those minutes. The claimant then referred to missing minutes from meetings that had been discovered during the course of the hearing before us. We assume the claimant is referring to the 'minute verification meeting' with Ms Howgate on 23 October and possibly one of the meetings with Mr Barkley. We should add however that the claimant has not complained about those matters during this hearing and there did not seem to be anything controversial about those unminuted meetings. The claimant went on to explain the adverse effect on her health that these events had caused her. Whatever the outcome of the case before the Tribunal the claimant was glad that she had had the courage to stand up for herself and that her voice had been heard.

7.2. Respondent's submissions

Mrs Niaz-Dickinson had, as we mentioned, prepared written submissions and has also referred us to various authorities. She made further oral submissions to us and commented on the claimant's submissions. As the written submissions are comprehensive we do not see the need to summarise them here.

## 8. Our conclusions

8.1. Disability discrimination – reasonable adjustments

8.1.1. Did the provision about representation in the respondent's relevant policies put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

We have considered what is said in the respondent's grievance policy and procedure (which we requested to be

added to the bundle); the disciplinary procedure and the harassment and bullying policy. The grievance procedure was obviously applicable to the claimant because she lodged a grievance. The harassment policy likewise and the disciplinary policy indirectly. That was because whilst the claimant was not herself subjected to any disciplinary process, her grievance led to somebody else being subjected to a disciplinary process.

Each of the three policies says more or less the same thing about representation. As an example, the grievance procedure provides at paragraph 3 (page 172F) that

"*Staff may be represented at all levels of that procedure by an accredited representative of their trade union, by an official employed by a trade union, or by a fellow worker not acting in a legal capacity*. "

As we have noted, the claimant contends that she was at a substantial disadvantage in terms of answering questions during the investigation into her own grievance and when giving evidence in the subsequent disciplinary proceedings against the third party, Ms B. At the April 2019 preliminary hearing it was recorded that the claimant's problems with reading, processing and understanding questions meant that she would not be able to participate fully in such meetings.

Mrs Niaz-Dickinson said that her primary submission in respect of this part of the claimant's case was that there had been no substantial disadvantage, indeed no disadvantage at all. She said that that was evident when one considered the minutes of the various meetings which showed that the claimant had been able to provide clear answers to the questions she had been asked and give full accounts of the alleged sexual harassment. We also remind ourselves that Ms Howgate's evidence to us was that although a representative or advocate had been present at all the relevant meetings, the claimant had needed very little support from either Ms Walton or Ms Oates. Ms Howgate candidly accepted that it is difficult when simply reading the notes of the meetings and not being able to hear the actual dialogue to appreciate the nuances of how she was asking questions of the claimant and how the claimant was interacting during the process. However Ms Howgate's evidence was that she kept all of her questions as simple as possible and only asked about one issue at a time allowing the claimant the time to answer and then she subsequently clarified individual points that occurred to her as being relevant with the claimant. She also notes that the claimant did not at any stage indicate that she was struggling to understand her questions. There were, for instance, in the first meeting only a couple of things which Ms Walton had to explain to the claimant or where the claimant sought further

clarification (see paragraphs 22 and 23 of Ms Howgate's witness statement).

We must also add from our own observation, that the claimant's reading skills as demonstrated before us were significantly higher than we had been led to believe they would be – for instance in the context of the prospective reasonable adjustments for our hearing.

Nevertheless, we note that the respondent acceded to the claimant's request for support and provided an advocate. It also felt that it was necessary, or at least advisable, to have the 23 October meeting with the claimant to make sure that she was happy with the minutes of the two preceding meetings. We also observe that the respondent has not disputed that the claimant is a person with a disability by reason of the mental impairment of learning difficulties.

On balance therefore we find that the claimant would have been at a substantial disadvantage if she had had to go into the grievance investigation and disciplinary meetings on her own.

8.1.2. Knowledge of substantial disadvantage

The primary submission of Mrs Niaz-Dickinson has been that the claimant was not put at a disadvantage. The respondent's case has not been run on the basis that there was lack of knowledge of disadvantage. That could hardly be the case in circumstances where it decided that it was appropriate to appoint advocates, to have the 23 October meeting and also to offer counselling to the claimant.

We find that there was knowledge.

8.1.3. As the duty to make reasonable adjustments was therefore engaged, was it satisfied?

The claimant contends that a reasonable adjustment would have been for the respondent to allow her son, Mr Leonard, to attend and support her at the relevant meetings. Ms Howgate said that having taken HR advice she was told that that was out with the respondent's procedures, as indeed it is, by implication. The Employment Judge asked Ms Howgate whether she felt that in the circumstances of the claimant's case it would be appropriate to make an exception to the normal rule. She said she felt that it would not be necessary because an alternative arrangement had been made.

We observe that the ethos behind the reasonable adjustment provisions in the Equality Act is that it may be necessary for an employer to do things somewhat differently when it is dealing with an employee who has a disability. However we instruct ourselves that that does not necessarily mean that

whatever an employee asks for by way of an adjustment will be regarded as a reasonable adjustment.

In the case before us the respondent clearly did make adjustments. A representative or advocate for the claimant was provided and as far as we are aware that is something which is not usually done. The usual procedure is for the employee to obtain their own representative or companion in the shape of a union official or work colleague.

We also note that during the course of the claimant's cross-examination she confirmed on several occasions that she was perfectly happy with the services provided by Ms Walton and subsequently by Ms Oates.

We should add that at one stage we became concerned that the claimant might have been under the impression that she simply had to agree with propositions put to her by Mrs Niaz-Dickinson. The Employment Judge therefore indicated to the claimant that whilst it was alright for the claimant to agree with points that were being put to her by counsel if she really did agree with them, she should not feel that she was obliged to agree with whatever was put to her. She had to tell us what she actually thought.

Despite this guidance the claimant continued to agree with most of the propositions which counsel put to her and did not resile from the fact that she was satisfied with the support that she had been given by Ms Walton and then Ms Oates.

We also observe that the respondent made the further adjustment on its own initiative to have the minute verification meeting with the claimant on 23 October. That again was not part of its usual procedure.

In all these circumstances the Tribunal are satisfied that the respondent did discharge its duty to make reasonable adjustments. Having provided the claimant with a suitable advocate it would not have been a reasonable adjustment to permit her to have an alternative advocate - her son.

8.2. Disability discrimination – discrimination arising from disability

8.2.1. The relevant part of the Equality Act is section 15 which provides:

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

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

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

8.2.2. Was the claimant treated unfavourably?

The job of proving that she was is the claimant's. In legal terms the burden of proof is on her to establish, on the balance of probabilities, that the unfavourable treatment

occurred. The claimant contends that the unfavourable treatment was that questions were repeated during the grievance and disciplinary meetings and that the respondent questioned the claimant's truthfulness.

We agree that the claimant was, for perhaps not particularly good reasons, required to repeat her account of the return to work meeting at the second investigation meeting (3 October 2018). However that meeting went on to deal with several other issues and in particular the second complaint or grievance that the claimant had brought in respect of Ms B's alleged treatment of her during her absence because of the injured thumb. We certainly do not get the impression that any repeat questions were being asked in an oppressive fashion or in such a way as to suggest that the respondent was going to keep asking the question until it got the answer that it wanted (whatever that was).

The claimant has given two specific examples of what she describes as repeat questions, although as was carefully analysed with her during cross-examination, those were not examples of the same question being asked but rather follow-up questions being asked. For instance - first question 'where was the wound?' - second question – 'what size was it?'

On the basis that for most of the relevant time the respondent was engaged in investigating the claimant's grievance it might be thought that carefully asking questions, even if those were questions of the griever herself, could be regarded as favourable treatment in the sense that it showed that the employer was taking the grievance seriously.

On the issue of questioning the claimant's truthfulness, it has to be borne in mind that the claimant had made a very serious allegation against Ms B. If that allegation had been upheld we consider that it is quite likely that Ms B would have been summarily dismissed and in fact it may have been career ending for her. Whilst the panel found that Ms B's enquiries about the claimant's wound were inappropriate, the issue before the disciplinary panel was whether something quite outrageous had been done. It would have been outrageous if there had been a request by Ms B that the claimant should remove her trousers and it would be scarcely less outrageous if the claimant had done that without any particular bidding. Although ultimately the disciplinary panel seemed to have not taken into account issues about the claimant's credibility, it has to be said that several of the disciplinary hearing/grievance witnesses, people who had worked with the claimant for quite a while and on general terms seemed to have been friendly with her, did report that she had a habit of making quite shocking statements which were then shown to be untrue.

Whilst we reject the allegation that there were repeated questions and that this constituted unfavourable treatment, we accept that having one's truthfulness doubted can properly be regarded as unfavourable treatment.

8.2.3. Was the questioning of the claimant's truthfulness something which arose in consequence of her disability?

We find that it was not. In so far as the claimant's truthfulness was being tested, that did not arise from any lack of clarity about what the claimant's allegations were. As we have found, she had been quite capable of giving her account of what had happened at the return to work meeting and she did not deviate from that account. It follows in our judgment that the only reason that her truthfulness was being questioned, or to put it another way, her credibility assessed was because she had made very serious allegations (which did not arise in consequence of her disability) and there was a drastic difference between the claimant's account and that of the other two people who were present at the return to work meeting. There was also a similar difference between the evidence given by Ms Hayley of a second trouser dropping incident and the claimant's denial that that had occurred. We therefore conclude that in so far as the claimant's credibility was under consideration, that was not because the claimant had difficulty in understanding and processing the questions she had been asked.

Accordingly we find that this complaint also fails.

8.3. Victimisation

8.3.1. As we have noted, the respondent concedes that the claimant's grievance was a protected act.

The Equality Act defines victimisation in section 27 in these terms:

"*A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act."*

8.3.2. Was the claimant subjected to the alleged detriments?

As was recorded at the April 2019 case management hearing the alleged detriments were done by the claimant's four colleagues Abraham, Almus, Vicki Hayley and Ms C. The claimant alleges that those individuals ganged up on her, ignored her and stopped having chats and cigarette breaks with her.

Again the burden of proof is on the claimant to establish on the balance of probabilities that those things happened. A particular difficulty for the claimant's case is the change in the claimant's case as to when these detriments are said to have occurred. At the case management hearing in April 2019, when the claimant was accompanied by her son, she

made an application to add this victimisation complaint. No doubt the Employment Judge wanted to be absolutely clear about what the claimant wanted to add to her case and so it is significant that Employment Judge Davies has recorded in the annex to the Order that the alleged bad treatment occurred after the final hearing on 12 December 2018.

The respondent was given permission to amend its grounds of resistance once the claimant's claims had been clarified and it needed to put in a defence to the victimisation complaint, which had not previously been part of the claim. When it did so in June 2019 it pointed out the fatal flaw in the victimisation complaint as pleaded and defined at the earlier hearing. That was that the claimant had been absent from work from 22 November 2018 and that continued right up to the end of her employment. She could therefore not have been treated as she alleged by these colleagues after 12 December, for the simple reason that she was not in work and would not have exposure to those colleagues.

In the claimant's witness statement (paragraph 19) the claimant notes that she originally claimed that the bad treatment began on 12 December 2018. She then writes that after careful thought she can confirm that it was around 24 October 2018. She says that she can remember that because it was around that date that her son invited her for tea, when he cooked for her gammon, egg and chips and that stood out because he did not normally cook gammon for her because he did not himself like it.

Whilst this association might be give this change of account an air of credibility, the difficulty for the claimant's case is that during cross-examination she indicated that whilst she was not sure of the precise date of the meeting after which her colleagues' behaviour changed, she was absolutely clear that it was after the meeting that had taken place in Wakefield. It is common ground, as we have noted, that all the meetings other than the disciplinary hearing had taken place at FM. It was only the disciplinary hearing for Ms B that had taken place in Wakefield and that was on 12 December 2018.

Accordingly, the claimant was really reverting to her original case and abandoning the attempted amendment as set out in paragraph 19 of her statement. This suggests to us that on realising the fatal flaw with an allegation that bad things happened after 12 December 2018, the claimant, rather than giving the matter careful thought, has had this part of her case revised by her son although, fairly candidly has reverted to her own case, rather than her son's version, during the course of cross-examination.

We should also mention that we do not understand the significance of the 24th October 2018. In terms of the

relevant chronology it was the day after the minute verification meeting with Ms Howgate but we cannot see the connection between that and any alleged change in attitude by the claimant's colleagues.

Over and above these difficulties we also take into account that when on 7 November 2018 the claimant wanted advice about how to phrase a resignation letter she went to Ms C and also seems to have been content for the involvement of Ms Hayley in that exercise. On the claimant's revised case as of that date those two colleagues would have been behaving badly towards the claimant and refusing to have anything to do with her. Despite this the claimant was happy to make contact with Ms C for advice and it seems that Ms C went out of her way to herself seek advice so that the letter could be put together. It was then arranged that both Ms C and Ms Haley would countersign that letter. We find that that is wholly inconsistent with the type of behaviour which the claimant alleges those two individuals had, by 24 October, started to display towards her.

Further we should add that the evidence that we have heard from Ms C and Ms Hayley is to deny the rather vague allegations which the claimant makes. They point out for instance that as they all only worked four hour shifts they did not have an official break. There was not much time for conversation and they say that they did not change their approach to the claimant. They point out that the other two colleagues referred to, Abraham and Almus, were Ethiopian and did not speak a great deal of English. In those circumstances they doubted that the claimant would at any time have had real conversations with those two colleagues.

Accordingly we find that the victimisation complaint fails because the claimant has not proved the alleged detriments.

8.4. <u>Constructive unfair dismissal</u>

8.4.1. Constructive unfair dismissal will occur where the employer commits a fundamental breach of the contract of employment and the claimant accepts that repudiatory breach by resigning.

8.4.2. When reiterating the issues at the start of the hearing we have noted the various matters which the claimant contends represented the fundamental breach in this case. Because of our findings on the victimisation complaint, we find that the claimant cannot rely upon the allegation that the claimant's colleagues had started treating her badly; that someone had told the claimant's colleagues about her grievance or that she was made to feel that everybody was against her and did not believe her.

8.4.3. This is not the type of case where, for instance, the employee had made a complaint to the employer about her alleged

mistreatment by her colleagues and then the employer had failed to do anything about that. In fact as far as we are aware the employer was unaware of the allegations about the colleagues' treatment of the claimant at the material time.

8.4.4. We would stress that the fundamental breach has to be the breach of the employer and unless the fellow employee is a senior or managing employee, it is unlikely that bad things done by colleagues would represent a fundamental breach of the contract of employment which is made, not between the colleagues and the employee, but between the employer and the employee.

8.4.5. The final alleged breach is that the claimant was not provided with a safe place of work because, as it was recorded at the April 2019 hearing "Ms B was still her line manager and might behave the same way again". Although we have no doubt that this is what the claimant related to Employment Judge Davies and it could be what the claimant's son thought was the position, on the evidence before us it is clear that as soon as the claimant's grievance was put in against Ms B, she ceased to have line management duties for the claimant. Instead Ms Whittam was asked to take over that role and subsequently it passed to Mr Barkley from whom we have heard.

8.4.6. As the claimant was absent from work for the latter part of her employment, it will never be known what arrangements for line management would have been made and agreed with the claimant at any return to work meeting. That is of course if it had not been the claimant's intention to retire at the end of December. Whilst those arrangements will therefore not be known, the claimant cannot point to anything which suggests that the employer would have insisted on Ms B resuming line management of the claimant. We would anticipate that in the circumstances which prevailed it would be very unlikely that a reasonable employer would put an employee back under the line management of a person against whom she had alleged sexual harassment, even though that allegation had not been upheld.

8.4.7. If we had upheld any of the discrimination complaints against the respondent, that treatment would probably have been a fundamental breach of the contract of employment in itself.

However that has not been our conclusion. Accordingly we find that the claimant was not constructively dismissed.

**Employment Judge Little**

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Date 17th March 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18th March 2020