EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms D Masawi		**Leonard Cheshire Disability**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL (RESERVED JUDGMENT)

HELD AT Croydon **ON** 2 – 6 March 2020
9 March 2020 (Panel Only)

EMPLOYMENT JUDGE GASKELL **MEMBERS:** **Mr R Shaw**
Mr A Peart

Representation
For the Claimant: **In Person** **For Respondent:** **Ms G Roberts (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of discrimination for a reason arising from disability; failure to make adjustments; and victimisation, pursuant to Section 120 of that Act are dismissed.

REASONS

Introduction

1 The claimant in this case is Ms Dorothy Masawi, aged 44yrs, who has been employed by the respondent, Leonard Cheshire Disability, since 4 May 2015. The claimant's employment is continuing. At all times material to this claim, the claimant was employed as a Team Leader at Springfield; a residential supported service operated by the respondent in Bromley, Kent.

2 From 28 July 2016 until 16 October 2019 the claimant was absent from work following injuries she received in an accident at work on 28 July 2016. The claimant believes that her employer was responsible for her injuries. The respondent accepts that, on the basis of pain and weakness in her neck; shoulder; right hand; and lower back; at all times material to this claim, the claimant was a disabled person as defined by Section 6 and Schedule 1 of the Equality Act 2010 (EqA).

3 By a claim form presented to the tribunal on 16 October 2018 (one year before the claimant's eventual return to work), the claimant brings claims for disability discrimination. The strands of discrimination are: -

(a) Discrimination for a reason arising from disability (Section 15 EqA)
(b) A failure to make adjustments (Section 21 EqA)
(c) Victimisation (Section 27 EqA)

Within the claim form and the claimant's witness statement are suggestions of claims for detriment for having made a protected disclosure and for unlawful deductions from wages. There was a Closed Preliminary Hearing (CPH) conducted by Employment Judge Corrigan on 7 March 2019 when the claims to be pursued were clarified. There are no claims before the tribunal in respect of protected disclosures or unpaid wages.

4 As stated above, disability is conceded. At the CPH, the claimant identified her protected act for the purposes of the victimisation claim as her complaint (grievance) dated 22 July 2018. The respondent concedes that, on a broad reading, this letter constitutes a Protected Act for this purpose.

5 The respondent denies any less favourable treatment either for reasons arising from disability or by reason of the claimant having done a Protected Act. The respondent asserts that, to the extent that the obligation to make adjustments arose at all, all reasonable adjustments were made.

Preliminary Matters

6 At the CPH, Employment Judge Corrigan made Case Management Orders which included for the mutual simultaneous exchange of witness statements on 17 September 2019. During the week immediately prior to the commencement of this Hearing, the respondent made an application to postpone the Hearing on the grounds that the claimant had failed to disclose her witness statements. The Regional Employment Judge refused the postponement application but directed that it could be renewed before the panel at the outset of the Hearing. Ms Roberts duly renewed that application before us.

7 The claimant acknowledged that she had not disclosed her witness statements. She claimed that this had not been possible because the respondent had not included all necessary documents in the agreed trial bundle. We directed the claimant to identify the missing documents: when she attempted to do so, it transpired either that the documents were in fact in the bundle, or they were in a separate additional bundle which had been prepared of documents disclosed by the claimant but which the respondent did not believe to be relevant. At 10:15am on the first day of the Hearing we directed the claimant to disclose her witness statements to the respondent by 2pm that afternoon (the claimant had confirmed that, all of the documentation having now been identified, this timescale was realistic). We also ordered her to provide to the respondent copies of any further documents which she believed had been omitted from the bundle; and to bring her witness statements and copies of those further documents to the hearing the following day.

8 At the outset of day two of the Hearing, Ms Roberts confirmed that three of the claimant's witness statements had been received at 2:45pm the previous afternoon and the claimant's own statement at 3pm. Ms Roberts accepted that the claimant had substantially complied with the orders we had made the previous day. Ms Roberts remained concerned as to the ability of the respondent to meet the claimant's case which had effectively only been fully outlined to them when the witness statement was received previous day. She maintained the application for an adjournment. The claimant opposed the application and wished to proceed.

9 The panel considered the application: we considered the contents of the witness statements which had been disclosed (the claimant had not disclosed any additional documentation); we did not find that the respondent ought to have been taken by surprise by anything in the witness statements; and that, with experienced counsel and solicitors acting, it should be possible for the respondent to proceed. We found that it was not in the interests of justice to further delay matters and the postponement application was refused.

The Evidence

10 The claimant gave evidence on her own account and called three witnesses: Mr Lawrence Masawi - the claimant's brother; Ms Chidochashe Nicole Masawi – the claimant's daughter; and Ms Chipo Dorothy Masawi - the claimant's mother.

11 The respondent called two witnesses: Mr Douglas Exton – HR Business Partner 2008 - 2019; and Mrs Jane Carter – Head of HR since 2010. The respondent relied on the evidence of a third witness: Ms Jackie Hall - Head of Operations for Kent, London and Essex. Ms Hall provided a detailed witness statement but was unable to attend the hearing to give evidence. The claimant did not object to her witness statement being read; although she made clear that this should not be taken as an indication that the evidence was agreed. We confirmed that we would read the statement and attach to it such weight as appeared proper.

12 There was a trial bundle running to over 660 pages; and an additional bundle of 103 pages being the additional documents requested by the claimant. We have considered those documents from the bundles to which we were referred by the parties during the course of the hearing.

13 The claimant was a wholly unsatisfactory witness. Her evidence was punctuated with inaccuracies and inconsistencies; at times she was simply not credible. She was prone to exaggeration and embellishment. Her evidence was often inconsistent with contemporaneous documents. Her credibility was significantly undermined by her readiness to make wild allegations which were without foundation; and to accuse others of dishonesty. The following are examples: -

(a) The claimant's employment which commenced on 4 May 2015 was subject to a three-month probationary period. Therefore, there was a review in August 2015. The respondent's case is that there was a review meeting between the claimant and her Service Manager, Mr Keshorsingh Beegun, on 19 August 2015, at which the claimant was informed that her performance had not been satisfactory, and her probationary period was therefore, to be extended by a further three months until November 2015. In her evidence, the claimant was adamant that there had been no such meeting. She accepted that she had been made aware of the proposed extension to her probationary period because she appealed against that in writing by email on 3 September 2015. Asked how she was made aware

of the extension, the claimant referred to a letter from Mr Beegun advising of this. But, the only letter which refers to the extension of the probationary period is a letter which itself refers to the meeting on 19 August 2015 and encloses copies of the notes of the meeting. Confronted by the contents of the letter, the claimant remained adamant that there had been no meeting and accused Mr Beegun of having "*fabricated*" the notes. The claimant's suggestion that there was no such meeting is clearly wrong; and is wholly inconsistent with contemporaneous documentation.

(b) In her witness statement, the claimant accused Mr Beegun of stating "*untrue information*" in a form which he completed for the DWP following the claimant's accident. A copy of the form was in our bundle; and, self-evidently, the information provided on it was correct. Confronted with the form, the claimant agreed that the its contents were correct; but she insisted that she had seen a different version of the form with untrue information. The claimant said that she had been provided with a copy of the other form by her solicitor (albeit in connection with her personal injury claim); she could not account for not having disclosed the other version of the form within these proceedings.

(c) The claimant was adamant that when she requested an employer's letter for the purposes of a visa to visit Morocco, she only received a response after she made a complaint to the respondent's CEO. A cursory examination of the contemporaneous emails demonstrates that this is not in fact, the case. She had received a positive response from both Michelle Walker of HR and from Mr Exton before she ever wrote to the CEO. (d) In her witness statement, the claimant described her treatment by Ms Hall and Ms Jakuszewska at a meeting on 7 June 2018 as "*brutality*". In our judgement, whilst this was clearly a difficult meeting, the use of that word is clearly inappropriate and a total misrepresentation of what happened. (e) In her witness statement the claimant alleges that at a meeting on 7 March 2018, Ms Hall and Ms Jakuszewska were "*gaslighting*" her by giving her inaccurate and untrue information regarding to the needs of the residents. The use of this highly emotive term is clearly an embellishment and an exaggeration.

(f) At every stage in the proceedings, the claimant accused anyone who disagreed with her of "*dishonesty*". Any note or document which was inconvenient to the claimant's case was described as a "*fabrication*". This even extended to Risk Assessments applicable each of the residents of Springfield which the claimant alleged had been fabricated simply to try and exaggerate risk and delay her return to work.

14 The only evidence which Mr Masawi and Ms Chidochashe Masawi could give which was relevant to issues of liability in this case (some further evidence many have been relevant to remedy had we found in the claimant's favour) related to the content of a telephone call between the claimant and Ms Stasia Jakuszewska – HR Case Manager on the afternoon of 21 May 2018. The claimant complains of Ms Jakuszewska's conduct during the telephone call. Part of the call was overheard by the claimant's brother and daughter when the claimant put the call onto loudspeaker. Their account of what was said is consistent with the claimant's account. But, the combined accounts are inconsistent with two contemporaneous documents namely an email exchange between the claimant and Ms Jakuszewska soon afterwards.

15 The evidence of Ms Chipo Masawi was in our judgement clearly unreliable. Her English was very poor - although the tribunal had not been alerted to the possibility that an interpreter may be required. It was quite clear that her witness statement had been prepared on her behalf and she had no understanding of its contents.

16 We found the evidence of Mr Exton and Mrs Carter to be compelling; consistent; truthful; and reliable. Their evidence remained consistent throughout cross-examination; it was consistent with their own earlier documents including their witness statements; their evidence was consistent with each other; and consistent with contemporaneous documents. We have no hesitation in accepting them as reliable historians of the truth.

17 Ms Hall did not give evidence. We read her witness statement very much on the understanding that we could attach relatively little weight to it. But we can observe that Ms Hall's witness statement is entirely consistent with contemporaneous documents and with the evidence of Mr Exton and Mrs Carter. Wherever it was possible to corroborate, or alternatively to contradict, Ms Hall's witness statement by reference to other sources of evidence we always found those sources to be corroborative.

18 Most of the basic facts of the case are agreed. But, where there is a discrepancy between the evidence given by the claimant and her witnesses compared with the evidence given by the respondent's witnesses we prefer the evidence of the respondent's witnesses. It is on this basis that we have made our findings of fact.

The Facts

19 The claimant commenced employment with the respondent at Springfield on 4 May 2015 as a Team Leader. The claimant's employment was subject to a three-month probationary period; her line manager was Mr Beegun. Springfield is a residential transition home providing support for 11 adults with physical disabilities situated in Bromley, Kent. As Team Leader, the claimant was effectively the second-in-charge of the Service; and her role involved approximately 70% hands-on Caring and 30% office-based Administration. The claimant's progress was reviewed at a Probationary Review Meeting on 19 August 2015. Mr Beegun was not satisfied with the claimant's progress - and extended her probationary period until November 2015.

20 On 14 August 2015, the claimant contacted the respondent's Customer Helpline raising concerns regarding service standards at Springfield. It is the claimant's case that this contact amounted to a Protected Disclosure. On or about 19 August 2015, the claimant raised a grievance concerning some of the staff that she worked with. At the same time, four members of staff raised grievances relating to the claimant; and one of the service users also raised a complaint against the claimant. The claimant was suspended from work pending an investigation. Mr Robert Hambrook, a Manager from another part of the respondent's organisation was commissioned to conduct the disciplinary investigation. His report is dated 16 December 2015 and recommends that the claimant faced a disciplinary hearing on four charges of misconduct.

21 The disciplinary process was then suspended pending the determination of the claimant's grievance and the grievances against her. Both at Stage 1, and at appeal, the claimant's grievances were partly upheld; and a number of recommendations were made. Because the grievance went to the appeal, it was not concluded until 23 May 2016. At this stage the claimant was still under suspension because of the pending disciplinary proceedings. A disciplinary hearing was arranged for 13 June 2016 and the disciplining officer appointed was Ms Allison Hardy. The initial hearing was very brief because the claimant had not notified Ms Hardy of her wish to call witnesses. The hearing was therefore reconvened for 27 June 2016. Following the hearing, Ms Hardy considered all of the evidence that she had heard and concluded that the evidence was not sufficient to ground disciplinary action. She did feel that there were obvious further investigations which could have been carried out which may have led to viable disciplinary action. But, due to the lapse of time since the original allegations and the original investigation, Ms Hardy concluded that further investigations were not now appropriate she determined that there should be no disciplinary action against the claimant

and that her suspension from work should be lifted with immediate effect. On 6 July 2016 the claimant returned to work.

22 On 28 July 2016, the claimant suffered an injury whilst manoeuvring a resident. It is her case that the respondent is liable to her for damages for the injury due to lack of appropriate training and/or support and/or equipment. Her claim for damages for personal injury is the subject of proceedings in the County Court for which the claimant is represented by solicitors and for which the respondent is separately represented through its insurers.

23 When the claimant had been absent from work for nearly 2 months following the accident, Mr Beegun contacted her to propose a well-being meeting. He suggested that the meeting should be conducted at the claimant's home and that he would be accompanied by the then Regional Manager, Ms Pauline Fretwell. The claimant's response to this suggestion was exceedingly hostile: she stated that she had not been able to recuperate fully and that a recovery was hampered by unnecessary correspondence from the respondent. The claimant pointed out that her Fit Note expired on 3 October 2016; and referred to the respondent's Sickness Absence Policy indicating that a return to work meeting should take place after that date. Mr Beegun therefore responded by fixing a meeting for 4
October 2016. He again offered for the meeting to take place at the claimant's home: but, in view of the claimant's hostility to this, it was rearranged to be held at St Cecilia's - another of the respondent's establishments located close to Springfield. In view of the claimant's response to Mr Beegun, Ms Fretwell decided that he should not take part in the meeting - she attended; and Mr Exton attended with her.

24 In the event, the meeting took place at St Cecilia's on 25 October 2016. The claimant was obstructive and rude throughout. She claimed that questions from Mr Exton and Ms Fretwell as to her welfare constituted harassment. She was confrontational saying "*well bring it on*". She asked simply to be referred to Occupational Health (OH) and could not understand what the purpose was of the meeting. When Ms Fretwell enquired what support the claimant might need, the claimant's response was that if Ms Fretwell had an education she would know what the claimant wanted. At one stage the claimant was asked to be specific about additional support she might need; she replied that she might benefit from privately funded Acupuncture. Whilst Mr Exton and Ms Fretwell, did indicate that the respondent would provide such support as it reasonably could, there was never any agreement or promise to fund Acupuncture. The claimant made clear that at that time, going forward, she

wanted minimal contact with the respondent and would prefer to be left to recuperate alone.

25 As promised, an OH referral was made; an appointment was arranged for 19 January 2017; the claimant was late for her appointment which was then rearranged for 26 January 2017. The OH report was received on 2 February 2017: the report stated that the claimant was not fit for work and that there were no adjustments which could be made at that time to facilitate a return. The fact that the claimant was not fit for work was consistent with the Fit Notes which were being received from her GP.

26 On 3 September 2017, the claimant sent an email to Mr Beegun requesting a letter confirming that she was an employee of the respondent for the purposes of obtaining a holiday visa for a visit to Morocco. Unsurprisingly, this was a matter which Mr Beegun appears to have forwarded to the respondent's HR Administration in Wolverhampton. There was nothing to indicate that the request was urgent. When the claimant had not received a response on 19 September 2017, she send a chasing email to Michelle Walker in HR who in turn alerted Mr Exton. The claimant had been far from clear as to what information would be required; Mr Exton therefore checked with the Moroccan Embassy Website; drafted an appropriate letter; and sent it to the claimant on the 20 September 2017. On 19 September 2017, the claimant had raised this outstanding matter with the respondent's Chief Executive Officer, Mr Neil Heslop. It was the claimant's case before us, that she only received the requested letter because of her complaint to Mr Heslop, but perusal of the emails in the bundle demonstrates that this is not in fact the case. The claimant had received emails from both Michelle Walker and from Mr Exton promising the requested letter before she wrote to Mr Heslop. When giving evidence before us, the claimant confirmed that she did not regard the delay in providing the requested letter to be in any way related to her disability or to her grievance of August 2015 (which was potentially a Protected Act but not the Protected Act relied upon for the claimant's victimisation claim). She claims that this delay was deliberate; and that it was in retaliation for her Protected Disclosure made on 14 August 2015. She understood that, as she was not pursuing a claim for protected disclosure detriment, this event had little relevance to the issues we had to determine. For what it is worth having heard the evidence on the point we are quite satisfied that the request for this employer's letter was correctly dealt with it was not an urgent request and the letter was received within three weeks of it being request there was no detriment or unfavourable treatment here at all.

27 On 28 September 2017, the respondent obtained a further OH report. This confirmed that the claimant was still unfit for any work and stated that it was likely she would remain unfit for the next 2 to 3 months. There were no adjustments which could be made to facilitate the claimant's early return. It was shortly after this that Ms Hall took over the role of Regional Manager from Ms Fretwell. It may be relevant to record Ms Hall's professional background: she is a Registered Learning Disability Nurse with some 20 years-experience of management roles.

She was a panel member for the Nursing and Midwifery Council Disciplinary Tribunal for nine years; and is now a panel member hearing appeals in relation to mental health and Personal Independence Payment in the First-tier Tribunal (Health & Social Entitlement Chamber). Upon her appointment, Ms Hall undertook a review of all of the respondent's Services under her management - this included Springfield. She identified that the claimant had been off sick for a long period of time and asked Mr Exton to arrange a well-being meeting with the claimant. She also asked for sight of copies of all relevant documentation; OH referrals; and OH reports.

28 It is Mr Exton's recollection that between them he and Ms Hall attempted in various ways to contact the claimant to arrange a meeting. He recalls attempting to reach the claimant on her mobile telephone; his understanding is that Ms Hall had written to the claimant. Contact was eventually made by letter and email dated 2 February 2018 suggesting a meeting on 8 February 2018. The claimant's response of 7 February 2018 was uncompromisingly hostile: she insisted that she needed more notice for a meeting; and she was unwilling to meet on 8 February 2018. The claimant took great exception to the suggestion in Mr Exton's letter that previous attempts had been made to contact her. The claimant regards this as a false statement by Mr Exton designed to present her in an unfavourable light. Having heard Mr Exton's evidence, we are satisfied that he did attempt to contact the claimant by telephone and certainly that he understood that Ms Hall had attempted to contact her in writing. The meeting was eventually fixed for 6 March 2018 at St Cecilia's.

29 The claimant confirmed that she would attend the meeting on the 6 March 2018 accompanied by her mother. It was not the respondent's normal policy to allow a companion at such meetings other than a work colleague or a trade union representative; but Mr Exton decided to waive the normal policy in order to accommodate the claimant. In the event, Mr Exton was unable to attend the meeting which was therefore attended by Ms Hall accompanied by Ms Jakuszewska. At the meeting, the claimant reported that her health was

improving but she was not yet fit to return to work. She agreed to a further OH referral.

30 Since September 2017, the respondent had been introducing revised terms and conditions for all of its workforce. New contracts had been issued and employees had been asked to sign and return them. By the time of the meeting in March 2018, the claimant was the only employee who had not signed the new contract. Her explanation for this was that, because of her injuries and mental health problems which have arisen because of her prolonged absence from work, she was simply unable to focus or concentrate on the new contract. She confirmed that she required additional help with this such as a line-by-line tracked changes version to enable her to understand the differences between the old and the new.

31 Ms Jakuszewska prepared the OH referral with full input from the claimant. An OH appointment was fixed for 12 April 2018; but it did not go ahead because the claimant arrived late. The claimant later explained that commuting into London was difficult as it involved walking and stairs because some of the tube stations had no escalators; she said that she was in immense pain from walking (to the appointment) that day; and that for future appointments the respondent should provide a taxi. She also asked that the appointment be after midday because she had difficulty sleeping due to pain. The OH appointment was therefore fixed for 26 April 2018 at 2pm. Ms Jakuszewska arranged a taxi for the claimant.

32 The claimant had exercised her right to review the report before it was disclosed to the respondent. Accordingly, although the report was dated 26 April 2018, the respondent did not see it until mid-May. The report confirmed that the claimant continued to experience pain symptoms in her neck; right arm; left hip; left leg; and lumbar back; that she had reduced muscle strength; and ongoing short-term memory impairment and headaches. The report confirmed that the claimant's GP had referred to her a specialist regarding her short-term memory problems. The OH report stated that the claimant was fit to work with temporary restrictions including: -

(a) Avoiding lone working.
(b) Tasks requiring the use of her right arm.
(c) Carrying loads of more than 2.5kg.

The report recommended a phased return over a seven-week period.

33 The claimant had added comments to the report before the respondent saw it. One phrase used by the claimant led to considerable confusion: she stated, "*I am incapable of doing all the duties I was contracted to do & my right hand is impaired & my back problem restricts me from carrying further duties*". It is clear that this was interpreted by the respondent as meaning that the claimant considered that she was not capable of performing *any* of her duties. We are satisfied that what she meant was that she could carry out *some* but not *all* of her duties. However, the respondent's confusion was not, in our judgement, unreasonable. Other comments which the claimant had added to the report demonstrate to us that she had a misunderstanding as to the report's purpose. She was particularly concerned that the report should comment on the causation of her injuries - essentially addressing issues of liability in her personal injury claim. Of course, this was not the purpose of the report which was to comment on her current medical condition and how best arrangements could be made for the claimant to return to work.

34 On 15 May 2018, the respondent received a further fit note from the claimant's GP certifying that she was unfit for work until 31 May 2018.

35 Ms Hall had very considerable misgivings about the situation upon receipt of the OH report. On the one hand, the OH Physician was advising that the claimant was fit to return to work on a phased return and with some restriction of her duties. But, this did not square with what Ms Hall had heard from the claimant herself as to the extent of her pain and discomfort both on the day of the meeting in March 2018 and in her explanation for her failure to arrive in time for the OH appointment. She was also concerned by the phrase used by the claimant in her comments on the OH report that she was incapable of carrying out her duties. In our judgement, Ms Hall was entirely right to be cautious; and to require further investigation before arranging for the claimant's return. There is no doubt that Ms Hall had considerable expertise in these matters: she had a duty to facilitate the claimant's return to work; but she also had a duty to ensure the claimant's safety at work and the safety of the service users.

36 Ms Jakuszewska was asked to arrange a further meeting with the claimant. She contacted the claimant by telephone on 21 May 2018: it transpired to be a somewhat controversial telephone conversation. The account given by the claimant is that Ms Jakuszewska was effectively demanding that the claimant should attend a meeting on 23 May 2018 thus giving her only two days-notice. The claimant explained that she had recently suffered a family bereavement, and, in any event, she had a medical appointment on 23 May 2018 and therefore could not attend. She claims that Ms Jakuszewska became irate and threatened

her with disciplinary action if she did not attend. At this point, the claimant switched the telephone onto loudspeaker. Her witnesses who were present in the room all testified as to having heard Ms Jakuszewska threaten disciplinary proceedings. A letter from Ms Jakuszewska written the following day, makes no reference to disciplinary proceedings or to any threat thereof: it explains that the purpose of the meeting was to discuss the most recent OH report and also to try and finalise the claimant's new contract. An email written by the claimant on 23 May 2018, suggests that it was the claimant who first introduced the possibility of disciplinary proceedings - making clear that she would not meet demands to attend meetings without adequate notice and that if the respondent was unhappy with that approach it could take disciplinary proceedings if it wished. What is clear to us is that when Ms Jakuszewska was seeking to arrange a meeting with a view to getting the claimant back to work (the claimant's stated wish), she had met with a degree of hostility and obstruction from the claimant. In our judgement, Ms Jakuszewska could not be criticised if she was assertive and pointed out to the claimant that she was still employed by the respondent and attending meetings were not therefore a matter of choice; and need not always be organised around the claimant's convenience; the respondent was entitled to insist on attendance.

37 The meeting was then arranged for 1 June 2018; but it did not take place on that day because the claimant was late, and Ms Jakuszewska had to leave to attend another appointment. The claimant's explanation for lateness on that day was that she had been in too much pain to drive; she had therefore arranged a taxi - which was late. The meeting was rescheduled for 7 June 2018.

38 At the meeting on 7 June 2018, the claimant described continuing significant pain and restricted movement. She stated that she was having to take strong painkillers and she gave as an example that she could not wash her hair or her back and her mother had to do these things for her. Ms Hall was concerned that, based on the claimant's own description of her pain and restrictions, she was not medically fit to return to the role of Team Leader at the Springfield Service. Ms Hall was concerned that the OH physician may have an imperfect understanding of the true nature of the role: Springfield provides a residential care service for 11 individuals all of whom have self-contained flats; there is a main building on two floors containing six self-contained flats and four separate bungalows; each individual had their own front door and there are no communal areas. There was a small staff room and an office. This meant that staff on duty had to provide a range of services including personal care; cleaning; cooking; shopping; and social trips. Because the individuals lived in selfcontained flats there was a considerable amount of lone working with one carer working at any one time with

a single individual resident. Ms Hall was of course familiar with other larger Services where there were communal areas and more staff on duty at any one time. Working in such an environment, would make it easier to avoid lone working and would also mean that there was more support available if things went wrong.

39 The claimant used the occasion of the meeting on 7 June 2018 to address a range of complaints about the respondent's managers. It was clear that she was wholly dissatisfied with every individual that had been involved in her management including Mr Beegun; Mr Exton; Ms Jakuszewska; Ms Fretwell; and Ms Hall. The claimant alleges that, during the course of the conversation, Ms Jakuszewska stated something to the effect that, if the claimant was so unhappy with how she was managed, she always had the option to resign. Ms Hall has no recollection of anything of that nature being said. But, in our judgement, if it was said, it may well have been entirely justified. Much of what the claimant was complaining about it been aired in a grievance; much of it was new; and none of it was relevant to the purpose of that meeting.

40 Shortly after the meeting of 7 June 2018, the respondent received a fit note from the claimant's GP. It was dated 11 June 2018 and stated that the claimant may be fit to return to work on a phased return.

41 Ms Hall was concerned: because her own assessment of the situation was that the claimant did not appear fit enough to return to work as a Team Leader at Springfield. The recommendation for a return was entirely inconsistent with the claimant's comments on the April 2018 OH report and her discussions with Ms Hall and Ms Jakuszewska at the meeting on 7 June 2018. In the light of these concerns, Ms Hall decided to refer the matter back to OH seeking additional clarification. Ms Jakuszewska explained to the claimant that, until they had received further OH advice, the respondent would not permit the claimant to return to work.

42 Ms Jakuszewska now put together a comprehensive package of information for consideration by OH. This included a detailed job description for the claimant's role with considerable input from Mr Beegun and detailed risk assessments for each of the residents at Springfield setting out their care and support needs. The OH reference was accompanied by a detailed list of service user requirements and a list of specific questions as to which aspects of her role in supporting the residents the claimant was capable of doing and which she was not.

43 The claimant's claim is that the job description was wholly inaccurate setting out fictitious requirements for the role; and that the risk assessments were complete fabrications.

44 The claimant underwent an OH examination by telephone on 14 June 2018; and, later the same day, the OH physician provided answers to the list of questions. There were 20 questions as to the claimant's abilities to conduct specific duties. In answer to eight of the questions, the OH physician gave an unqualified negative response - the claimant could not conduct those duties. A further seven of the questions received an unqualified affirmative response. The remaining five answers were qualified and depended on additional detail not available to the OH physician and/or were dependent on the claimant's progress during a phased return. The answers to the eight negative questions did not indicate whether the claimant's inability to undertake those aspects of her role would be a permanent state of affairs or one which may improve and, if so, over what timescale. This necessitated a further OH referral asking for more specific information in answer to the questions. This further advice was received in a letter dated 11 July 2018; it confirmed that many of the restrictions would be permanent. Ms Hall was particularly concerned that, among the permanent restrictions, would be an inability for the claimant to undertake physical activities associated with an evacuation of the premises in an emergency situation. The advice also indicated that the claimant denied any significant short-term memory issues: this conflicted with information which the claimant had provided to the respondent particularly when pressed to deal with the new employment contract. If the claimant did experience short-term memory issues, this would impact upon her responsibility to properly administer medication to residents.

45 Ms Hall remained concerned that it was unsafe for the claimant to return to her team leader role at Springfield: unsafe for the claimant; and unsafe for the residents. Ms Jakuszewska wrote to the claimant inviting her to a meeting on 23 July 2018. In the letter, she explained Ms Hall's concerns which were based both on the OH advice and on information received from the claimant at recent meetings.

46 On 22 July 2018, the claimant wrote a letter of complaint to Mr Heslop. Her letter is headed "*Re: Manipulative and Dishonesty Senior Managers*": the letter is critical of both Mr Exton and Ms Jakuszewska the claimant accuses them both of dishonesty and deceit. She repeats her allegations to the effect that both her job description and the residents risk assessments were fabricated so as to ensure that OH could not recommend her immediate return to work.

47 Mr Heslop passed the letter to Mr David Jessop - the respondent's People Director, who in turn passed it to Mrs Carter for action. In view of the contents of the letter, Mrs Carter decided that she would attend the meeting on the 23 July 2018 in place of Ms Jakuszewska. The meeting took place at St Cecilia's at 4pm; the claimant was accompanied by her mother. Ms Hall went through each of her concerns and discussed the information recently provided by OH and information previously provided by the claimant. The claimant again took the opportunity to resurrect old grievances particularly involving Mr Beegun. It was a long meeting and, when it ended, Ms Hall was still extremely concerned about the claimant returning to her role as Team Leader at Springfield. Mrs Carter also had concerns as to the relationship between the claimant and Mr Beegun; she wondered whether it was realistic for the claimant to return to work under his management.

48 During the meeting, Mrs Carter also engaged with the claimant regarding her concerns about Mr Exton and Ms Jakuszewska which were the subject of the recent complaint. After the meeting, Mrs Carter reviewed all of the paperwork; she was satisfied that there was no substance or merit in the complaints against Mr Exton or Ms Jakuszewska. On 29 August 2018, Mrs Carter wrote to the claimant providing her response to the complaint. Mrs Carter accepts that she did not deal with the complaint in accordance with the respondent's Grievance Procedure. She did not recognise the complaint as a formal Grievance (the respondents Grievance Procedure contains a clearly defined process - including a prescribed grievance form which the claimant had not used). Furthermore, Mrs Carter was concerned that the Grievance related to current rather than historical problems - she was concerned to provide a prompt response in the hope that matters could move on and the claimant could return to work. On 31 August 2018, the claimant responded to Mrs Carter - she now stated that it did not matter what Mrs Carter felt as she had asked an independent body to intervene. (It is now known that, on this date, the claimant had initiated the ACAS EC Procedure). The letter also accused Mrs Carter of dishonesty.

49 There was a further meeting on 26 September 2018 involving the claimant accompanied by her mother with Ms Hall and Mrs Carter. Ms Hall and Mrs Carter were anxious to find a solution - but they could not compromise the safety of the claimant or the residents. They determined to obtain further independent specialist advice: not from the respondents OH provider but from an independent Consultant Orthopaedic Surgeon.

50 On 17 October 2018, Ms Jakuszewska prepared the referral and sent it to the claimant for approval. The claimant responded on 25 October 2018 requesting

extensive amendments. An amended referral was prepared and sent to the claimant for approval on 7 November 2018 - this prompted a request for further extensive amendments. The process continued and, ultimately, the referral was not complete until mid-December 2018. An appointment was given for 4 February 2019. In the meantime, on 16 October 2018 the claimant had presented her claim form to the tribunal.

51 When the specialist report was received in April 2019 it was to the effect that the claimant was fit to return to work in the capacity of Team Leader but that this needed to be managed under a phased return to work for a period of 12 weeks during which time there needed to be a careful review of the claimant's progress to ensure that she could undertake all aspects of her role. Mrs Carter was concerned that, because of the situation at Springfield (a small service with a limited number of staff and the claimant often working one-to-one with a resident), Springfield was not the ideal establishment for the phased return and the regular review of progress. Ms Hall gave considerable thought as to how the situation might best be managed and the solution she came up with was that, for the 12-week period, the claimant should return to work at an establishment other than Springfield. She suggested that the claimant should return to Atholl House: this was geographically closer to the claimant's home than Springfield; and a much larger service than Springfield - meaning that the claimant would be better supported on a day-to-day basis with more colleagues on hand and a greater variety of work available. This would enable a thorough review of the claimant's fitness to return to her Team Leader role at Springfield. There was to be no demotion of the claimant's status and no reduction in salary.

52 The claimant refused the offer to work at Atholl House. She claimed that there was no mobility clause in her contract and that her trade union had advised that she could not be obliged to move. Once again, the position was at stalemate.

53 In July 2019, Ms Hall left the respondent's employment. Mrs Carter therefore arranged a meeting for 21 August 2019 to be conducted by Mr David Slater - the respondent's Director of Operations for England. The claimant attended with her trade union representative. Both Mr Slater and Mrs Carter tried to persuade the claimant to take up the option of a return to work at Atholl House; they reassured her that her substantive role at Springfield remained open; and that it was anticipated that she would return there after the 12-week period. However, the claimant would only consider a return to Springfield. Reluctantly, Mr Slater agreed to at least try this; he confirmed the arrangements in a letter to the claimant on 10 September 2019; there was a return to work meeting on 16

September 2019; a later meeting with Mr Beegun at which the claimant's work schedules were agreed; and the claimant resumed work at Springfield on 16 October 2019.

54 In what is described as a gesture of goodwill, the respondent backdated the claimant's return to full pay to February 2019.

The Law

55 **The Equality Act 2010 (EqA)**

Section 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.

Section 20: Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Section 21: Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 27: Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act; (*d*) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Section 39: Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 123: Time limits

(1) Subject to section 140A proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136: Burden of proof

(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;

56 **Decided Cases**

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**
A -v- Chief Constable of West Midlands Police **UKEAT/0313/14 (EAT)**

If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence. Discrimination and victimisation may be conscious or sub-conscious.
In a victimisation claim there must be a causal link between the detriment and the making of the complaint in the first place.

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**
JP Morgan Europe Limited –v- Chweidan **[2011] IRLR 673 (CA)**

There can be no question of direct discrimination or discrimination arising from disability where everyone is treated the same.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Rihal –v- London Borough of Ealing **[2004] IRLR 642 (CA)**
Anya –v- University of Oxford **[2001] IRLR 377 (CA)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
R –v-Governing Body of JFS **[2010] IRLR 186 (SC)**

In a case involving a number of potentially related incidents the tribunal should not take a fragmented approach to individual complaints, but any inferences should be drawn on all relevant primary findings to assess the full picture. Any inference of discrimination must be founded on those primary findings. Where there is no actual comparator a better approach to determining whether there has been less favourable treatment on prescribed grounds is often not to dwell in isolation on the hypothetical comparator but to ask the crucial question "why did the treatment occur?" In deciding whether action complained of was taken on grounds of race a distinction is to be drawn between action which is inherently racially discriminatory and that which is not; to establish that the action was taken on racial grounds in the former case motive or intention of the perpetrator is not relevant - in the latter it is relevant.

Laing –v- Manchester City Council **[2006] IRLR 748**

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

Morse –v- Wiltshire County Council **[1999] IRLR 352 (EAT)**

A tribunal hearing an allegation failure to make reasonable adjustments must go through a number of sequential steps: It must decide whether the provisions of EqA impose a duty on the employer in the circumstances of the particular case. If such a duty is imposed it must next decide whether the employer has taken such steps as it is reasonable all the circumstances of the case for him to have to take.

Smith –v- Churchills Stairlifts plc **[2006] IRLR 41 (CA)**

The test is an objective test; the employer must take "such steps as it is reasonable to take in all the circumstances of the case". What matters is the employment tribunal's view of what is reasonable.

Tarbuck –v- Sainsbury's Supermarkets Limited **[2006] IRLR 664 (EAT)**

There is no separate and distinct duty of reasonable adjustment on an employer to consult the disabled employee about what adjustments might be made. The only question is objectively whether the employer has complied with his obligations or not. If the employer does what is required of him than the fact that he failed to consult about it, or did not appreciate that the obligation even existed, is irrelevant. It may be entirely fortuitous and unconsidered compliance but that is enough. Conversely if he fails to do what is reasonably required it avails him nothing that he has consulted the employee.

Project Management Institute –v- Latif **[2007] IRLR 579 (EAT)**

In order for the burden of proof to shift to the respondent, the claimant must not only establish that the duty to make reasonable adjustments has arisen but also that there are facts from which it can reasonably be inferred that it has been breached.

Environment Agency –v- Rowan **[2008] IRLR 20 (EAT)**

An employment tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

(a) the provision criterion or practice apply by or on behalf of the employer,
(b) the identity of non-disabled comparators, and
(c) the nature and extent of a substantial disadvantage suffered by the claimant.

Unless the tribunal has gone through that process it cannot go on to judge if any proposed adjustment is reasonable.

Nottingham City Council -v- Harvey **UKEAT/0032/12 (EAT)**

The flawed application of a discipline or grievance procedure is not a "*practice*". Practice has the element of repetition about it. It is not sufficient merely to identify that an employee has been badly treated by the flawed application of such a procedure; or that are non-disabled individual may not have suffered to the same extent. There needs to be a causative link between the PCP (rather than its flawed application) and the substantial disadvantage.

DWP –v- Alam **[2010] ICR 665 (EAT)**
Wilcox –v- Birmingham CAB Services Limited **[2011] EqLR 810 (EAT)**

The duty to make adjustments is not engaged unless the employer knows (or ought to know) of both the disability and the substantial disadvantage.

Royal Bank of Scotland –v- Ashton **[2011] ICR 632 (EAT)**

Before there can be a finding that there has been a breach of the duty to make reasonable adjustments an Employment Tribunal must be satisfied that there was a provision criterion or practice that placed the disabled person, not merely at some disadvantage viewed generally but, at a disadvantage that was substantial viewed in comparison with persons who are not disabled. When addressing the issue of reasonableness of any proposed adjustment, the focus has to be on the practical results of such measures that might be taken. It is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make an adjustment. It is practical outcomes rather than procedures which must be the focus of consideration. A proposed

adjustment from which the claimant could in reality derive no benefit is unlikely to be “reasonable”.

Burrett –v- West Birmingham Health Authority **[1994] IRLR & (EAT)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
St. Helens MBC –v- Derbyshire **[2007] IRLR 540 (HL)**

The fact that a claimant honestly considers that he has been less favourably treated or subject to detriment does not, of itself, established that there has been less favourable treatment or detriment. Whether there is detriment is for the Employment Tribunal to decide. Detriment exists if a reasonable worker would or might take the view that treatment was in all the circumstances to his or her disadvantage. An unjustified sense of grievance cannot amount to a detriment.

The Claimant’s Case

Discrimination Arising from Disability

57 The claimant asserts that the following are acts/omissions on the part of the respondent which amount to unfavourable treatment because of something arising in consequence of her disability: -

(a) Failure to provide support following her meeting with Mr Exton on 25 October 2016.
(b) Failing to act in a timely manner in response to the claimant’s request for an “employer’s holiday letter” on 4 September 2017.
(c) Mr Exton providing untrue information in his letter of 2 February 2018 suggesting that he and Ms Hall had tried to contact the claimant several times.
(d) At the meeting with the claimant on 7 March 2018, Ms Hall and Ms Jakuszewska exaggerated the difficulties which the claimant may face if she returned to work.
(e) Ms Jakuszewska acted in an intimidating and coercive manner in the telephone call on 21 May 2018.
(f) The conduct of Ms Hall and Ms Jakuszewska at the meeting with the claimant on 7 June 2018 (which the claimant describes as “brutal”). (g) Ms Hall, Ms Jakuszewska, and Mrs Carter making assessments as to the claimant’s ability or otherwise to conduct her duties without proper assessment of her capabilities at meetings in June and July 2018.

(h) The provision of inaccurate information about the claimant her role and the residents needs when making an OH referral on 14 June 2018.

(i) Failing appropriately to respond to the claimant's grievance dated 22 July 2018.

(j) Ms Hall, on 14 September 2018, refusing to conclude that the claimant could resume her Team Leader duties.

(k) Delaying the claimants return to work after 26 April 2018.

58 The claimant did not at any stage specifically identify the "*something arising*" from her disability in relation to any of the above.

Failure to Make Adjustments

59 The parties are agreed that the PCP which was applied to the claimant was a requirement to undertake her role as set out in her job description and/or as detailed in the OH referrals.

60 It is the claimant's case that the application of this PCP from March 2018 onwards placed her at a disadvantage. And, that the respondent failed in its duty to make adjustments.

Victimisation

61 It is common ground that the claimant's letter of complaint dated 22 July 2018 was a Protected Act.

62 In her List of Issues, the claimant suggests that a number of events occurring prior to July 2018 were acts of victimisation. Clearly they cannot have been as they predated the Protected Act.

63 The only incidents of unfavourable treatment relied upon by the claimant which post-date the Protected Act are: -

(a) Mrs Carter's failure to properly investigate the complaint and to deal with it in accordance with the respondent's Grievance Procedure. (b) The delay in allowing the claimant to return to work.

Other Matters

64 The claimant presented a great deal of evidence regarding the events transpiring between May 2015, when her employment commenced, and July 2016 when she had her accident. This related to her protected disclosure; her probation review and extension; the grievances made by and against her in August 2019; her suspension from work; and the disciplinary process. She described all this as background information. It clearly had no relevance to a claim for disability discrimination when the earliest date for the onset of disability was the 28 July 2016 – post-dating all of the above events.

65 The claimant also gave evidence that she was underpaid for contractual sick pay at the start of her sickness absence. She hinted at a claim for unlawful deduction from wages; but she accepted that no such claim had ever been presented to the tribunal.

The Respondent's Case

Discrimination Arising from Disability

66 Regarding allegations (a), (b), (c), (e), (f), and (i) in Paragraph 57 above, the respondent disputes the factual assertions made by the claimant. But, even if the claimant's allegations are factually correct, the respondent is unable to identify anything "*arising from the claimant's disability*" which is in any way connected to the behaviour complained of.

67 Regarding allegations (d), (g), (h), (j), and (k) in Paragraph 57 above, these all essentially relate to the respondent's reluctance to allow the claimant to return to work on various dates after March 2018 when the claimant declared herself fit to do so. The respondent admits that this reluctance arose from doubts as to the claimant's physical ability to perform her role; and these doubts in turn arose from the claimant's disability. The respondent's case is that, if this amounts to unfavourable treatment for a reason relating to disability, then it is clearly objectively justified. Its actions in carefully and thoroughly investigating the claimant's abilities were entirely proportionate in pursuance of the legitimate aim of ensuring a safe return to work for both the claimant and the residents of Springfield.

Failure to Make Adjustments

68 The respondent accepts that the PCP set out at Paragraph 59 above was applied to the claimant. And that, as her disability created physical restrictions upon her, the application of the PCP inevitably placed the claimant at a

disadvantage in comparison to non-disabled people. Thus, the respondent accepts that the duty to make adjustments was engaged.

69 The respondent's case is that the duty is to make such adjustments as are reasonable to avoid the disadvantage. Identifying what would avoid the disadvantage; and what was reasonable; involved thorough investigation especially as the safety of the residents was a legitimate concern. The respondent was engaged on this process from June 2018 until June 2019. And the delay in reaching a conclusion was in no small part caused by the claimant's lack of engagement with medical investigations. Further, it is the respondent's case that the offer of temporary redeployment to Atholl House was a reasonable adjustment. There was no proper basis for the claimant to decline.

Victimisation

70 The respondent accepts that the letter of complaint dated 22 July 2018 was a Protected Act for the purposes of the victimisation claim. However, the respondent denies that any unfavourable treatment or detriment arose in response.

Other Matters

71 The respondent's case is that the matters complained of between August 2015 and July 2016 were all legitimate management actions; unrelated to Protected Disclosures and, in any event, they can have no relevance to this case.

72 The respondent's case is that there was an error with the processing of the claimant sick pay at the commencement of her sickness absence in July 2016. This led to a grievance by the claimant in October 2016 and the error was rectified.

Jurisdiction

73 The respondent raises the question as to whether allegations (a), (b) and (c) in Paragraph 57 above can truly be said to be part of a continuing act. If they are not part of a continuing act, then, by reference to Section 123 EqA, they have been presented out of time unless there is a basis to conclude that it is just and equitable to consider them.

Discussion & Conclusions

Background Matters

74 It is unnecessary for us to make any formal finding with regard to the events occurring between August 2015 and July 2016. This is a claim for disability discrimination: the claimant was not a disabled person during that period; it follows therefore that, even if she was treated unfairly, it cannot have been related in any way to disability. It is the claimant's case that those events were predetermined and unfair; she relates this to her Protected Disclosure made on 14 August 2015; but seems also to suggest that other factors were also in play including, possibly, her race. What the claimant does not appreciate is that her raising of these matters in the context of the disability discrimination claim, if anything, is counterproductive. She seems to be suggesting that there were reasons other than disability causing the respondent's managers to act unfavourably towards her. So, far from enhancing her disability discrimination claim, this actually undermines it. It gives rise to the possibility that any unfair treatment arising after July 2016 may have been unrelated to disability but related to other things.

75 In any event, on the basis of the evidence we have, contained primarily in documents, there is nothing which would give rise to the suggestion that the claimant's complaint of 14 August 2015 prompted her disappointing probation review five days later. Indeed, the documents suggest that Mr Beegun considered whether the claimant's employment should continue at all at the end of the probationary period; he made a decision in the claimant's favour - to extend the period of probation. This is entirely inconsistent with retribution for the Protected Disclosure. So far as the grievances are concerned, both the claimant's grievance and the grievances against her were thoroughly and independently investigated. Parts of the claimant's grievance were upheld; this appears to us to have been genuine and appropriate management action. So far as the disciplinary process is concerned there was a very thorough and independent investigation which recommended disciplinary action. The respondent was conspicuously fair to the claimant by placing the disciplinary action on hold until the grievances had been dealt with. And, was again conspicuously fair to the claimant in determining not to proceed with the disciplinary process after an inconclusive disciplinary hearing.

76 There is evidence that the claimant raised a grievance in October 2016 relating to her sick pay. It appears from her contractual documentation that a mistake had been made in the calculation. But, there is no mention of this issue

again after October 2016; and, on that basis, we conclude on the balance of probabilities, that the mistake was rectified.

Discrimination Arising from Disability

77 Our findings with regard to the allegations set out at Paragraph 57 above are as follows: -

Allegation (a): It was abundantly clear that the claimant did not welcome the meeting with Mr Exton on 26 October 2016; she regarded it as harassment. Mr Exton specifically asked what support the claimant might need; the only specific request she made was for funded Acupuncture Therapy. There was no promise by Mr Exton that this would be provided for her and at no stage did any medical advice suggest that it was necessary or that it would be advantageous. The failure by the respondent to provide funding for Acupuncture was not unfavourable treatment - it simply amounted to not meeting the claimant's unjustified demands. In any event, it is difficult to see how the decision not to provide funding for such therapy could be said to be for a reason relating to disability. If the claimant had wanted Acupuncture for a reason unrelated to her medical condition, there is no reason to suppose that the response would have been different.

Allegation (b): We find that the respondent did act in a timely manner in relation to the request for the "employer's holiday letter". The response came within less than three weeks and in good time before the claimant's holiday. There was no deliberate omission on the respondent's part to cause any delay - if anything, there was simply an administrative lapse. And, even if there was deliberate inaction, it was certainly not for a reason relating to the claimant's disability.

Allegation (c): We find, as a fact, that when Mr Exton wrote to the claimant on 2 February 2018, he had previously attempted to contact her by telephone. And, he had a genuine understanding that Ms Hall attempted to contact the claimant in writing. Nothing in his letter was untrue. Even if what Mr Exton stated was disingenuous, this would more likely to be an attempt to cover up administrative failures in not contacting the claimant earlier; than for a reason relating to her disability.

Allegation (e): On the evidence available to us, we find that, on 21 May 2018, Ms Jakuszewska was robust in her insistence that there needed to be a meeting in the face of what she regarded as of obstruction on the claimant's part.

Even if the claimant and her witnesses have given an unembellished account of what was said, our judgement is that Ms Jakuszewska was entitled to threaten disciplinary action if the claimant did not make herself available for a meeting. The claimant was still employed by the respondent and she was only absent from work due to ill-health - she had an obligation to cooperate with the respondent's managers in discussions intended to promote her return to work. We do not however accept the account given by the claimant and her witnesses because we find this account to be inconsistent with the contemporaneous documents subsequently prepared by both Ms Jakuszewska and the claimant herself.

Allegation (f): The meeting of 7 June 2018 was specifically to address the claimant's return to work in the light of the latest medical evidence. The claimant chose to revisit her previous grievances particularly those which she held against Mr Beegun. In our judgement, there is no unfavourable treatment in Ms Hall and Ms Jakuszewska suggesting that, if the claimant was so unhappy with the way in which she had been managed, that, possibly, she should consider resignation. This was a legitimate response to matters which the claimant insisted on raising which were irrelevant to the purpose of the meeting.

Allegation (i): The claimant did not present her complaint of 22 July 2018 as a formal grievance within the respondent's Grievance Procedure - she did not even use the prescribed form. Further, the complaint was not about historical matters which could be investigated and adjudicated upon; it was about current and ongoing situation which needed to be resolved. Mrs Carter responded to the complaint within the dynamic process of identifying that resolution; she responded to it thoroughly, genuinely and promptly. The fact that she chose not to formally engage the Grievance Procedure (which the claimant had not done either), was not unfavourable treatment. To the contrary, in our judgement, Mrs Carter acted outside the Grievance Procedure in a way which was to the claimant's advantage.

Allegations (d), (g), (h), (j) & **(k):** These five allegations all relate to the respondent's (Ms Hall, Ms Jakuszewska & Mrs Carter) reluctance to permit the claimant to return to work as soon as she declared herself ready to do so in March 2018 and subsequently.

Allegation (d): At the meeting on 7 March 2018 the claimant's GP continued to sign her off work as unfit albeit that the latest OH report indicated that the claimant was fit to return. Ms Hall and Ms Jakuszewska simply sought to understand whether the claimant could really cope with the demands of her role and the needs of the residents at Springfield. These were entirely appropriate

and necessary enquiries. In her witness statement the claimant alleges that Ms Hall and Ms Jakuszewska were "*gaslighting*" her by giving her inaccurate and untrue information regarding to the needs of the residents. There is no evidence to support this assertion. Ms Hall and Ms Jakuszewska were right to test the claimant's readiness to return by reference to possible scenarios which may not previously have arisen.

Allegation (g): Ms Hall Ms Jakuszewska and Mrs Carter did not make assumptions as to the claimant's fitness for her role. The contrary is true: instead they sought to make evidence-based decisions on this matter; and fully intended, on the basis of such evidence, to make any adjustments that might reasonably be made. But they were dealing with a range of conflicting information including: -

(i) On 12 April 2018 the claimant advised that her left leg was in *immense pain from walking* and that her journey for an OH appointment was *exhaustive and stressful* she also stated that she had difficulties with sleeping because of *disturbed nights due to pain*

(ii) The OH report of 26 April 2018 advised the claimant was fit to return but indicated that she had ongoing significant physical problems as well as short-term memory problems. The claimant herself had added corrections to the report stating that she was "*incapable of doing all the duties I was contracted to do, and my right hand is impaired, and my back problem restricts me from carrying duties*"

(iv) The claimant was an hour late for the meeting on 1 June 2018 and explained that she was suffering with neck discomfort and unable to drive that morning.

(vi) The report of 14 June 2018 advised that the claimant was fit to return to work but that she would be permanently restricted from certain physical aspects of the caring role. This was said to be due to the "*chronic nature of her musculoskeletal symptoms*". (v) The information provided by the claimant was contradictory and confusing: in her email of 20 July 2018 she asserted that she did not suffer from musculoskeletal disease and she stated that she did not have any discomfort. (In cross-examination, the claimant sought to draw a distinction between "*discomfort*" which, by 20 July 2018, she was not experiencing; and "*pain*", from which she continued to suffer.)

(vi) On 31 August 2018 the claimant wrote that she had never stated that she was incapable of conducting all of her duties

In view of these contradictions, the respondent was right to carefully investigate what the claimant could safely do and what she could not. Having heard Mrs Carter's, evidence we are satisfied that Ms Hall was thorough and forensic in her questioning of the claimant; and attentive to the claimant's responses and demonstrations. No assumptions were made; the decision that further medical evidence was required was reasonable, proportionate, and genuine.

Allegation (h): There is no basis for the assertion that false information was provided to OH in the referral of 14 June 2018. It is quite clear to us that the respondent provided OH with a clear and thorough resume a of the claimant's duties and of their understanding of her limitations. The claimant may have disagreed with some of the information provided but this does not render it as "*non-factual*" or "*inaccurate*". We reject the claimant's very serious allegation that Risk Assessments for the residents were "*fabricated*": the claimant failed to advance any possible reason for this; there was no reason why, if the claimant was obviously fit to resume their duties, that the respondent would not want her back in post as soon as possible. Still less, was there any basis to suggest that the residents would be exposed to risk by reliance being placed on fabricated Risk Assessments. The claimant took issue in this referral with the reference to her suffering from "*short-term memory loss*"; and yet, the OH report of 26 April 2018 specifically refers there-to. She took issue with a reference to her medication causing drowsiness: but again, she had reported that very issue to OH on 26 April 2018. Even if it was the case that some of the information provided was inaccurate, there was no detriment to the claimant from this because the resulting OH report indicated that she was fit to return. It expressly stated that it was for management to determine whether any necessary adjustments could be accommodated.

Allegation (j): In her letter of the 14 September 2018, following the meeting of the 23 July 2018, Ms Hall made clear that no conclusions had been reached. In our judgement, she was appropriately concerned as to whether it was safe for the claimant to return to her role at Springfield and was keen to explore further options. There is nothing discriminatory about the letter.

Allegation (k): In our judgement, there was no culpable delay on the respondent's part in getting the claimant back to work between March 2018 when she declared herself fit and October 2018 when she commenced these proceedings. The only period of delay which causes us any concern arises after the commencement of these proceedings between February 2019, when the respondent received the independent specialists report, and June 2019 when Ms

Hall proposed the claimant's return to Atholl House. The period between March and June 2018 is adequately explained by the fact that whilst the claimant was declaring herself fit to return to work her GPs fit notes said otherwise. Upon receiving both the fit note and an OH report suggesting that the claimant was fit, Ms Jakuszewska was keen to arrange a meeting as quickly as possible - hence her telephone call to the claimant on 21 May 2018. In fact, the meeting did not take place until 7 June 2018 - but this was entirely due to the claimant firstly being unavailable; and then being late for an arranged meeting. The respondent cannot be held responsible for such delays. Following the meeting on 7 June 2018, it was clearly necessary to obtain further clarification from OH; this was done promptly but matters were no clearer by the time of the meeting on 23 July 2018 - not least because of contradictory statements being made by the claimant. Progress with the matter was hampered by the claimant's insistence on revisiting old grievances and, on 22 July 2018, making new but totally unjustified complaints against Ms Hall and Ms Jakuszewska which then had to be investigated by Mrs Carter. We are quite satisfied that, by the time of the meeting on 26 September 2018, Ms Hall genuinely could not have allowed the claimant to return to work in her role as Team Leader - and it was both reasonable and proportionate for her to suggest obtaining the opinion of an independent Consultant Orthopaedic Surgeon. The referral to the Consultant was not made until December 2018; but this was largely due to delay on the claimant's part insisting on amendments and additions to the referral each time it was submitted to her for approval - and there was a several week delay in November/December 2018 in obtaining the claimant's approval. It was not until February 2019 that there was real clarity as to the claimant's ability to return to work. Our judgement is that Ms Hall displayed admirable flexibility and ingenuity with her suggestion that the claimant should undertake a phased return at Atholl House - this would have been safest for the claimant and for service users. The respondent had no control over the claimant's negative response which was never explained other than in contractual terms. It was right to meet the claimant an attempt to persuade her that such a move was to mutual advantage - hence the involvement of Mr Slater. When it became clear that the claimant would not display the same level of flexibility as the respondent, Mr Slater (more senior in rank than Ms Hall) took the risk and directed the claimant's return to Springfield.

Justification

78 Even if, and we do not find this to be the case, the delay in getting the claimant back to work was unfavourable treatment for a reason relating to her disability. Our judgement is that the respondent's actions were entirely justified. The legitimate aim of the respondent was to ensure that when the claimant

returned to work she did so in safety both for herself and for the residents of Springfield - (it should perhaps be borne in mind that, throughout the period under consideration, the claimant was pursuing a personal injury claim against the respondent claiming that injuries had been suffered because of her manual handling of a resident for which she said she was untrained and/or unsupported and/or ill-equipped). Clearly, the respondent had an obligation to ensure that there was no repetition. The respondent's actions were, in our judgement, entirely proportionate. Ms Hall and Ms Jakuszewska worked tirelessly to resolve confusion and conflicts as to the claimant's medical condition; her physical and mental abilities; and her corresponding disabilities.

Failure to Make Adjustments

79 On the basis that the respondent concedes that a PCP was applied to the claimant that she was required to be able to undertake the full range of her duties, and on the basis that throughout the period under consideration it was the respondent's position that she was unable to do so by reason of her disability, then clearly the obligation to make adjustments was engaged.

80 However, the duty is to make such adjustments as are *reasonable* to *avoid* the disadvantage. It is not a duty to make all possible adjustments; and it is certainly not a duty to take a haphazard approach of trial and error. The safety of the claimant herself was a matter of concern to the respondent; as was the safety of the residents of Springfield. There was no room for trial and error in this case; the respondent needed to be clear what adjustments might avoid the disadvantage; and then consider whether the making of such adjustments was reasonable.

81 In our judgement, the respondent was conscientious in its investigations: through the claimant at meetings; through the claimant's GP; through OH; and ultimately through the independent Consultant. Throughout this process, Ms Hall herself an expert in the provision of care, was concerned that, in the context of the claimant's role at Springfield, it simply may not be possible for satisfactory adjustments to be made.

82 Many of the interactions between the claimant and the respondent during the investigation process generated hostility on the claimant's part which was simply not justified. The claimant's hostility was an obstacle to progress. In our judgement, a respondent who is conscientiously investigating what is required in order to make adjustments providing for the safety of the claimant

and its service users, is not failing in its duty to make adjustments. To the contrary, that employer is doing what is required.

83 We find that Ms Hall's suggestion that the claimant should be deployed to Athol House for her 12-week phased return to work was a paradigm example of a reasonable adjustment. The claimant's objection, based entirely on the fact that there was no mobility clause in her contract, was absurd and, in our judgement, contrary to law. If it is the case, that the claimant's trade union advised that, absent a mobility clause, she could not be required to move location, then, in our judgement, such advice is plainly wrong. The reality is that most PCPs have their foundation in the employment contract; and EqA requires an employer to depart from the terms of the contract and make adjustments. It is unnecessary for the employee to consent to the contractual variation if in fact the adjustment meets the requirements of Section 21 EqA - namely that it is reasonable and that it avoids the disadvantage. We therefore conclude that the respondent was entitled to insist that the claimant deployed to Athol House on a temporary basis as an adjustment. The respondent could not have been criticised if it had so insisted and potentially it could legitimately have disciplined the claimant for her refusal.

84 It is to the respondents credit it did not insist and did not go down the disciplinary route; but instead the respondent, through Mr Slater, was willing to step back reconsider. Mr Slater was willing to take a risk which Ms Hall had been reluctant to take. The mere fact that the claimant appears to have successfully returned to Springfield does not mean that the request for her to deploy temporarily to Athol house was anything other than reasonable.

85 We find that there has been no breach in this case of the respondent's duty to make adjustments. To the contrary, the respondent did all that was reasonable in its efforts to accommodate the claimant's return to work.

Victimisation

86 There was no detriment to the claimant in the manner of Mrs Carter's handling of her complaint of 22 July 2018. On the contrary, this was potentially to the claimant's advantage. Mrs Carter attempted to deal with the complaint quickly and without a prolonged procedure in the hope that in doing so she might find a solution to mutual advantage in getting the claimant back to work sooner rather than later. Even if Mrs Carter's method was to the claimant's disadvantage, it is difficult to see how this can properly be characterised as an act of victimisation because of the claimant having made the complaint in the first place. In our judgement, the respondent's concession that this complaint was a Protected Act is a generous concession: it does not expressly refer to EqA or to breaches

thereof; or to discrimination. But the respondent accepts that, on a broad reading, this can be implied. In order for us to find that it was dealt with in the way was as an act of victimisation, we would effectively have to decide that, had the complaint been about something other than disability or the claimant's treatment as a disabled person, it would have been handled differently through the formal Grievance Procedure. There is absolutely no basis for us to reach such a conclusion; we accept Mrs Carter's evidence that she did not recognise this complaint as a formal grievance. Throughout this hearing, the claimant has been quick to point to the precise terms of the respondent's Policies and Procedures: but, in relation to this complaint, she herself did not follow the Grievance Procedure - it is difficult therefore to see how she has any legitimate complaint that the respondent did not follow the formal Grievance Procedure either.

87 Our findings with regard to the alleged delay in arranging the claimant's return to work are set out in Paragraphs 77 and 79 – 84 above. We find that there was no detriment to the claimant here; and, certainly, the delay was unrelated to the Protected Act.

Burden of Proof

88 Applying Section 136 EqA, we find that the claimant has not established before us any facts from which we could properly infer that discrimination has occurred in this case.

Jurisdiction

89 For the reasons set out above, on substantive consideration, the claims will be dismissed in their entirety. But, for the sake of completeness, we have considered the respondent's jurisdictional objections set out at Paragraph 73 above. Our judgement is that Allegation (a) and Allegation (c), both of which relate to the claimant's prolonged absence from work and possible efforts to promote her return, do form part of a continuing series of events unbroken until the commencement of proceedings. Accordingly, applying Section 123(3)(a) EqA, we find that these complaints are within time and the tribunal has jurisdiction to consider them. However, Allegation (b) is of a completely different nature and is principally against a manager (Mr Beegun) who does not feature in the later catalogue of complaints. This complaint is clearly out of time and, as the claimant has not advanced before us any basis upon which we could properly conclude that it was just and equitable to extend time, had we not determined the complaint substantively as we have, we would find that the tribunal did not have jurisdiction to consider it.

Disposal

90 For the reasons set out above, we find that these claims are totally without merit. They are dismissed in their entirety.

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Employment Judge Gaskell
30 April 2020