EMPLOYMENT TRIBUNALS

Claimant: Ms Abigail Williams

Respondent: HS2 Ltd

Heard at: Birmingham

On: 21, 22, 23, 24, 25 , 28, 29 and 30 September 2020

Before: Employment Judge Meichen, Mrs RJ Pelter, Mr TC Liburd

Appearances:
For the claimant: In person
For the respondents: Mr A Allen QC, counsel

JUDGMENT

1) The claimant's claim of direct disability discrimination fails and is dismissed.

2) The claimant's claim of indirect disability discrimination is dismissed following a withdrawal of that claim by the claimant.

3) The claimant's claim of discrimination arising from disability fails and is dismissed.

4) The claimant's claim of failure to make reasonable adjustments in relation to matters post dating 15 December 2018 fails and is dismissed.

5) The claimant's claim of failure to make reasonable adjustments in relation to matters pre dating 15 December 2018 is out of time, it is not just and equitable to extend time, the tribunal has no jurisdiction to hear the claim and it is dismissed.

6) The claimant's claim of harassment related to disability in relation to matters post dating 15 December 2018 fails and is dismissed.

7) The claimant's claim of harassment related to disability in relation to matters pre dating 15 December 2018 is out of time, it is not just and equitable to extend time, the tribunal has no jurisdiction to hear the claim and it is dismissed.

8) The claimant's claim of victimisation fails and is dismissed.

9) The claimant's claim that she was automatically unfairly dismissed because she made a protected disclosure fails and is dismissed.

10) The claimant's claim that she was subjected to detriments because she made a protected disclosure fails and is dismissed.

11) The claimant's claim of unfair dismissal fails and is dismissed.

12) The claimant's claim of wrongful dismissal fails and is dismissed.

13) The claimant's claim of unlawful deduction from wages/breach of contract in relation to a failure to pay holiday pay fails and is dismissed.

REASONS

Introduction

1. This was a hybrid hearing. The claimant and Mr Allen QC attended the tribunal in person and most witnesses gave evidence remotely via CVP and most observers observed remotely.
2. The claimant gave evidence and was cross examined. The claimant also called two witnesses – her mother and her sister – who were not cross examined. The claimant's mother and sister also attended at various points in the hearing to support her.
3. The respondent called 8 witnesses: Shira Johnson, Karen Davis, Joe Connor, Martyn Lewis, Ruth Newsum, Richard Jordan, Nita Rabadia and Kate Wilson. All of the respondent's witnesses were cross examined.
4. We heard submissions on the final day of the hearing and by the time that was complete it was nearly lunchtime. We therefore reserved our decision.

Preliminary issue

5. We had to determine one preliminary issue which was the claimant's application for witness orders.
6. The claimant made her application on 19 August 2020 but it had not been considered by the start of the hearing.
7. The application initially related to two people; Darren Evans and Richard Ball. However the claimant withdrew her application in respect of Richard Ball.
8. As the claimant explained in her application her case was that the potential value of Mr Ball's evidence was that he could confirm that after the incident on 25 January 2019 the claimant answered "no" to a question asked while on the phone to 111 which was "are you in a position to harm yourself or others?".
9. We observed that the claimant could have given evidence herself about that matter but had not covered it in her witness statement. We bore in mind that

issuing a witness order at this late stage would inevitably cause delay and disruption to the final hearing and we therefore wished to try and deal with the issue pragmatically. The respondent said they would not object to the claimant being given permission to expand on the evidence in her statement by giving evidence of the answer she gave to 111. We therefore granted the claimant permission to do that and the claimant decided there was no need to pursue the witness order application in respect of Mr Ball.

10. In the event the respondent did not challenge the claimant's evidence in that particular respect and so we accepted it and we took it into account as part of our decision making

11. We refused the claimant's application in respect of Darren Evans. We found that the potential value of his evidence was not sufficient to justify the disruption and delay which issuing a witness order at this late stage would cause. We took into account that we could see a statement from Mr Evans at page 445 of the bundle and all that appeared to be was a report of what the claimant had told him at various times. It therefore seemed that little, if anything, would be gained by calling Mr Evans to give evidence. We decided we would read Mr Evans' statement and consider it as part of the evidence overall.

12. The claimant raised an additional point about the value of Mr Evans' evidence because she asserted that Mr Evans had also told her that in January 2019 there were discussions about her (or what was called the "Abigail Scenario") between senior managers in HR. This point was not contained in Mr Evans' statement. However, the claimant said that she didn't know what was said in the conversations and it seemed to us entirely unsurprising that discussions about the claimant were taking place in January 2019 at a high level in HR in view of the events which we shall go on to describe. We therefore could not see any significant evidential value in this evidence either.

13. As a result we concluded that it would be disproportionate to make a witness order at this stage and we did not feel that refusing the application would cause any prejudice to the claimant as there was no indication that the witness could add anything of real value to her case.

The issues

14. The parties worked on agreeing a list of issues which was amended during the hearing as the claimant decided to withdraw some of her allegations.

15. By the end of the hearing there was a final list of issues which both parties agreed was a complete and comprehensive list of the issues which we were asked to determine. The liability issues were as follows.

Jurisdiction (Section 123 Equality Act 2010 - "EA")

16. Are any of the claimant's claims for disability discrimination out of time under s123 EA:

a. Do any of the claimant's complaints relate to matters occurring before 15 December 2018?

b. If so, in relation to each complaint: was that complaint part of a continuing course of conduct, with the last action occurring after 15 December 2018?
c. If not, would it be just and equitable for the Tribunal to extend time?

Direct disability discrimination (s13 EA)

17. Was the claimant subjected to less favourable treatment because of her disability? The claimant relies on the following comparators or a hypothetical comparator:

a. Tahira Khan (a non-disabled person) relating to her conduct on 1 October 2018 and how the respondent treated it.
b. Ian Bettison (a disabled person) relating to his conduct on 25 January 2019 and how the respondent treated it.

18. The following allegations are said to amount to less favourable treatment:

a. The claimant's summary dismissal on 9 July 2019 purportedly as a result of her episode on 25 January 2019.

19. In relation to the dismissal referred to above:

a. Does it amount to less favourable treatment?
b. Are the comparators identified appropriate comparators?
c. Was it because of the claimant's disability?

Discrimination arising from disability (s15 EA)

20. Was the claimant subject to unfavourable treatment because of something arising in consequence of her disability?

21. The unfavourable treatment alleged is as follows:

a. The claimant's summary dismissal on 9 July 2019.
b. On 18 December 2018 Shira Johnson issuing an 'informal verbal warning' in a phone call following an incident on 6 December 2018.
c. On 25 January 2019 Shira Johnson instructing the claimant to go home from work in a phone call at 13.42 following an incident that morning.
d. On 25 January 2019 Ian Bettison physically manhandling the claimant back to her desk following the incident in the afternoon

22. Was the treatment because of something arising in consequence of her disability? The claimant relies on the following matters as having arisen in consequence of her disability:

a. An aggravated emotional situation arising from interpersonal conflict
b. A sharp escalation in the claimant's fight or flight response
c. Being prone to uncontrolled emotional outbursts
d. Mental cognition becoming unstable
e. Anxiety.

23. If so, was the treatment a proportionate means of achieving a legitimate aim? The respondent relies on one or more of the following matters as its legitimate aim:

a. Ensuring a safe working environment for all colleagues; and/or
b. Upholding acceptable standards of conduct and behaviour in the workplace.

Failure to make reasonable adjustments (s20-21 EA)

24. Did the following amount to a provision, criteria or practice ("PCP")?

a. Not making Occupational Health ("OH") referrals in a timely manner in response to incidents at work;
b. Not following the advice of OH reports;
c. Not carrying out regular workplace risk assessments or implementing action/support plans;
d. Implementing disciplinary investigations in relation to workplace disputes;
e. Not implementing phased return to work following a period of illness; and
f. Not introducing the Disability Policy approved on 18 April 2018.

25. In relation to each of the PCPs, if so, did this PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that?

a. In relation to alleged PCP a above, the claimant asserts that she did not get the necessary OH support and intervention at the following times:
    - Following a panic episode on 17 October 2016 she was not referred to OH until March 2017;
    - Following an episode of anxiety/exhaustion on 12 May 2017 she was not referred to OH for advice or support;
    - On 8 November 2017 there was no referral to OH for further advice or support following discussion of hypnotherapy at the claimant's mid-year performance review;
    - In February 2018 following a meeting with Shira Johnson where an Assertiveness course was suggested, there was no referral to OH for further advice and support; and
    - In September 2018 there was no referral to OH for updated advice following the claimant commencing her new role.
b. In relation to alleged PCP b there was no follow up meeting after the OH report of March 2017 or a support/action plan put in place.
c. In relation to PCP c:
    - there was no implementation of the Tailored Adjustment Agreement/risk assessment carried out after the meeting in February 2018;
    - between March and August 2018 there was no implementation of the support/action plan during the HR restructure and introduction of the new operating model; and
    - in September 2018 there was no amendment of the support/action plan to take account of the claimant's new role.

d. In relation to alleged PCP d, when the respondent held an investigatory meeting on 26 November 2018 it caused the claimant anxiety and shock;
e. In relation to alleged PCP e, as the claimant was not 100% fit after her illness and was struggling to maintain full time hours, not implementing a phased return to work put her at an increased risk of a trigger event of having an emotional outburst; and
f. In relation to alleged PCP f above, the Disability Policy was not in place to support the claimant from April 2018 onwards.

26. If so, did the respondent take such steps as it was reasonable to have to take to avoid the disadvantage?

27. The reasonable adjustments relied upon by the claimant are:

a. In relation to 9a above, timely referral to OH for advice and assistance;
b. In relation to 9b & c above, the preparation of a risk assessment/response plan to deal with early warning signs or triggers and implementation of possible reasonable adjustments in Mind's 'Guide to Wellness Action Plans (WAPS)' presented to the respondent on 5 December 2017 including the following:
c. Working hours or patterns - Take a flexible approach to start/finish times and/or shift patterns - Allow use of paid or unpaid leave for medical appointments - Phase the return to work, e.g. offering temporary part-time hours - Equal amount of break time, but in shorter, more frequent chunks - Allow someone to arrange their annual leave so that is spaced regularly throughout the year - Allow the possibility to work from home at times - Temporary reallocation of some tasks.
d. Physical environment - Minimise noise – at times of sensory overload e.g. providing private office/room dividers/partitions, reducing pitch or volume of telephone ring tones - Provide a quiet space for breaks away from the main workspace - Offer a reserved parking space - Allow for increased personal space - Move workstation – to ensure for example that someone does not have their back to the door.
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f. Support from others - Provide a job coach - Provide a buddy or mentor - Provide mediation if there are difficulties between colleagues.
g. Awareness of mental health conditions amongst staff, e.g. line management, through training, communication or education can reduce the harmful attitudes and stigma that may undermine what adjustments are put in place – and increase trust.
h. Clearly communicating policies and outlining what support will be available should someone ask for help may encourage employees to disclose when they need support.

i. In relation to 9d, above, resolving the workplace dispute arising in November 2018 informally rather than instigating a disciplinary investigation;
j. In relation to 9e above implementing a phased return to work in January 2019 or facilitation a suspension from duties on medical grounds; and
k. In relation to 9f above implementing the Disability Policy in time to support the claimant at the time of her suspension following the incident on 25 January 2019

Harassment related to disability (s26 EA)

28. Did the respondent engage in the following conduct with the claimant?

a. On 9 March 2017, during the claimant's annual review the claimant was subjected to coercion by Julia Dobson and Linda Litherland to explain to Cathy Chutto and Karen Davis as to why she was hotdesking in the department with other co-workers. The claimant cooperated with their instruction and met with them individually explaining that her hidden disability was exacerbating and wanted to sit with HRSS for company as Cathy Chutto and Karen Davis were often out of the department at meetings or working from home. The recommendations in the OH report were not progressed by Linda Litherland.
b. On 16 March 2017, the claimant held a one to one meeting with Cathy Chutto who was indifferent and unreceptive to her reasoning for 'hot-desking' and was subjected to inappropriate remarks, 'that if the claimant's behaviour came into question, a HR Disciplinary panel would not view this sympathetically'.
c. On 2 July 2017, the claimant was subjected to coercion by Linda Litherland and Cathy Chutto to explain her condition to new co-worker Nichola Darwin when she had not been provided with any reasonable adjustment or response plan. The claimant cooperated and briefly mentioned to Nichola Darwin during a welcome chat that she suffered with an anxiety disorder.
d. On 5 July 2017, the claimant was subject to inappropriate comments in the claimant's written annual performance report in relation to Cathy Chutto and Karen Davis feeling 'impacted' by the claimant's medical condition which was unrelated to her performance. After raising concerns with the Head of Equality, the comments were removed by Linda Litherland.
e. On 15 November 2017, the claimant was subjected to inappropriate remarks from Cathy Chutto when she openly complained about her neighbour who she implied was mentally unstable. Cathy Chutto showed the claimant a picture of her neighbour on her mobile phone with the word 'cunt' written across the photo that her friends on social media had created. Cathy Chutto stated that she had learnt to be patient due to the claimant's mental illness. The comments were unprovoked and caused the claimant to suffer an anxiety attack in relation to her hidden disability on arrival to work on 27 November 2017.
f. On 23 August 2018, Shira Johnson allegedly held a curt phone call and told the claimant to 'stop getting in negative states' when she advised that there was a backlog of backdated supplier payments due to Linda Litherland being on sick leave and no other resource to help her. The claimant suffered a dizzy spell relating to her hidden disability resulting in sick leave.

g. On 1 October 2018, Tahira Khan approached the claimant after she had delivered an all-day Corporate Induction and informed her that she had 'better not get stressed in her new role because others wanted her job and others will use her condition against her because she had overheard something'.
h. On 31 October 2018, during the third mentoring session, Joe Connor allegedly told the claimant that she could go elsewhere when she stated she was being prevented from releasing her old duties whilst starting her new role. She was subsequently asked about her private affairs, i.e. her family, her mortgage, her connections within HS2.
i. On 16 November 2018, on a wellbeing phone call Karen Davis allegedly accused the claimant of upsetting Triya Patel, without clear reason, when the claimant had flagged Tahira Khan's conduct to both on the previous day.
j. On 18 December 2018, Shira Johnson allegedly held a curt phone call and issued an 'informal verbal warning' asking if the claimant remembered the situation when she had left the office early on 6 December 2018. Shira Johnson alleged that the claimant had raised her finger and sworn at Karen Davis. The claimant challenged Shira Johnson back with her version of events and later flagged the phone call to the Whistleblowing contact, Russell Askew.
k. On 25 January 2019, Shira Johnson allegedly held a curt phone call informing the claimant she was suspended and needed to go home without clear reason.
l. On 25 January 2019, Ian Bettison allegedly grabbed the claimant's shoulders during an anxiety attack and pushed her back with force to her desk which triggered a major panic episode and emotional outburst.
m. On 8 April 2019, Kate Wilson allegedly held a curt phone call using a confrontational, condescending tone regarding the claimant's whistleblowing, her grievances, the involvement of the police. The claimant was told the outcome letter of the disciplinary matter would be sent direct to her home address resulting in her exit.

29. If so in relation to each:

a. Was the conduct unwanted?
b. Was the conduct related to the claimant's disability?
c. Did the conduct violate the claimant's dignity and/or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, taking into account the perception of the claimant, the other circumstances of the case, and whether it was reasonable for the conduct to have the effect?

Victimisation (s27 EA)

30. Did the respondent subject the claimant to a detriment because the claimant did a protected act, or because, the respondent believed that the claimant had done, or may do a protected act?

31. Did the following acts amount to detriments?

a. Informal verbal warning issued by Shira Johnson on 18 December 2018.
b. Allegations to West Midlands police by an unidentified staff member on 27 January 2019.

c. Disciplinary instructed by Joe Connor and investigated by Neil Simmonds on 28 January 2019.
d. Summary dismissal on 9 July 2019 by Richard Jordan.

32. In relation to each, if so, was it because the claimant did a protected act, or because the respondent believed that the claimant had done, or may do a protected act?

33. The following are agreed to amount to protected acts:

a. The claimant's whistleblowing concern raised with the CEO on 9 December 2018.
b. The claimant's additional grievance on 22 March 2019.
c. The claimant's claim against the respondent on 14 April 2019.

34. The claimant also asserted that the following amounted to a protected act:

a. The claimant's amended claim against the respondent on 16 September 2019.

   This was accepted as a protected act by the respondent although it was irrelevant to the issues before the tribunal as it postdates the detriments complained of.

Automatically unfair dismissal – "whistleblowing" (Section 103A Employment Rights Act 1996 - "ERA")

35. Did the claimant make a qualifying disclosure on 9 December 2018 within s43b ERA? In particular:

a. Did the claimant reasonably believe the information disclosed tended to show a relevant failure falling within paragraphs (a) to (f) of section 43b(1) of the ERA?
b. Did the claimant have a reasonable belief that the disclosure was in the public interest?

36. If the claimant made a protected disclosure, was that the principal reason for dismissal in contravention of section 103a ERA?

Protected disclosure detriment - "whistleblowing" (section 47B ERA)

37. The claimant alleges that the respondent subjected her to a detriment, in a contravention of section 47b of the ERA, by doing the following things:

a. Being issued with a verbal warning on 18 December 2018.
b. An allegation of gross misconduct being made following the incident on 25 January 2019

38. Did the acts alleged above take place?

39. Was the claimant subjected to detriment by the acts complained of?

40. If the claimant made a protected disclosure, was this the reason for the detrimental treatment complained of?

Unfair dismissal (s94 ERA)

41. Was there a potentially fair reason for the claimant's dismissal on 9 July 2019? The respondent relies on conduct as the fair reason under s98(2) ERA.

42. If so, was the claimant's dismissal fair in all circumstances?

a. Did the respondent have a genuine belief that the claimant had committed the alleged misconduct?
b. Were there reasonable grounds for that belief?
c. Did the respondent carry out a reasonable investigation?

43. Was the claimant's dismissal procedurally fair?

a. The claimant believes there were conflicts of interest i.e. a witness also acted as case advisor. The claimant believes there were procedural errors during the investigation instigated on 28 January 2019 and was not invited to fact finding until 2 months after the incident which is not best practice. Furthermore, the investigation was influenced by false allegations made to West Midlands police on 27 January 2019 as opposed to keeping these as 2 separate channels of investigation and enquiry.
b. There has been an additional allegation brought into play by Triya Patel during the morning of the 25 January 2019 which should have been addressed by a separate investigation via the Bullying, Harassment and Victimisation Policy. Instead this allegation was not upheld during the hearing process in June 2019.
c. On the 13 February 2019, the claimant was expected to respond to serious allegations arising from 25 January 2019 by a West Midlands police officer and alleged false information from by an unknown source that the claimant had been disciplined before. The claimant's verbal account of the incident was then fed back by the West Midlands police officer to an unknown workplace contact instead of being invited to make a statement with West Midlands police.
d. The investigation witness statements were all signed as true, accurate records on 31 May 2019, some 4 months after the incident which could give rise to alterations, collusion and framing against the claimant.
e. The investigation was not put on hold to deal with the Whistleblowing concern of 9 December 2018 or the additional grievance of 22 March 2019. This meant that during the claimant's notice period from 31 May 2019, she was expected to undergo two hearings, further investigations, two appeals and a whistleblowing outcome (whilst still unwell and suffering post-traumatic stress) which would take her beyond the original termination date of 30 August 2019.
f. In effect, it has resulted in 1 year passing of the original grievance of 2 September 2018 which if dealt properly would have resolved matters relating to the claimant's hidden disability effectively and without repercussion or detriment.

g. The claimant believes the disciplinary was perpetrated on 25 January 2018 so that the respondent was not liable for severance payment alongside notice pay in accordance with the Framework document, section 29.1 and in Chapter 4 and Annex 4.13 of Managing Public Money.
h. In the Managing Public Money, it states that special payments can be made (which include special severance payments which a paid to employees in the event they are leaving employment whether they resign, are dismissed or reach an agreed termination of contract) but require treasury approval and they will apply a sceptical approach to proposals for special severance settlements.
i. As per A412.11, it states the department should not treat special severance as a soft option, e.g. to avoid disciplinary processes'.
j. As per A412.12, it states it is important to ensure that Treasury approval is sought before any offers are made.
k. There is nothing to suggest that they can only provide PILON which the claimant understood could be offered at point of resignation on 31 May 2019 and believes the claimant avoided a compensatory payment for loss of job because the respondent needed treasury approval.

44. If the claimant's dismissal was procedurally unfair, would she have been dismissed in any event had a fair procedure been carried out? If so, to what extent, of any should the claimant's compensation be reduced in line with the decision in Polkey v AE Dayton Services Ltd (1987) UKHL 8?

45. If the claimant was unfairly dismissed:

a. Should any reduction be made to the claimant's basic award to take account of the claimant's conduct under s122(2) ERA?
b. Was the claimant's dismissal to any extent caused or contributed to by any action by the claimant? If so, what extent should the claimant's compensatory award be reduced under s123(6) ERA?

Wrongful dismissal

46. Was the claimant wrongfully dismissed? i.e. did the claimant commit gross misconduct entitling the respondent to dismiss her without notice?

Unlawful deductions from wages/breach of contract – holiday pay

47. Was the claimant, on or about 9 July 2018, paid less in accrued but untaken holiday pay (the claimant alleges she was entitled to an additional 1.5 days' pay) than she was entitled to be paid and if so, how much less?

A summary of the essential law to be applied

48. Firstly, we must bear in mind the burden of proof provisions of the Equality Act 2010 ("EA"). Section 136(2) Equality Act 2010 sets out the applicable provision as follows: "*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".*

Section 136(3) then states as follows: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

49. These provisions require the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination.

50. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and has been reaffirmed recently in the case of Efobi v Royal Mail Group Limited [2019] IRLR 352

51. It is also well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. These principles are most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

52. In addition to the above case law has shown that 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 (see in particular the case of Bahl v The Law Society and others [2004] IRLR 799).

53. The claimant's direct discrimination claim falls under section 13 EA which provides that*: "a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others".* For the claimant's claim she relied on the protected characteristic of disability and the less favourable treatment identified was her dismissal (purportedly as a result of the incident on 25 January 2019).

54. We shall also consider section 23 EA which relevant provides as follows:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to
(2) The circumstances relating to a case include a person's abilities if—
(a) on a comparison for the purposes of section 13, the protected characteristic is disability.

55. The questions for the tribunal are therefore whether someone who was not disabled and who had been found to have done what the Claimant had been found to have done on 25 January 2020 would not have been dismissed; and if so whether the reason for the Claimant's dismissal was disability.

56. Regarding the claimant's claim of a failure to make reasonable adjustments the relevant parts of the EA are as follows:

> *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.
. . .

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.

Schedule 8, Part 3, paragraph 20
20. Lack of knowledge of disability, etc
(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
. . .
(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

57. In Environment Agency v Rowan [2008] IRLR 20 the EAT said that in considering a claim for a failure to make adjustments the tribunal must identify the following matters without which it cannot go on to assess whether any proposed adjustments are reasonable:

a. the PCP applied by / on behalf of the employer;
b. the identity of non-disabled comparators where appropriate;
c. the nature and extent of the substantial disadvantage suffered by the claimant.

58. The onus is on the claimant to show that the duty arises i.e. that a PCP has been applied which operates to their substantial disadvantage when compared to persons who are not disabled. The burden then shifts to the employer to show that the disadvantage would not have been eliminated or alleviated by the adjustment identified, or that it would not have been reasonably practicable to have made this adjustment. For the duty to arise, the employer must have knowledge of the disability and the substantial disadvantage.

59. A 'practice' involves an element of repetition - even if that is only in relation to one employee (Nottingham City Transport Ltd v Harvey UKEAT/0032/12). The concept of a 'PCP' does not encompass all one-off decisions made by employers during the course of dealings with particular employees. This was confirmed in the case of Ishola v Transport for London [2020] EWCA Civ 112.

A practice must also be applicable to both the disabled person and his or her non-disabled comparators.

60. Undertaking consultation and/or risk assessments and referrals to OH are prudent practice in any case where an employer is made aware of a disability, although the failure to take such steps would not of itself amount to a breach of the duty (see EHRC Code of Practice, paras 5.12 and 7.29 and also Tarbuck v Sainsbury's Supermarkets [2006] IRLR 664).

61. Regarding the claim of discrimination arising from disability section 15 EA states as follows:

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

62. The unfavourable treatment must be shown by the claimant to be "because of something arising in consequence of [her] disability". The tribunal must ask what the reason for this alleged treatment was. If this is not obvious then the tribunal must enquire about mental processes - conscious or subconscious - of the alleged discriminator see R (on the application of El v Governing Body of JFS and The Admissions Appeal Panel of JFS and Ors [2010] IRLR, 136, SC).

63. In Pnaiser v NHS England [2016] IRLR 170 the EAT set out the following guidance:

a. A tribunal must first identify whether there was unfavourable treatment and by whom.

b. The tribunal must determine the reason for or cause of the impugned treatment. This will require an examination of the conscious or unconscious thought processes of the putative discriminator. The something that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and amount to an effective reason for or because of it. Motive is irrelevant. The focus of this part of the enquiry is on the reason for or cause of the impugned treatment.

c. The tribunal must determine whether the reason or cause is something arising in consequence of the claimant's disability. The causal link between the something that causes the unfavourable treatment and the disability may include more than one link. The more links in the chain the harder it is likely to be to establish the requisite connection as a matter of

fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

64. The 'because of' enquiry therefore involves two stages: firstly, A's explanation for the treatment (and conscious or unconscious reasons for it) and secondly, whether (as a matter of fact rather than belief) the "something" was a consequence of the disability. It does not matter precisely in which order these questions are addressed.

65. The employer will escape liability if it is able to objectively justify the unfavourable treatment that has been found to arise in consequence of the disability. The aim pursued by the employer must be legal, it should not be discriminatory in itself and must represent a real, and objective consideration. As to proportionality, the EHRC Code on Employment notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (4.31).

66. Regarding the claim of harassment section 26 EA states as follows:

> (1*) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B*
>
> *. . .*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*

67. In GMB v Henderson [2017] IRLR 340, the Court of Appeal suggested that deciding whether the unwanted conduct "relates to" the protected characteristic will require a "consideration of the mental processes of the putative harasser".

68. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity merely because she thinks it does. It must be conduct which could reasonably

be considered as having that effect. However, the tribunal is obliged to take the complainant's perception into account in making that assessment.

69. Regarding the victimisation claim section 27 EA states as follows:

> (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*

70. If what is alleged would not be unlawful under the relevant legislation there is no protected act. The protected act must be more than simply causative of the treatment (in the "but for" sense). It must be a real reason.

71. When considering the victimisation claim our attention was also to drawn to Section 39(4) EA which states:

> *Employees and Applicants*
>
> *(4) An employer (A) must not victimise 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 any other benefit, facility or service;*
>
> *(c) by dismissing B;*
>
> *(d) by subjecting B to any other detriment.*

And then Section 109 EA which states:

> *109 Liability of employers and principals*
>
> *(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*

72. For the claimant's whistleblowing claim the relevant parts of sections 43A and 43B ERA state:

43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

73. It was accepted that (if it was a qualifying disclosure) the claimant's email of 9 December 2018 was sent to the employer in accordance with s43C ERA 1996.

74. The relevant parts of section 47B ERA state:

47B Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer. (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement. But this does not prevent the employer from being liable by reason of subsection (1B). (2) … this section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.

75. Section 103A ERA states:

103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

76. Regarding the claimant's claim for 'ordinary' unfair dismissal the relevant parts of the ERA state:

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

. . .

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

. . .

(b) relates to the conduct of the employee

. . .

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

77. It is for the respondent to show that the reason for dismissal was potentially fair. The potentially fair reasons for dismissal include conduct which is the reason relied on in this case.

78. Guidance as to what constitutes reasonableness in the context of a dismissal for conduct was given in the case of BHS Ltd v Burchell [1980] ICR 393. The guidance suggests that the tribunal should consider whether the employer had a genuine belief in the misconduct alleged and whether that belief was held on reasonable grounds formed after a reasonable investigation.

79. We shall also consider whether the sanction of dismissal fell within the range of reasonable responses open to a reasonable employer. We remind ourselves that it is not for us to substitute our own view for that of the respondent.

80. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.

81. As part of our decision making the tribunal will consider whether there were any procedural flaws which cause unfairness.

82. Guidance on that part of the exercise was given by the Court of Appeal in the case of OCS v Taylor [2006] ICR 1602, which clarified that the proper approach is for the tribunal consider the fairness of the whole of the disciplinary process. The court stated that our purpose is to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage.

83. The Court went on further to say that the tribunal should not consider the procedural process in isolation but should consider the procedural issues together with the reason for dismissal as it has found it to be and decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.

84. The claimant's claim for notice turns on whether the respondent was entitled to treat the claimant's actions as a breach of the contract of employment entitling them to dismiss without notice.

85. Regarding the claimant's claim for holiday pay, it is for the claimant to demonstrate the level of pay for accrued holiday on termination that she says she should have received compared to the level of accrued holiday pay that she in fact received.

The claimant's disability and its effect

86. The disability relied upon by the claimant is panic disorder. On 5 July 2019, the Respondent conceded that the claimant's panic disorder is a disability within the meaning of the Equality Act. The claimant has had a diagnosis of panic disorder for a number of years.

87. The respondent also accepts that it knew that the claimant had a panic disorder from the date of the first OH report on 10 March 2017. It is notable that that first report was prompted by the claimant experiencing what was referred to as an "outburst". In her disability impact statement the claimant explained that during an outburst she feels intense emotional pressure, vulnerable, confused and disorientated. She says that those feelings relate to emotional outbursts which don't relate to or make sense in the present moment. The claimant says that this is due to unresolved issues and external factors that have built up and not been processed effectively in her mind.

88. The claimant says that during an outburst she finds it impossible to keep her emotions under control and she may display anger leading to raising her voice or shouting.

89. From the evidence we have seen and heard we would agree that the description of the outbursts summarised above is accurate.

90. The respondent accepts that outbursts of this nature are something arising in consequence of the claimant's disability and that it was aware of that. However, the respondent says it did not know that the claimant's panic disorder may manifest itself in the form of physical violence and it was unaware of any disadvantage related to that.

91. It is important to emphasise that it has never been asserted by the claimant that physical violence is something arising in consequence of her disability. Nor is such an assertion supported by any medical evidence. Instead, the claimant's evidence before us has been that although physical violence was alleged by the respondent to have taken place on 25 January 2019 that allegation is false and is the result of collusion. She does not assert for the purpose of her s.15 EA claim or generally that physical violence was something arising in consequence of her disability and indeed she does not accept that she was ever violent towards anyone.

92. We should also note that the claimant reports that she is currently undergoing assessment for possible Asperger's Syndrome as her therapist belies she may have been misdiagnosed with panic disorder. In her oral evidence the claimant explained that her therapist had suggested that the uncontrolled nature of the claimant's outbursts is more characteristic of Asperger's Syndrome than panic syndrome. That evidence stood out because it seems clear to us that on the key day in this case – 25 January 2019 – the claimant completely lost control when she experienced an outburst.

93. Unfortunately the claimant has not been able to arrange any sort of testing for Asperger's Syndrome and she therefore still only has one diagnosis for her condition which is panic syndrome. We therefore did not have any medical evidence as to the possible effects of Asperger's Syndrome on the claimant, or even any confirmation of a diagnosis of Asperger's Syndrome. Although the claimant explained the views of her therapist during her evidence she has not attempted to rely on Asperger's Syndrome as a disability for this claim and we did not understand her to be positively asserting that she has Asperger's Syndrome – just that it is a possibility.

94. We have been conscious that these are adversarial proceedings and not something in the nature of an enquiry. This means that we are required to determine the case which the claimant has chosen to bring. The claimant has chosen to bring a claim in which she relies only on the condition of panic syndrome as her disability and she has chosen not to assert that violence and in particular the violence which is alleged to have occurred on 25 January 2019 was something which arose in consequence of that disability. Indeed the claimant stressed in her oral evidence that that violence could not possibly be something arising in consequence of her disability because it did not in fact occur.

95. In the case of Chapman v Simon [1994] IRLR 124 Lord Justice Peter Gibson said this:

> *"Under s.54 of the 1976 Act, the complainant is entitled to complain to the Tribunal that a person has committed an unlawful act of*

discrimination, but it is the act of which complaint is made and no other that the Tribunal must consider and rule upon. If it finds that the complaint is well founded, the remedies which it can give the complainant under s.56(1) of the 1976 Act are specifically directed to the act to which the complaint relates. If the act of which complaint is made is found to be not proven, it is not for the Tribunal to find another act of racial discrimination of which complaint has not been made to give a remedy in respect of that other act."

96. These observations were made in the context of a race discrimination complaint under earlier legislation (the Race Relations Act) but we have no doubt that the same principles apply here also. This is authority for this proposition which we think is plainly right: our task is to determine the disability claims which the claimant has brought and not any other claim.

Time limits in relation to this claim

97. The ET1 was presented on 14 April 2019. The date before which any issue viewed individually is out of time is 15 December 2018.

98. Section 123 Equality Act 2010 states:

123 Time limits
(1) Subject to sections 140A and 140B, 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.

99. The claimant made it clear that she relied on there being conduct extending over a period – i.e. a "continuing act" - in the sense that the individual acts she is complaining of should be viewed as sufficiently similar to constitute a continuing course of conduct extending after 15 December 2019 and culminating in her dismissal. The effect of the claimant's argument is that she says that the acts which occurred prior to 15 December 2019 should be treated as part of the same course of conduct as the acts occurring after 15 December 2019 and therefore all acts of discrimination are in time. This

argument can only succeed if we find there are acts of discrimination which are in time.

100. The respondent disputes that the acts complained of by the claimant can be classed as a continuing act. They point out that the allegations relating to 2016, 2017 and early 2018 concern different individuals (Ms Dobson, Ms Litherland, Ms Chutto) to those responsible for the matters giving rise to allegations during the period that is in time and there is therefore no 'continuing act' by any individual.

101. Given the number of allegations which have been presented by the claimant and the historic nature of some of those allegations we think it is appropriate to focus firstly on the allegations which are in time. The in-time allegations include the allegations relating to 25 January 2019 and subsequent events including the claimant's dismissal and therefore on any view they incorporate the most important matters in this claim. If we uphold any of the allegations which are in time we will consider whether there has been a continuing act. If we do not uphold any of the in-time allegations (or we find there has not been a continuing act) we will consider whether there should be an extension of time on just and equitable grounds. If we conclude in the claimant's favour on that point then we will consider the out of time allegations in detail.

Our findings of fact

102. We made the following findings of fact which we found were necessary for us to properly determine the issues which were before us. We emphasise that our findings were made on the civil standard of proof which is the balance of probabilities. A classic statement of the balance of probabilities standard was given by Lord Nichols in the case of Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, 586 where he said that, '*a court is satisfied an event occurred if the court considers, on the evidence, the occurrence of the event was more likely than not.'*

103. The claimant was employed by the respondent from 1 June 2015 until she was summarily dismissed for gross misconduct with effect from 9 July 2019. At the time of her dismissal the claimant was employed as a Talent Specialist – Future Talent. The claimant started in this role in September 2018 following a promotion.

104. The fact of the promotion reflects the picture we have taken from the evidence overall which is that the claimant was a capable individual who at least initially formed good working relationships with her colleagues.

105. On the other hand however there were occasions when the claimant found managing work relationships challenging and others found working with her to be challenging too. The impression we have formed is that when difficulties or issues arose the claimant found it difficult to move past them and became quite intensely distrustful of the other people involved. An example of this is the issues which the claimant had with her previous managers Linda Litherland and Cathy Chutto. The claimant continued to refer to her

complaints against those individuals long after the matters complained of and indeed after they had both left the business.

106. As we have said the respondent was aware of the claimant's disability and of the potential for her to experience emotional outbursts from March 2017. We think overall is it clear that the respondent was seeking to support the claimant in managing her condition. The most notable example of this is the claimant's Workplace Action Plan (or "WAP"). This was a plan which was initially formulated by the claimant and discussed and reviewed with the respondent. The plan contained information about the claimant's condition and how it could be managed. It included provision for the claimant to work from home if she was feeling unwell and specified named "buddies" who the claimant should approach if she was feeing unwell in order to assist her. One purpose of the WAP was to empower the claimant to make decisions herself when things were getting too much for her at work and the buddies were essentially safe contacts in the absence of line management who had been proposed by the Claimant and identified in the WAP. One such contact was Verona Farquharson.

107. On 2 September 2018 the claimant raised a grievance. The grievance related to concerns which the claimant had previously raised in December 2017 which the claimant said remained unresolved. The claimant said she was concerned at the way her health condition was being managed and referred to the impact of a grievance taken out by Cathy Chutto and alleged misconduct by Linda Litherland earlier in 2018. The claimant went on to say that she was looking forward to her new role which was due to start the next day and she regarded her new line manager, Karen Davies, as supportive and impartial about her health condition.

108. The claimant's grievance was addressed to Neil Hayward. On 28 September 2018 the claimant wrote to Mr Hayward to say that she was satisfied that matters were "fully resolved". She said she had achieved closure and was grateful for the support that she had received.

109. Subsequent to this however the claimant became concerned about a conversation she had had with a colleague, Tahira Khan, on 1 October 2018. The claimant says that Ms Khan referred to other people (including Triya Patel) wanting her job and that she should be careful who to trust. The claimant raised this issue with her manager Karen Davis and with Ms Khan directly. On 4 December 2018 she informed Ms Davis that she was going to deliberate on whether she would progress to a formal complaint regarding Ms Khan's alleged behaviour.

110. The claimant was referred to OH on 20 November 2018 and was off sick with work related stress for two days until 22 November 2018.

111. At around this time it appears that a number of the claimant's colleagues had raised concerns about her behaviour and it was decided that there should be a fact-finding investigation. The claimant was invited to an investigation meeting by letter dated 26 November 2018 by Martyn Lewis. The meeting was to consider a number of incidents that had been raised in

relation to the impact of the claimant's behaviour on members of the HR team. Prior to handing the letter to the claimant Mr Lewis held a short meeting with the claimant in which he explained that the nature of the concerns raised about the claimant would be discussed at the meeting. Mr Lewis took the view that it was not appropriate to explain them until the meeting itself.

112. The claimant was subsequently informed that the meeting would take place as part of the disciplinary process. Essentially the purpose was to discuss the allegations which had been made and decide what the next steps should be, including whether the matter would proceed to a disciplinary hearing. The claimant agreed to meet with Mr Lewis on 7 December.

113. On 29 November 2018 an OH report was produced which simply recorded that the claimant had not wished to continue the assessment as she did not feel there was enough detail in the referral. The report also records that the claimant had not given permission to release information on her disability to the respondent at that stage.

114. On 6 December 2018 there was an incident where we have concluded that the claimant experienced an outburst in consequence of her disability. We have summarised the circumstances leading up to this day above as it seems clear to us that there was a build-up of issues which the claimant found stressful and difficult and we think it is more likely than not that that led to her behaviour on 6 December.

115. We find that what happened was as follows. Karen Davis and Shira Johnson were having a meeting when the claimant came to inform them that she was going home as she felt unwell. This was an appropriate thing for the claimant to do in light of her WAP when she felt an outburst may occur. Neither Ms Davis nor Ms Johnson objected to the claimant's proposal but the claimant nevertheless became angry. She said that the two managers did not care about her and she shouted and pointed her finger. She accused the managers of failing in their duty of care. When the claimant returned to her desk prior to going home she was overheard saying that the two managers did not "give a shit" about her. The claimant then left and went home (this was in line with her WAP as she was plainly feeling unwell).

116. We accept the evidence to the effect that both managers felt intimidated by the claimant's behaviour and were left shaken by the incident. The claimant was clearly confrontational and the incident occurred in a pod where the 3 people involved were in close proximity with one another. We have also taken into account that not long after this incident, on 13 December, Ms Davis wrote an email explaining that she had decided that she could no longer manage the claimant as she found her to be intimidating and aggressive and Ms Davis felt in fear of what would happen next.

117. We have considered the dispute in the evidence about when the claimant swore during the incident on 6 December. Ms Davis' evidence was that the claimant told her directly that she did not give a shit about her whereas the claimant says she only swore when she returned to her desk and she said words to the effect of they (meaning the managers) do not give a shit

about me. We have preferred the claimant's evidence because Ms Davis' evidence was not supported by Ms Johnson who could not remember the claimant swearing at Ms Davis directly and whose file note made at the time did not record any swearing in the discussion between the three of them. On balance therefore we think it more likely that the claimant swore when she was at her desk and this was reported back to Ms Davis.

118. In our view however the question of when the claimant swore makes little difference. Whenever it was it was clear that the claimant's behaviour was inappropriate. It seems particularly salient to us that the claimant could have taken the opportunity to go straight home as neither manager raised any issue with that and it was in line with her WAP but she did not do so.

119. The claimant was then off sick from 7 to 10 December with work related stress. This meant she did not attend the fact-finding meeting which was scheduled for 7 December 2018. That meant the claimant did not find out the nature of the issues which had been raised and it seems to us this is likely to have intensified her feelings of mistrust. The claimant emailed Mr Lewis on 7 December to say that she did not wish to attend a fact-finding meeting as she believed it was an "act of retaliation" by HR individuals. She told Mr Lewis that she would be pursuing a formal complaint.

120. It is in our view highly unfortunate that the claimant decided not to attend the fact-finding meeting. The meeting would have clarified what the issues of concern were and possibly enabled the parties to work through them constructively. Formal disciplinary action was only one option and it was not necessarily inevitable at that stage.

121. On 9 December 2018 the claimant raised a complaint directly to the respondent's CEO. She relies on this complaint as the protected act for the purpose of her whistleblowing claim. The claimant complained of three matters:

a. That her grievance of 2 September had not been investigated.

b. That she had not been supported in her "informal harassment complaint" of 1 October (i.e. a complaint about Ms Khan's comments, although we understand the date of the incident was 1 October, rather than any complaint).

c. That the grounds of the disciplinary process instigated on 26 November remained unclear.

122. Nita Rabadia was tasked with investigating the claimant's email of 9 December 2018.

123. On 11 December 2018 the claimant was again referred to OH.

124. On 18 December 2018 Shira Johnson spoke to the claimant on the phone. The purpose of the conversation was for Ms Johnson to issue the claimant with an informal verbal warning regarding her behaviour on 6 December. Ms Johnson had concluded that such a warning was necessary as the claimant's behaviour could not be tolerated. However the claimant hung

up on Ms Johnson during the call and Ms Johnson sent an email later that day confirming the warning.

125. We consider it is important to read that email in full. The email records that the warning has been given because of the claimant raising her voice, pointing and swearing at Ms Davis before she left the office. Although the warning was a (low level) disciplinary action the email is written in constructive and sympathetic terms. The claimant was asked to consider how her actions affect others as colleagues, including her line manager, have been left upset. The claimant was advised that if she did not feel she could change her approach advice could be sought from OH as to how she could be offered further support. Ms Johnson ended by asking the claimant to please look after her wellbeing and let Ms Johnson know if there is anything further that could be done to support her.

126. On or around 18 December 2018 the claimant withdrew her consent for the OH appointment which was scheduled to take place on 20 December 2018.

127. Over the Christmas and New Year period the claimant took some leave and was then off sick. She was signed off with tiredness/anxiety and then work-related stress. The claimant's last sick note is dated 21 January 2019 and it records that the claimant may be fit to work with a phased return to work. The claimant then returned to work; initially working from home for two days and in the office for one day. On the day that she was in the office the claimant asked to leave early and this was granted.

128. On 23 January 2019 Ms Johnson sent the claimant an email in which she firstly welcomed the claimant back to work and informed her that in the short term she would be acting as her line manager. Ms Johnson told the claimant that she would like to get some time in the diary to complete the claimant's return to work. Ms Johnson proposed meeting with the claimant either over the phone in that week, or if the claimant preferred in a face-to-face meeting when Ms Johnson was back in the office on 30 or 31 January. Ms Johnson also told the claimant that she would complete a further OH referral for the claimant and forward it to her for review. The claimant was asked to let Ms Johnson know what her preference was regarding the timing of the return to work meeting.

129. Ms Johnson's evidence, which we accept, was that she would have discussed any formal phased return arrangements with the claimant during the return to work meeting. In her response to that email sent on the same day the claimant said that she would prefer a face-to-face meeting on either the 30 or 31 of January.

130. On 25 January 2019 the claimant was due to attend a meeting with Ms Patel. On the morning of 25 January the claimant sent an email to say that she felt it would be best if she didn't attend that meeting in light of the allegations which she felt had been made against her.

131. At around the same time Ms Patel sent an email saying that the claimant had confronted her about another issue and that she too would not

feel comfortable attending the meeting after that incident. Ms Patel subsequently went home as she felt unwell.

132. The claimant also sent another email in which she complained to Ms Johnson that her team had not briefed her on her return to work regarding her workload.

133. There was then a further email sent by Verona Farquharson in which she referred to the claimant being in a distressed state. She said that the claimant had approached her in a confrontational way and told her to keep it professional and not mention her dad or family when talking to her. We understand that Ms Farquharson had asked after the claimant's father as they had previously discussed that he had been unwell. Ms Farquharson reported that the claimant had said "*it's none of your business - keep it professional"* before walking away.

134. It seems clear from these emails that the claimant was not in a good place on 25 January 2019.

135. As a result of the emails Ms Johnson was aware of the situation regarding the claimant and even though she was not in the office that day she nevertheless took the decision after consulting with HR that she would contact the claimant and send her home. Ms Johnson decided that this was the best course of action as it was in line with the claimant's WAP and it appeared to Ms Johnson that the claimant was not following her WAP by taking herself home. Ms Johnson therefore contacted the claimant and asked her to phone her. The claimant then phoned Ms Johnson back and Ms Johnson explained that she'd seen some emails and that the claimant had upset two of her colleagues. She said to the claimant that as part of her safety and well-being she should go home. The claimant responded by saying that she was not going home.

136. The claimant told Ms Johnson that Ms Farquharson was prying into her personal life. Ms Johnson could tell that the claimant was distressed and so she repeated that she should go home for her own wellbeing. At this stage the claimant responded with a raised voice to allege that Ms Johnson was unprofessional. Ms Johnson told the claimant that they could discuss it further on Monday and that she did not need to come into the office on that day either. The suggestion was therefore that the claimant could work from home. At this point the claimant hung up on Ms Johnson.

137. We accept that in telling the claimant to go home Ms Johnson was acting in the claimant's best interest. It was obvious that the claimant was unwell and that she needed to go home. Furthermore this action was entirely in line with the claimant's WAP which the claimant herself had created. However the claimant did not go home as she had been asked to do by Ms Johnson and instead the conversation between Ms Johnson and the claimant appears to have antagonised the claimant further.

138. Shortly after the conversation between the claimant and Ms Johnson the claimant confronted Ms Farquharson again. The claimant was obviously upset about the fact that Ms Farquharson had reported her behaviour to Ms

Johnson. She began shouting at Ms Farquharson and told her that she was pathetic for having told Ms Johnson about what had happened in the morning. When Ms Farquharson tried to walk away the claimant blocked her exit and when she tried to move away again the claimant then pushed her into some cabinets. Ms Farquharson told the claimant not to put her hands on her and that her behaviour wasn't acceptable. At that point the claimant began shouting and swearing, she physically confronted Ms Farquharson and was grabbing at her and pulling at the scarf which was around Ms Farquharson's neck. The claimant was swearing and shouting throughout this.

139. Several people intervened to try and calm the incident down. However the claimant continued to shout and swear and as an example was shouting things such as *"fuck management they don't care".* The claimant also referred to other members of the HR team as *"bitches"* and her language became highly offensive.

140. A particular member of staff - Ian Bettison - got involved to try and remove the claimant from the situation. The point at which Mr Bettison got involved was when the claimant was being violent towards Ms Farquharson. Mr Bettison placed his hands on the claimant and tried to guide her away. We find that this was done solely with the intention of removing the claimant from what was becoming a volatile and dangerous situation and preventing the claimant from being physically violent again

141. However, when the claimant went back towards her own desk she began to throw things which had been on her desk. She was shouting and swearing and was still obviously very angry.

142. One of the other people who was witnessing this incident was Helen Davies who had previously enjoyed a good relationship with the claimant and in the past had been able to calm the claimant down when she been upset over a different incident the previous year. Ms Davies approached the claimant and asked if she would like to come for a walk. In response the claimant turned around and pushed Ms Davies away with both hands-on Ms Davies' chest. The claimant shouted at Ms Davies *"you can fuck off you fucking called me trouble last year"*. The claimant was referring to the fact that Ms Davies used to see the claimant having lunch with another person who she knew well and she would joke that they were trouble when they were together as they both used to have a laugh. Ms Davies then removed herself from the situation.

143. Another member of staff - Pamela Seal - was able to safely approach the claimant, persuade her to leave the area and take her to a quiet place. The claimant then went home in a taxi where she was accompanied by Richard Ball. The claimant describes in her witness statement that she felt she suffered a breakdown following this incident and she was in bed for two weeks after it.

144. The events of 25 January 2019 which we have summarised above were witnessed by a large number of employees of the respondent. The witnesses were asked to give to give evidence to the subsequent investigation

into what happened. The witnesses who had seen the incident confirmed that the claimant had been very angry, verbally abusive and physically violent.

145. The claimant has pointed out there are a number of differences between the witnesses as to exactly what took place and when. However overall there is clear and consistent evidence that the claimant was the aggressor in the incident and that her behaviour included physical violence. We do not consider that the minor differences between the witnesses are sufficient to indicate that the evidence overall is in any way unreliable. We bear in mind that this was plainly a fast-moving and shocking incident and it is to our mind unsurprising but there were minor differences between the witnesses.

146. We have taken into account that the claimant completely denies being physically violent towards anyone and in particular she denies having pushed either Ms Farquharson or Ms Davies. The claimant made it clear during the hearing that she believes that the witness evidence which said that she had been violent has been manufactured as a result of collusion between members of the HR team. We do not accept that evidence. We consider it is inherently unlikely that so many witnesses would collude with one another to make up that the claimant had been physically violent. Even if there are individuals who had had had enough of the claimant and wanted to get rid of her it would be an extreme step to make up allegations of physical violence. All of the witnesses who had seen the incident supported the case that the claimant had been physically violent. We cannot see any proper basis on which we could possibly conclude that such a large number of witnesses had colluded to present false evidence against the claimant.

147. We have not seen any evidence of any real animosity towards the claimant prior to 25 January which could possibly cause such a large number of people to falsify evidence against her. There was not a single witness produced either in the respondent's internal investigation, in the respondent's disciplinary process or indeed at the hearing before us who supported the claimant's case that she had not been violent.

148. Moreover the claimant's theory that there had been collusion between the HR team does not take account of the fact that there were witnesses who reported having seen her being violent from outside that team. In particular there were two members of staff who were from the legal team who are also consistent in their evidence that it was the claimant who had been the aggressor and that the claimant had been abusive and violent.

149. The claimant made it clear that she did not allege that the witnesses from the legal team were involved in the collusion against her, but then she did not did not have any explanation as to why their evidence was consistent with the evidence of members of the HR team.

150. We would accept in general terms the point made on behalf of the respondent that it must be particularly unlikely that the lawyers would falsify evidence given their professional responsibilities and the potential ramifications for their careers if they were found to have lied in their witness

statements. However it seems to us that the fundamental point is that the legal witnesses simply had no reason to lie about the claimant and the claimant's own case is that they were not part of any collusion. In those circumstances the corroborative evidence from the lawyers which confirmed that the claimant had been violent must be regarded as particularly compelling.

151. We took into account the claimant's evidence of her answer on the 111 call to the effect that she did not feel as though she would harm anyone. That may have been how the claimant felt after the incident but it was not compelling evidence that she had not in fact been violent. In view of the overwhelming witness evidence to the effect that she had been violent we concluded on the balance of probabilities that the claimant completely lost control of herself and acted violently in the way we have described.

152. As a results of the events of 25 January the claimant was suspended from work and she was informed about that by letter on 28 January 2019. The claimant was also signed off sick from around the same time due to her panic disorder.

153. On 28 February 2019 the claimant was asked for her consent to a further OH referral and she gave such consent on 8 March 2019. The claimant was then referred to OH on 10 March. There was a report by OH on 18 March and the outcome of the report was that the OH opinion was that the claimant was currently unfit to resume work but that she was able to engage in the investigation and possible subsequently disciplinary process.

154. On 22 March 2019 the claimant raised a grievance in which she complained, among other matters, of an alleged assault by Ian Bettison during the incident on 25 January and what she described as false allegations which had been made about her to the police arising out of the incident. It appears that somebody – possibly Ms Farquharson - had made a complaint of assault to the police following the events of 25 January and the police contacted the claimant about that. We understand that no further action was in the end taken by the police in relation to the allegation of assault and that the claimant has made a complaint to the police about their handling of the matter.

155. On 29 March 2019 Neil Simmons who was investigating the disciplinary case against the claimant held an investigation meeting with her. The claimant was accompanied at that meeting by Rebecca Young who was a colleague and also a mental health first aider.

156. On 8 April 2019 Kate Wilson wrote to the claimant in relation to the claimant's email of 9 December 2018. Ms Wilson said that although the claimant had raised a complaint in that email via the whistleblowing policy the complaint would instead be dealt with via the respondent's grievance procedure. Ms Wilson's email was to the effect that the respondent did not consider that the matters which had been raised in the claimant's email in fact amounted to a whistleblowing complaint.

157. Ms Wilson referred to the fact that the claimant had already had a meeting with Nita Rabadia to go through her concerns. This meeting was on

23 January 2019 and following that Ms Rabadia was awaiting further information/evidence from the claimant before proceeding with her investigation.

158. Ms Wilson said the respondent would continue with the investigation even though that the matter was being dealt with as a grievance rather than a whistleblowing complaint. The claimant was informed that Nita Rabadia may need to re-interview her to finalise the terms of reference and that she would interview named witnesses. The claimant was told that once the investigation was over there would be a grievance hearing to consider the case. There was also a telephone conversation between Ms Wilson and the claimant on the same day in which similar matters were discussed. We make findings as to this conversation below as it relates to a specific claim raised by the claimant.

159. Ms Wilson reminded the claimant that Ms Rabadia was awaiting further information/evidence from her. However, the claimant did not provide Ms Rabadia with the further information/evidence as had been agreed and eventually, on 5 August 2019, Ms Rabadia closed the case without having completed the investigation into the claimant's letter of 9 December 2018.

160. On 14 April 2019 the claimant submitted her ET1 claim form to the employment tribunal.

161. On 31 May 2019 the claimant submitted a resignation letter. In her letter the claimant said that she felt let down, discriminated against and humiliated and that she had no choice but to resign. The claimant resigned on notice and her notice was due to expire on 31 August 2019.

162. On 3 June 2019 Mr Simmons produced his disciplinary investigation report. Mr Simmons' conclusion was that there was sufficient evidence for there to be a disciplinary hearing to consider the following allegations:

a. physical violence, fighting or assault;

b. deliberate and serious damage to company property;

c. acts of bullying, harassment or discrimination;

d. a serious breach of trust and confidentiality.

163. By letter dated 4 June 2019 the claimant was invited to a disciplinary meeting which would be held on 7 June 2019. The hearing would consider the above allegations and the claimant was warned that a possible outcome may be her dismissal.

164. In response the claimant informed the respondent that she was unwell and that she would require additional time to prepare. She requested the hearing be postponed.

165. In light of that the respondent rearranged the meeting to take place on 14 June 2019. The respondent also asked the claimant to consent to a further OH assessment to confirm that she remained well enough to engage in the rescheduled disciplinary hearing.

166. The claimant was subsequently seen by OH and they produced a further report regarding the claimant's fitness to attend the disciplinary hearing. OH made some recommendations to support the claimant at the hearing and subject to those they advised that in their opinion the claimant was fit to attend the hearing. The recommendations related to requests made by the claimant: firstly that the hearing should last no longer than an hour and secondly for a mental health first aider to be available at the meeting.

167. OH also suggested that some information from the claimant's GP could be obtained in order to get some more detail about the claimant's condition if the claimant would consent to that. Before us, the claimant's position was that she provided this consent. However by email dated 3 July 2019 Pamela Seal wrote to the claimant to say that she had received notification from OH that they had not received the consent they needed. Ms Seal advised the claimant to provide consent but the claimant's response was to say that had already been done and now it was too late as OH should have done it years ago. The claimant also asked what the point would be as she had resigned. As a result of this email the disciplinary decision was taken without any input from the claimant's GP. Our conclusion is that the claimant did not take the opportunity to provide the respondent with consent to obtain information from her GP.

168. The disciplinary hearing took place on 21 June 2019 with the OH recommendations in place. The meeting did not take more than an hour. The claimant was accompanied by Rebecca Young who as we've mentioned was a mental health first aider. Also Mr Jordan, who heard the disciplinary, was himself a mental health first aider.

169. At the start of the disciplinary hearing Mr Jordan made it clear that he did not believe there was sufficient evidence for him to uphold the allegations of company property being damaged, bullying and harassment and falsifying records or breaching confidential agreements. Therefore Mr Jordan confirmed that the only allegation he would be looking into was that of physical violence fighting or assault (against Verona Farquharson and Helen Davies).We think that was an entirely reasonable, and correct, approach for Mr Jordan to take.

170. During the disciplinary hearing the claimant put forward to Mr Jordan her case that the evidence against her had been produced as a result of collusion in the HR team. Mr Jordan pointed out that two of the witnesses who had seen her be violent were lawyers and therefore lying in a statement about what had taken place could have a serious impact on them. The claimant made it clear that she did not suggest there had been any collusion from members of the legal team but perhaps they may have been somehow mistaken about seeing her be violent towards Ms Farquharson and/or Ms Davies.

171. In light of the claimant's allegation of collusion Mr Jordan decided it was appropriate to conduct a further investigation interview, which he did himself. Mr Jordan decided to interview one of the members of the legal team who had witnessed the incident, Non Owen. Mr Jordan was able to confirm firstly that Ms Owen had had a clear view of the incident and he went on to discuss with Ms Owen the possibility of collusion and specifically asked her if

she had talked with anyone in HR about the incident or been asked to falsify evidence or add in detail that didn't happen. Ms Owen denied that anything like that had taken place and said that she would not discuss the incident with the HR team.

172. Non Owen said she didn't know who else had been asked to provide statements and she categorically denied that there had been any collusion. Ms Owen said that she would not do anything of that nature as it would put her professional reputation and integrity at risk and would make her position untenable. In light of those clarifications from Ms Owen and in conjunction with the overall picture of the evidence Mr Jordan in effect concluded that the claimant had been violent as alleged and there was no evidence to support her allegation of collusion.

173. On 25 June 2019 the claimant attended a grievance hearing which was heard by Ruth Newsome.

174. On 9 July 2019 Mr Jordan wrote to the claimant with his disciplinary outcome decision, In line with what he had told the claimant at the disciplinary hearing Mr Jordan made it clear that he did not find the allegations of damage to property, bullying or harassment or breach of trust or confidentiality to be substantiated. However Mr Jordan found the allegation of violence, fighting or assault against Verona Farquharson and Helen Davies was substantiated.

175. Mr Jordan referred to the clear consistency in the witness statements. He observed that all the relevant statements stated that the claimant had approached Verona Farquharson and subsequently shoved her, and that the majority of the relevant statements had also made reference to the claimant grabbing a scarf around Ms Farquharson's neck, grabbing for her neck or grabbing her cardigan around her neck. Mr Jordan also referred to the weight of the evidence which referred to the claimant having also pushed Helen Davies. Mr Jordan found that it was clear from the evidence that this was a two-handed push which forced Helen Davies backwards.

176. Mr Jordan accepted that there were differences in the witnesses' recollection but found that he was satisfied that there was sufficient consistency to conclude that physical violence had occurred. Mr Jordan was plainly aware of the claimant's mental health condition but he found it was imperative that the workplace was a safe environment where people can expect to work free from the threat of violence. Mr Jordan also referred to the fact that the claimant had refused to go home when requested to do so by Ms Johnson and had instead started the altercation with Ms Farquharson. He also referred to the fact that Ms Farquharson was a trusted manager (or "buddy") on the claimant's WAP.

177. Mr Jordan referred to his re-interview with Non Owen which he effectively found had disproved the claimant's suggestion that the allegations against her were as a result of collusion from the HR team. He therefore rejected the allegation of collusion. Mr Jordan found that the fact the claimant had continued to deny the allegations despite the evidence provided was a matter of great concern as it gave no reassurance that a similar incident

would not happen again in future. As a result of those conclusions Mr Jordan found that the claimant's actions constituted serious gross misconduct and that she should be summarily dismissed with effect from 9 July 2090.

178. On 11 July 2019 Ruth Newsome sent the claimant the grievance outcome. The outcome was that the claimant's grievance was not upheld.

179. In respect of both the grievance and disciplinary outcomes the claimant was given a right of appeal. However on 26 July 2019 the claimant informed the respondent that she would not be appealing the dismissal or grievance outcomes or continuing with her whistleblowing complaint of 9 December 2018. It appears that the claimant instead decided to focus on her claim which was then before the employment tribunal, and she subsequently made amendments to her claim to include all the issues which we have identified above.

Our findings on the claim of direct disability discrimination (s 13 EA)

180. The claimant relies on her dismissal as the less favourable treatment. This claim is in time. The claimant has not presented any evidence to show a prima facie case that the reason for her dismissal was her disability. We have not made any findings of fact from which we could infer that the reason for dismissal was disability. We consider there is a clear non-discriminatory reason for the treatment – that is the respondent's finding that the claimant was physically violent towards two of her colleagues on 25 January 2019 and the concern that, as the claimant had not admitted any violence, there was no reassurance that a similar incident would not happen again in future.

181. The comparators put forward by the claimant are not comparable and do not assist us with determining this claim. There was never any suggestion that Tahira Khan had been violent to anyone. There was a suggestion by the claimant that Ian Bettison had been violent towards her however it was clear in light of all the evidence that Mr Bettison had only physically intervened to remove the claimant from an increasingly dangerous situation and to protect others. In contrast the evidence indicated that the claimant's physical actions towards Ms Farquharson and Ms Davies were entirely unprovoked and unwarranted. Moreover we were told that Mr Bettison also has a disability. For those reasons we did not accept that the claimant's comparators were appropriate.

182. The claimant has failed to show a prima facie case of discrimination and we are entirely satisfied that a non-disabled person who assaulted two colleagues as the claimant did would also have been dismissed. The treatment was not because of the claimant's disability and this claim must fail.

Our findings on the claim of discrimination arising from disability (s15 EA)

183. All of the allegations of discrimination arising from disability are in time. We shall consider each allegation separately.

The claimant's summary dismissal on 9 July 2019

184. This was unfavourable treatment by Mr Jordan. However the reason for the dismissal was not something arising in consequence of the claimant's disability. The reason for the dismissal was Mr Jordan's findings of physical violence and his concern that, as the claimant had not admitted any violence, he was given no reassurance that a similar incident would not happen again in future.

185. The claimant does not allege that physical violence arises in consequence of her disability. There is no medical evidence that physical violence arises in consequence of her disability. Therefore the necessary causal link is not present. We refer to our explanation above to the effect that the claimant has not pursued a claim involving an assertion that violence generally or specifically on 25 January arose in consequence of her disability and our task is to determine the claims of discrimination which the claimant has brought.

186. It is worth mentioning that the claimant does not assert either that she cannot remember the incident of 25 January or that she may have suffered something akin to a blackout as a result of her disability (and nor is there any medical evidence to that effect). The claimant's case is that violence did not happen and she expressly does not rely on violence as being something arising in consequence of her disability. As we have found that violence did occur and the finding that it did was the reason for dismissal the claim must fail.

187. In any event we would have found that the dismissal was justified. The respondent had legitimate aims of ensuring a safe working environment for all colleagues and upholding acceptable standards of conduct and behaviour in the workplace. Mr Jordan took his decision after a full investigation and having taken into account the Claimant's medical condition. Mr Jordan satisfied himself (reasonably in our view) that the claimant's argument that there had been collusion was not made out. It was relevant that the claimant's continued denial of any violence meant Mr Jordan could not be satisfied that violence would not reoccur. It must also be highly relevant that the claimant had failed to follow her WAP, disobeyed a direct instruction to go home and been physically violent to a colleague who was one of her designated "buddies" in the WAP. Realistically then there were no less discriminatory measures available to the respondent. Taking those factors into account we would have found that dismissal was a proportionate means of achieving the respondent's legitimate aims.

On 18 December 2018 Shira Johnson issuing an 'informal verbal warning' in a phone call following an incident on 6 December 2018

188. This amounted to unfavourable treatment by Shira Johnson. We find that it occurred as a result of something arising from the Claimant's disability. We think it would be wrong to draw a distinction between the claimant's behaviour when talking to Ms Davis and Ms Johnson and her behaviour when she was back at her desk (which is when we have found she swore). It seems

to us that at both stages the claimant was in the midst of an emotional outburst which is something arising in consequence of her disability.

189. The informal warning was issued because of the claimant raising her voice, pointing and swearing (and the effect of those behaviours on the two managers). These behaviours are all part of the claimant's emotional outburst. We have found that the swearing took place when the claimant returned to her desk and this was then reported back to the managers. It therefore seems to us that the warning was imposed because of the claimant's behaviour overall rather than just limited to matters which took place during the discussion with Ms Johnson and Ms Davis.

190. Notwithstanding that we have accepted the claimant's version of events regarding when she swore our finding is that on any view she was unacceptably rude on 6 February and her behaviour was wholly inappropriate and could not be tolerated. In our view the decision to issue an informal verbal warning was justified. The respondent had the legitimate aims of upholding acceptable standards of conduct and behaviour in the workplace and ensuring a safe working environment for all. Ms Johnson's action was a proportionate means of achieving that aim – it was a very low-level informal sanction and, having witnessed the event herself, there was no need for any further investigation. As we have mentioned it is also instructive to read the email communicating the warning in full. The sympathetic and constructive nature of the communication reinforces our conclusion that such a warning was proportionate and overall justified.

191. We also take into account that the claimant was by this stage plainly aware of her WAP and that the correct practice under the WAP would have been for her to go home. Neither manager expressed any opposition to the claimant going home as this was in accordance with the WAP but the claimant did not do so and instead confronted the two managers in the way we have described. In those circumstances it seems to us that the respondent was bound to take some form of disciplinary action in order to communicate the unacceptable nature of the claimant's behaviour. As we have said the informal verbal warning was a very low-level sanction issued in a sympathetic and constructive way. We therefore find that there was no less discriminatory measure available.

On 25 January 2019 Shira Johnson instructing the claimant to go home from work in a phone call at 13.42 following an incident that morning

192. This was not unfavourable treatment, taking into account the surrounding context. It was an action taken (in large part) for the benefit of the claimant since it was designed to remove her from a potentially volatile situation, enable her to compose herself and avoid the consequences of an emotional outburst.

193. The instruction was in accordance with the WAP which had been constructed by the claimant and followed with her agreement. The claimant

regularly worked from home and there was no disadvantage to her in doing so on 25 January.

194. We also cannot ignore the fact that if the claimant had complied with the instruction to go home then the incident in the afternoon of 25 January would not have occurred and the claimant might still be employed by the respondent. This reinforces our conclusion that the instruction was, in context, not unfavourable treatment.

195. We would agree that the treatment occurred because of something arising in consequence of the Claimant's disability – namely the behaviour towards Triya Patel and Verona Farquharson in the morning of 25 January 2019. It seems to us that this behaviour was consistent with her experiencing an emotional outburst (or perhaps the early stages of such an outburst coming on), However we would find that the treatment was justified.

196. The respondent had legitimate aims of ensuring a safe working environment for all colleagues (including the claimant) and / or upholding acceptable standards of conduct and behaviour in the workplace. Ms Johnson's action was a proportionate means of achieving those aims. Ms Johnson was acting because of the reports she had received regarding the claimant's behaviour and correctly identified that it was necessary to instruct the claimant to go home to prevent any escalation. She deliberately did not name the people who had reported the Claimant's unusual behaviour in case the Claimant went to confront them (which is exactly what happened).

197. Ms Johnson's action was in accordance with the WAP and the agreement with the claimant that she would go home if she was feeling unwell. It was consistent with action taken on other occasions when the claimant had gone home due to being unwell. This was something the claimant had agreed to and used for her benefit – including on 23 January. The matter did escalate in the way Ms Johnson feared when the claimant failed to follow her instruction. In those circumstances it seems to us that no other less discriminatory measure was available to the respondent and the instruction was proportionate.

On 25 January 2019 Ian Bettison physically manhandling the claimant back to her desk following the incident in the afternoon

198. There is some dispute of fact as to exactly what happened with Mr Bettison but we have found that he physically intervened in the situation on 25 January in that he placed his hands on the claimant in order to remove her from the situation and escort her back to her desk. In context we do not think this was unfavourable. Our finding is that Mr Bettison was acting solely to remove the claimant from a volatile situation in which she was assaulting other members of staff. The action was taken in part to protect others but also for the benefit of the claimant - to try and prevent her from making the situation any worse for herself and get her to a place where she could calm down.

199. In any event we would find that the actions of Mr Bettison did not occur because of something arising in consequence of the Claimant's disability. It is clear from the evidence that Mr Bettison only physically intervened because of the physical violence which was being perpetrated by the claimant. As we have explained above it is not part of the claimant's case that physical violence arose in consequence of her disability and there is no basis on which we can find that it did.

200. Moreover we would find that the actions of Mr Bettison were justified. The respondent had legitimate aims of ensuring a safe working environment for all colleagues (including the claimant) and / or upholding acceptable standards of conduct and behaviour in the workplace. The claimant was being physically violent towards a colleague. For Mr Bettison to have stopped this was a proportionate means of achieving that aim. Mr Bettison's action in being physical reflect the fact that he was intervening at a stage when the claimant was being violent towards Ms Farquharson. In that context we think he acted proportionately.

201. A comparison with how Ms Seal intervened later in the incident is not appropriate as by that stage the claimant had to some extent calmed down and was not in the process of being violent to anyone. Mr Bettison's actions were proportionate to the situation he intervened in; he did not attempt to hurt the claimant and did no more than guide her away. The seriousness of the situation at that stage is demonstrated by the fact that even after Mr Bettison guided the claimant away from Ms Farquharson and back to her desk she began to pick things off her desk and throw them. We therefore do not think there was any less discriminatory measure available at that time.

202. For the above reasons the claim of discrimination arising from disability must fail.

Our findings on the claim of failure to make reasonable adjustments (s20-21 EA)

203. The claimant alleges that the following amount to a PCP:

a. Not making OH referrals in a timely manner in response to incidents at work;
b. Not following the advice of OH reports;
c. Not carrying out regular workplace risk assessments or implementing action/support plans;
d. Implementing disciplinary investigations in relation to workplace disputes;
e. Not implementing phased return to work following a period of illness; and
f. Not introducing the Disability Policy - "approved on 18 April 2018".

204. We ought to clarify that in relation to the last allegation concerning the Disability Policy it was established during the hearing that the document was misdated and it was not in fact in place until February 2019. This affects our decision making in the sense that it means the allegation is in time. It is not entirely clear but we understand the claimant's complaint amounts to a

general allegation that the respondent failed to apply the Disability Policy to her (because it had not been "introduced").

205. An allegation that there was a general failure to apply such a policy to the claimant does not amount to a PCP. The absence of such a policy is not a PCP and neither is a failure to "introduce" such a policy. The policy merely reflects the law relating to disability discrimination. It is clear that the claimant and the respondent were familiar with and where appropriate applied the essential concepts of the relevant law, in particular reasonable adjustments which had been agreed and put in place for the claimant for some time.

206. We would also find that there is no substantial comparative disadvantage as the claimant has not identified a specific part of this policy which was not applied to her, thereby placing her at a specific disadvantage.

207. As to the proposed adjustment the claimant has merely stated 'implementing the Disability Policy in time to support the claimant at the time of her suspension'. She has not specified how it should have been implemented in her case. It therefore seems to us that there would be no basis on which we could conclude that the proposed adjustment would have eliminated or alleviated any disadvantage.

208. It is clear from the clarifications contained in the list of issues replicated in the issues section above that the only other claim of a failure to make reasonable adjustments which is in time related to the failure to implement a phased return - which took place following the claimant's period of illness in January 2019.

209. We do not think that this amounts to a PCP. This was something which happened to the claimant on one specific occasion in January 2019. In relation to previous absence for illness (in particular in September 2018) the claimant had undergone a phased return. There is no evidence that the respondent generally failed to implement phased returns and no element of repetition here.

210. We also take into account that there does not appear to be any failure on the part of the respondent here. The evidential picture was that by this stage the claimant was able to request specific working arrangements and these would be discussed and agreed. Examples include the claimant working from home and leaving early. The claimant was given the option of a return to work meeting with Ms Johnson either on the phone or the following week when Ms Johnson returned to the office and she chose the later option. If the claimant had required any change to her working arrangements she could have let Ms Johnson know or simply requested the meeting over the phone and mentioned it then.

211. As to comparative substantial disadvantage the claimant's case is that not implementing a phased return to work put her at an increased risk of a trigger event causing an emotional outburst. There is no medical evidence

that the claimant was placed at an increased trigger risk as a result of any failure to implement a phased return to work. Moreover we think the evidence indicates the key factor which led to the claimant having an emotional outburst on 25 January was that she had learned that allegations had been made against her by her colleagues but had not found out what they were or taken steps to address them because she had not attended the fact-finding meeting scheduled on 7 December.

212. It appears clear to us that this led the issue to fester in the claimant's mind over the Christmas period and during her sickness absence. This is demonstrated by the fact that when she approached Ms Farquharson the claimant raised the fact that she believed Ms Farquharson had made allegations against her. We also have to bear in mind that prior to 25 January the claimant had only just returned to work – she had worked from home for 2 days and left early on the one day she had been back in the office. It seems to us unlikely that the claimant could be triggered into such a severe emotional outburst by being at work for such a short period without a formal phased return. We find that not implementing a phased return did not put the claimant at an increased risk of a trigger event and it was not in fact a trigger for what occurred on 25 January 2019. The claimant has not therefore made out the substantial disadvantage relied upon.

213. For those reasons our decision is that the claims for failure to make reasonable adjustments which are in time must fail.

Our findings on the claim of harassment related to disability (s26 EA)

214. The first allegation which is in time is that on 18 December 2018, Shira Johnson held a curt phone call with the claimant, issued an informal verbal warning, asked if the claimant remembered the situation when she had left the office early on 6 December 2018 and alleged that the claimant had raised her finger and sworn at Karen Davis.

215. We do not agree with the claimant's allegation that Ms Johnson was curt with her during the call. Our finding is that it was the claimant who hung up on Ms Johnson and we find that Ms Johnson's tone is more likely than not to have been in keeping with her subsequent email which we have found to be sympathetic and constructive.

216. We agree that Ms Johnson issued the informal verbal warning and it seems to us more likely than not that she would have asked the claimant if she remembered what had taken place and explained that the warning was being issued because the claimant had raised her voice, pointed her finger and swore.

217. The warning was unwanted as no employee would wish to have any form of disciplinary sanction imposed. We find that the warning was related to disability in the sense that it was imposed due to the claimant's behaviour on 6 December and the claimant's behaviour on that day was as a result of an

outburst which was, as we have found, a consequence of the claimant's disability. Moreover when we examine the mental process of Ms Johnson, who imposed the warning, it is clear from her email of 18 December that she was aware of the impact of the claimant's condition on her behaviours. The point of the warning was to nevertheless encourage the claimant to consider how her behaviour was affecting others and how it could be managed.

218. We do not find that the warning had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for her. The claimant's response to the warning shows that she found it to be "unacceptable" but we do think it can be reasonable for the conduct to have had the relevant effect for harassment.

219. It is clear that the warning was being imposed because of the detrimental effect of the claimant's behaviour on others and to encourage her to reflect on that. The context of the warning cannot be ignored in that at the same time the claimant was asked if there was anything else that could be done to support her including a further OH referral. We also take into account the intention of Ms Johnson which we find was plainly to encourage the claimant to manage her behaviour and to do so in a sympathetic and constructive way.

220. It seems particularly significant to us that on 6 December the claimant did not go home when she had the opportunity to do so but instead stayed and the incident then occurred. It has not been suggested to us that that the claimant was incapable of exercising her option of going home when experiencing an emotional outburst (or when she felt one may occur). On the contrary, it was a key part of the WAP (designed by the claimant) that the claimant would take responsibility to go home when she realised she was experiencing or was going to experience an outburst. It seems to us that in light of the claimant's failure to undertake the agreed actions under her WAP on 6 December that it cannot be reasonable for the warning to have had the relevant effect under section 26 EA.

221. The second allegation which is in time is that on 25 January 2019, Shira Johnson held a curt phone call informing the claimant she was suspended and needed to go home without clear reason.

222. We do not find that Ms Johnson was curt with the claimant in the phone call on 25 January. Again we find it was the claimant who terminated the call early and it was the claimant who was plainly upset. We refer to our findings of fact above in relation to the way in which Ms Johnson presented her instruction to the claimant to go home.

223. We do not find that Ms Johnson informed the claimant she was suspended. Suspension was not mentioned in the phone call. It was a part of the claimant's WAP that she would go home if feeling unwell; this had been followed on other occasions and the claimant regularly worked from home. There was therefore no implication that the claimant was suspended.

224. In the phone call Ms Johnson told the claimant that she'd seen some emails, that the claimant had upset two of her colleagues and she explained to the claimant that as part of her safety and well-being she should go home. This represented clear reasoning as to why the claimant should go home (albeit we agree that Ms Johnson did not identify the colleagues who the claimant had upset in an attempt to prevent further confrontation).

225. We find that the part of the allegation which is made out, i.e. that Ms Johnson told the claimant to go home, was related to the claimant's disability. This is because Ms Johnson issued this instruction because of the claimant's treatment of her colleagues during the morning which we have found was part of an aggravated emotional state which arose in consequence of her disability. Again we consider Ms Johnson's mental process and we think she was obviously aware that the claimant's behaviour related to her disability because she was following the WAP as to what to do when the claimant experienced an emotional outburst which was a consequence of her disability.

226. We do not find that the instruction to go home had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for her. The claimant knew that going home was part of her WAP – not least because she had designed the WAP. The primary purpose of the call was to ensure the claimant's safety and wellbeing and this was emphasised to her during the call by Ms Johnson.

227. We take into account Ms Johnson's intention and we find her intentions were clearly designed to help the claimant and specifically help her avoid a situation in which her emotional state would be further aggravated. Ms Johnson was aware that may impact on the claimant's behaviour which could have adverse consequences for the claimant and her colleagues. The claimant was plainly aware of that too as that was why the WAP included the provision for the claimant to go home. In all the circumstances then it was not reasonable for the Claimant to regard this call as having the relevant effect under s. 26 EA.

228. Again we cannot ignore the fact that if the claimant had complied with the instruction to go home the incident which led to her being dismissed would have been avoided and this reinforces our view that it cannot be reasonable for the conduct to have the relevant effect.

229. The third allegation which is in time is that on 25 January 2019, Ian Bettison grabbed the claimant's shoulders during an anxiety attack and pushed her back with force to her desk which triggered a major panic episode and emotional outburst.

230. We do not accept the assertion that Mr Bettison pushed the claimant. On balance we find based on the overall picture from the witness evidence that Mr Bettison placed his hands on the claimant's shoulders and attempted to guide her away from the situation. The suggestion that it was Mr Bettison's

intervention which triggered a panic episode and emotional outburst is plainly wrong. The claimant was already in the midst of an outburst when Mr Bettison intervened.

231. It is clear that Mr Bettison only intervened physically because the claimant was being physically violent to Ms Farquharson. We find that absent the violence perpetrated by the claimant Mr Bettison would not have intervened in the way he did. As we have already explained the claimant does not assert that violence was related to her disability and there is no evidential basis for us to conclude that it was.

232. In any event we would find that Mr Bettison's actions were designed to assist a very difficult situation for the benefit of all involved and it is not reasonable for the claimant to regard them as having created the relevant effect under section 26 EA. It is relevant that his only intention was to prevent any further violence and calm the situation.

233. The fourth, and final, allegation which is in time is that on 8 April 2019, Kate Wilson held a curt phone call using a confrontational, condescending tone regarding the claimant's whistleblowing, her grievances and the involvement of the police. The claimant also alleges that she was told the outcome letter of the disciplinary matter would be sent direct to her home address resulting in her exit.

234. This allegation has not been made out on the facts. We do not find that Ms Wilson was curt, confrontational or condescending towards the claimant. The key piece of information which Ms Wilson communicated to the claimant was that her whistleblowing complaint was to be treated as a grievance. The claimant was plainly aggrieved by this decision and she raised her voice and accused Ms Wilson of not knowing anything and of having no experience. At that point Ms Wilson gave the claimant an overview of her career and relevant experience. The claimant viewed this as condescending/curt/confrontational but we do not agree – it was in response to the accusation by the claimant that Ms Wilson was inexperienced and did not know anything.

235. We do not accept the suggestion that Ms Wilson told the claimant about the outcome of the disciplinary matter (which had not even been heard by that stage). We take into account that Ms Wilson was relatively new to the respondent's business (having only joined in January) and is an experienced HR professional. There is no reason at all for her to have prejudged the disciplinary as suggested by the claimant, and it is not even clear how she would have been aware of the potential outcome given it was being heard by Mr Jordan.

236. In any event, during cross examination, the claimant accepted that even on her account the allegations that she makes about Kate Wilson's conduct during this call were not 'related to disability'.

237. For those reasons this claim too must fail.

238. Therefore all of the allegations of harassment which are in time fail.

Our findings on the claim of victimisation (s27 EA)

239. The following are agreed to amount to protected acts:

a. The claimant's whistleblowing concern raised with the CEO on 9 December 2018.
b. The claimant's additional grievance on 22 March 2019.
c. The claimant's claim against the respondent on 14 April 2019.

240. The claimant also asserted that her amended tribunal claim against the respondent on 16 September 2019 was a protected act. Although this too was accepted as being a protected act by the respondent it was irrelevant to the issues before the tribunal as it postdates the detriments complained of.

241. We find that each of the detriments relied on by the claimant are in fact detriments. Each allegation of detriment is in time. We shall now consider in relation to each detriment whether the respondent did it because the claimant had done a protected act.

Informal verbal warning issued by Shira Johnson on 18 December 2018.

242. The reason for the informal verbal warning was the Claimant's behaviour on 6 December 2018, when she was rude to Ms Davis and Ms Johnson and then swore about the two managers when she returned to her desk. It was not that she had raised a complaint on 9 December 2018.

243. There was no evidence which suggested that the respondent generally or any particular individual were aggrieved by the fact that the claimant had made her complaint on 9 December, such that they would seek retribution.

244. Although we have no reason to doubt that the claimant genuinely believes that the warning was issued because of the complaint made by the claimant on 9 December we have not made any finding which could possibly support such a belief.

Allegations to West Midlands police by an unidentified staff member on 27 January 2019

245. It is clear that somebody reported the claimant to the police as a result of her behaviour on 25 January 2019 however it is not clear who that was. The most likely person to have done so appeared to be Verona Farquharson but we understand the claimant no longer thinks it was her. We are unable to make a positive finding about who reported the claimant to the police but it is more likely than not to have been a staff member of the respondent.

246. We would accept the submission made on behalf of the respondent that reporting someone to the police for assault is not something 'done in the

course of employment'. Therefore, the respondent could not be liable for that action.

247. In any event, the clear and obvious reason for someone reporting the claimant to the police was that the claimant had been, as we have found, physically violent towards co-workers on 25 January 2019. We have not made any findings which could possibly support the contention that the reason for reporting the claimant to the police was that she had raised a complaint on 9 December 2018.

Disciplinary instructed by Joe Connor and investigated by Neil Simmonds on 28 January 2019

248. The reason for a disciplinary investigation was that the claimant had been verbally abusive and physically violent towards co-workers on 25 January 2019. There was a substantial amount of witness evidence to the effect that the claimant had been violent and rude and her behaviour had left a number of her colleagues upset and traumatised. By way of example Verona Farquharson described herself as 'emotionally scarred' by the incident and Triya Patel was unwilling to return to the workplace afterwards. We are entirely satisfied that the reason for the disciplinary was nothing to do with the fact that the claimant had raised a complaint on 9 December 2018. There was no evidence or any finding of fact which could support the assertion that the reason was the claimant's complaint.

Summary dismissal on 9 July 2019 by Richard Jordan

249. The reason for the claimant's dismissal was Mr Jordan's finding that the claimant had been physically violent towards co-workers on 25 January 2019 and his conclusion that her refusal to accept this meant that he could not be reassured that such an event would not reoccur. Mr Jordan relied on the overwhelming witness evidence demonstrating that the claimant had been violent to justify his decision. We are entirely satisfied that the reason for dismissal was not that the Claimant had raised a complaint on 9 December 2018 or presented a claim to the ET. There was no evidence which could support the assertion that the reason was the claimant's complaint or claim.

<u>Our findings on the whistleblowing claims</u>

250. We first have to consider whether the claimant made a protected disclosure.

251. The only alleged protected disclosure which is relied upon is the claimant's email of 9 December 2018. The email of 9 December 2018 makes reference to the following three matters:

a. The claimant's grievance complaint of 2 September, which she says was never investigated.
b. The claimant's informal harassment complaint of 1 October, which she says was never supported.

c. The disciplinary process instigated against the claimant on 26 November; the claimant says the grounds of this remain unclear.

252. The claimant relies on s43B(1)(b) ERA (i.e. that this is a disclosure of information which in her reasonable belief tends to show that the respondent has failed, is failing or is likely to fail to comply with its duties to her under the Equality Act 2010) and/or s43B(1)(d) ERA (i.e. that this is a disclosure of information which in her reasonable belief tends to show that her health and safety has been, is being or is likely to be endangered).

253. As summarised above this disclosure was all about things that did or didn't happen to the claimant as an individual. There is no evidence that the claimant was bringing to light an important concern for the benefit of others. On the contrary, it was a feature of the evidence that the claimant in making the disclosures wished to gain 'protection' from allegations made against her and it was clear that the claimant believed she was protected against allegations of misbehaviour by her because she had made the disclosure.

254. For those reasons it seems to us that this disclosure was not made in the public interest and we do not think that the claimant had any reasonable belief that she was making it in the public interest.

255. Moreover we do not accept that the claimant had any reasonable belief that there had been a breach of the Equality Act or that her health and safety had been endangered, for the following reasons:

a. In relation to her grievance of 2 September 2018, on 28 September 2018, the claimant had said *"I am satisfied that matters are fully resolved now and I have achieved closure".* This was plainly an informal resolution of the grievance to the claimant's satisfaction (which was a recognised outcome under the respondent's grievance policy). In light of this outcome we do not see how the claimant could have reasonably believed there had been any breach of the Equality Act or endangerment of her health and safety.

b. There is no evidence of any harassment complaint by the claimant on 1 October 2018, informal or otherwise. That was the date of the alleged communication from Tahira Khan. It was not until 3 December 2018 that the claimant referred to her allegation as potentially being disability related harassment. Prior to that point the claimant had referred to being told by Thaira Khan that she should watch her back. Whilst potentially unpleasant this does not amount to an allegation of harassment or any other breach of the Equality Act. After 3 December the claimant was asked if she wished to make a formal complaint and she said that she would deliberate but she did not do so. There was no failure to give the claimant support – if she had wished to do so she could have informed management that she wished to progress a complaint. No alleged breach of the Equality Act has been identified in the way in which management dealt with this complaint; nor has any endangerment of the claimant's health and safety.

c. As we explained above, Martyn Lewis had invited the claimant to a fact-finding investigation meeting following a number of concerns raised by colleagues about her behaviour. The nature of the concerns was not made clear prior to the meeting but Martyn Lewis explained they would be discussed at the meeting itself. However by her emails on 7 December 2018, the claimant indicated that she was refusing to attend this fact-finding meeting and that was why she did not find out the detail of the allegations. In light of that we do not see how we do not see how the claimant could have reasonably believed there had been any breach of the Equality Act or endangerment of her health and safety by management.

d. Although the claimant became aggrieved by the alleged failures she outlined in her letter of 9 December there is no evidence that her health and safety were endangered by them.

e. The claimant has not identified any breach of the respondent's internal policies, let alone a potential breach of the Equality Act in relation to any of the alleged failures.

256. We therefore find that the claimant did not make a disclosure qualifying for protection under s43B ERA.

257. If the claimant had made a protected disclosure, we would not find that was the principal reason for dismissal in contravention of section 103A ERA. As we have already made clear we find that the reason for dismissal was Mr Jordan's finding that the Claimant had been physically violent towards co-workers on 25 January 2019 and that her refusal to accept this, meant that he could not be reassured that such an event would not reoccur. There was overwhelming evidence supporting this finding and we accept Mr Jordan's evidence that that was the reason for his decision to dismiss.

258. In the course of her evidence the claimant made it clear that as Mr Jordan came from outside HR then she did not believe that he was part of the alleged collusion. She accepted in oral evidence that based on the evidence before him relating to physical violence and based on her refusal to accept that evidence, it was inevitable that she would be dismissed. In light of this counsel for the respondent, Mr Allen QC, very properly drew our attention to Royal Mail Ltd v Jhuti [2019] UKSC 55 in which the Supreme Court held that the reason for the dismissal could be a reason other than that given to the employee by the decision-maker, if a person in the hierarchy of responsibility above the employee determined that the employee should be dismissed for a reason, but hid it behind an invented reason which the decision-maker adopted.

259. We considered the case and Mr Allen was quite right to draw it to our attention but in the end we have found that there was no collusion as alleged by the claimant. Her allegation in that respect was simply not supported by any evidence other than the claimant's assertion and it was always an inherently unlikely suggestion.

260. We also took into account that the claimant's allegation of collusion in this case was made against those at the claimant's level – the various witnesses to the incident on 25 January 2019. In addition the claimant raised this argument before Mr Jordan who conducted additional investigation – in particular speaking to one of the non-HR lawyer witnesses, Non Owens. Ms Owens confirmed her evidence that the claimant was violent and the claimant did not allege that she was part of the collusion. Our view is that was an effective way for Mr Jordan to satisfy himself that the allegation of collusion had not been made out.

261. For those reasons we think our findings of fact take this case outside of the type of case where the principles in Jhuti may apply and in particular this is not the type of 'extreme' set of facts that led to the decision in Jhuti as described by Lord Wilson at paragraph 41 of the judgment in that case.

262. The claimant also alleged that she had been subjected to detriments and that the detriments were done on the ground that she had made the same protected disclosure on 9 December 2018. If we had found that the claimant had made a protected disclosure we would not find that any of the detriments were done on the ground that the claimant had made the disclosure.

263. The first detriment relied on was the claimant being issued with a verbal warning on 18 December 2018. As we have already found this was done on the ground that the claimant was rude to, shouted at and swore about her managers on 6 December 2018.

264. The second detriment was the allegation of gross misconduct being made following the incident on 25 January 2019. This was done on the ground that the claimant was violent towards two colleagues on 25 January, and the fact that her behaviour was witnessed by a large number of staff and it left several of the claimant's colleagues upset and traumatised.

265. We refer to our findings above to the effect that we did find any evidence supporting the contention that the reason for the claimant's treatment was her complaint raised on 9 December 2018.

Our findings on the claim of unfair dismissal (s94 ERA)

266. The reason for the dismissal by Richard Jordan was clearly his findings as to the Claimant's conduct on the afternoon of 25 January 2019, and her refusal to acknowledge that conduct. The respondent has therefore satisfied us that the reason for dismissal was the potentially fair reason of conduct.

267. There is equally no doubt that Mr Jordan had a genuine belief that the claimant had committed misconduct and there were reasonable grounds for that conclusion. His belief and the reasons for it were clearly set out in the dismissal letter. Mr Jordan relied on the overwhelming witness evidence to the

effect that the claimant had been violent and we find that he was plainly reasonably entitled to do that.

268. We find that there was a reasonable investigation. A large number of witnesses were interviewed who gave broadly consistent evidence. The claimant did not identify any deficiency in the investigation which might have created unfairness or been unreasonable. The further witnesses suggested her by her appear to be at best peripheral and were not witnesses who could speak to the core issue of whether she was violent on 25 January (for example, Richard Ball).

269. We do not think it was unfair for the claimant not to have been given the opportunity of cross-examining witnesses in the internal process, particularly in the context of the claimant having been violent. The claimant had the statements and could make representations based on that evidence.

270. It was striking that in her oral evidence the claimant accepted that it was inevitable that Mr Jordan would dismiss based on the evidence before him. The claimant's argument on unfairness really amounts to a complaint about the procedure leading up to Mr Jordan's decision. Her complaints are set out in the list of issues which has been replicated above. Before we address those matters we should say that we are satisfied that the respondent followed a process which was overall fair. All of the fundamental steps which in our view are usually necessary to demonstrate a fair process were taken. The claimant was aware of the allegations against her, she participated fully at the investigation and disciplinary stage and she had the evidence relied upon by the respondent so that she could comment on it. The claimant was also given an appropriate right of representation and a right of appeal (which she decided not to exercise). The claimant was warned an outcome of the disciplinary may be her dismissal, and she was able to provide evidence in the form of a statement as well as provide oral evidence at the meeting which was properly considered by the decision maker.

271. We have considered all of the matters which the claimant suggests led to procedural unfairness and we find that the claimant has not shown any matter which led to unfairness. In particular:

a. There is no evidence that the decision maker had a conflict of interest. Pamela Seals' involvement was not a matter which gave rise to any unfairness to the claimant.

b. The delay before the investigation meeting and then the disciplinary hearing was not so substantial as to give rise to any unfairness and the delays were in part attributable to the claimant's poor health.

c. There is no evidence that the investigation was influenced at all by the allegations made to West Midlands police, and no evidence that any comment was fed back to the respondent by the police or that any such

feedback formed part of the disciplinary investigation by Mr Simmonds or decision making by Mr Jordan.

d. We are satisfied that Mr Jordan focused only on the allegation of physical violence on the afternoon of 25 January 2019. This was a reasonable (and undoubtedly right) course for him to take.

e. We do not agree there was collusion by the HR team as alleged by the claimant. We are also satisfied that Mr Jordan took a reasonable step in speaking to a non- HR witness from the legal department, Non Owen, to effectively test the claimant's allegation of collusion.

f. It was reasonable for the Respondent to proceed with the disciplinary process rather than await the conclusion of any other process. Especially since it was unclear how the claimant wanted to progress her other issues – for example she had previously said that her original grievance of 2 September 2018 was fully resolved to her satisfaction.

g. There is no evidence for the assertion that the reason for the claimant's dismissal was avoidance of a severance payment under the Framework document. We are entirely satisfied that the reason for the dismissal was the claimant's conduct on 25 January 2019.

272. We find that dismissal was within the range of reasonable responses given the finding that the claimant had been violent and her failure to accept any responsibility for that. We find that decision was reasonable even taking into account, as Mr Jordan did, the claimant's disability. Mr Jordan was reasonably entitled to conclude that he could not be satisfied that such an incident would not reoccur given the claimant's failure to even acknowledge what had taken place. We also find it was reasonable for Mr Jordan to take into account that the claimant had failed to comply with her WAP and go home even when instructed to do so and that one of the people who the claimant had been violent towards, Ms Farquharson, was supposed to be a buddy who the claimant had identified as someone who she could trust to support her. These were further matters which in our judgement confirmed that the decision to dismiss was within the reasonable range.

Our findings on the claim of wrongful dismissal

273. The issue for us to consider is whether the claimant committed gross misconduct entitling the respondent to dismiss her without notice. We emphasise that we are making our findings on a balance of probabilities basis.

274. Although we have not heard directly from those present on 25 January we have considered all of the evidence surrounding that day and had regard to the substantial witness evidence which was collected from those present. In light of all the evidence we concluded that the claimant is more likely than not to have been physically violent to two of her colleagues on 25 January. We have set out our relevant findings of fact in more detail above.

275. Accordingly, the Claimant was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the Respondent to summarily terminate her contract and the wrongful dismissal claim must therefore fail.

Our findings on the claim of unlawful deductions from wages/breach of contract – holiday pay

276. The claimant alleges that she was entitled to an additional 1.5 days holiday pay than she was paid. We remind ourselves that it is for the claimant to demonstrate the level of pay for accrued holiday on termination that she says she should have received compared to the level of accrued holiday pay that she did receive.

277. The claim relates to January 2019. The claimant says that although she was on pre-booked annual leave, she was in fact ill on 2-4 January 2019. However the fact is that the claimant did not self-certify as ill on those dates in line with the respondent's sickness absence policy. This was a process with which the claimant was familiar and indeed she had self-certified in compliance with the policy as recently as November and December 2018. In view of the claimant's failure we consider therefore those days were correctly counted as annual leave rather than sickness absence and the claimant has failed to prove her claim.

Our findings on the out of time claims

278. We have now considered all of the claimant's complaints which are in time, and we have concluded that each allegation has failed. As part of our assessment we have taken into account the evidence which we saw and heard relating to the claimant's out of time complaints of discrimination but we were not referred to anything which might be considered to be relevant background evidence supporting the in-time complaints. We shall now consider whether we have any jurisdiction to hear the complaints which were brought out of time (i.e. those relating to acts alleged to have occurred prior to 15 December 2019). The out of time complaints related to alleged failures to make reasonable adjustments and alleged disability related harassment.

279. Since the out of time claims are all claims under the Equality Act the starting point is Section 123 of the Equality Act 2010 which provides as follows:

(1).....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.

280. In this case the claimant relied on showing there was an act of discrimination extending over a period in order to bring all of her allegations of discrimination in time. Following the decision of the Court of Appeal in Hendricks v Metropolitan Police Commissioner [2003] IRLR 96 the burden was on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period. There was no suggestion in this case of a continuing act which should be approached as being a rule or a regulatory scheme which during its currency continues to have a discriminatory effect. As the claimant has failed on every allegation of discrimination which is in time this means there can be no continuing act which would bring the earlier acts in time. Accordingly the tribunal only has jurisdiction to hear the earlier allegations if they were brought within such other period as we think just and equitable.

281. We remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule - see Robertson v Bexley Community Centre 2003 IRLR 434. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings - see Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050 CA.

282. The relevant factors which should usually be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

283. The primary difficulty for the claimant is that she has not presented a positive case as to why it would be just and equitable to extend time. The issue was not addressed in her witness statement, her skeleton argument or her closing submissions. When the claimant's attention was drawn to the potential time issue in oral claiming submissions by the Employment Judge her response focused only on her case that there was a continuing act.

284. We do not think it would just and equitable to extend time to consider matters pre dating 15 December 2018 for the following reasons:

a. The claimant has not presented any evidence as to why she did not bring a claim earlier.

b. There is no evidence that the claimant would have been unable to bring a claim earlier, save perhaps for a brief period after 25 January 2019 when the claimant reports being very unwell after what had taken place on that day. In our judgment even taking the claimant's evidence at its highest the period when she reports being incapacitated was a period of weeks rather than anything longer. By early March 2019 the claimant was able to communicate with the respondent and progress her issues – on 5 March she raised concerns about data protection, on 8 March she requested copies of various polices and referred to obtaining access to her laptop, on 22 March she raised an additional grievance and 29 March she attended an investigation meeting and gave her account of what happened.

c. It is abundantly clear that the claimant was aware of her rights under the Equality Act throughout her employment, but she had not acted promptly to bring the claim earlier.

d. A number of the allegations are historic – relating to 2016, 2017 and early 2018.

e. The respondent has clearly struggled to obtain direct witness evidence in relation to a number of the historic allegations (some of which involve individuals who have left the business) and was reliant on constructing its case from documentary evidence which did not tell the whole story. This indicated that the cogency of the evidence had been affected by the delay. This was part of the reason why we decided it was not appropriate to attempt to make findings on the out of time allegations.

f. We took into account that there were a number of allegations which are less substantially out of time however this did not carry much weight in light of the other factors which we identified.

g. There is no suggestion that the respondent failed to respond to requests for information. On balance the evidence indicates that the respondent was willing to engage with the claimant's complaints internally but she was inconsistent about how she wanted them progressed. An example is the claimant responding to Ms Davies that she would deliberate on whether she wanted to make a formal complaint about the alleged harassment on 1 October and then complaining that she had not been supported in that complaint on 9 December, despite the fact that she had not got back to Ms Davies on whether she wanted the complaint to be progressed..

h. We did not consider that the question of the steps taken by the claimant to obtain professional advice was determinative in circumstances where the claimant was somebody who was herself aware of her rights and was plainly an intelligent individual who was capable of progressing her complaints herself.

i. Although the claimant's claim was wide it was abundantly clear to us after having heard the claimant over the 8-day hearing that the matter which she was most concerned with was her dismissal and in particular her allegation that her dismissal was discriminatory and/or was as a result of the alleged disclosure of 9 December 2018. By way of example that matter was put right at the forefront of both the claimant's skeleton argument and her written closing submissions. We have considered that matter in full. We therefore did not consider that the claimant was put at any substantial prejudice by our not considering the out of time allegations. On the other hand we felt the respondent would be at an unfair disadvantage, particularly in relation to the historic allegations where the cogency of the evidence had been affected by the delay.

j. We considered all the evidence to which we were referred in respect of the out of time claims and we were not referred to any compelling evidence which would indicate that the claimant had been, or may have been, discriminated against.

Our overall conclusion

285. Our overall conclusion is that for the above reasons we do not have jurisdiction to hear the claims pre dating 15 December 2018 and the claims after that fail. All of the claims are therefore dismissed.

Signed by: Employment Judge Meichen

Signed on: 20 November 2020