Case Nos. 1306083/2019 V
1304439/2020

EMPLOYMENT TRIBUNALS

Claimant: Miss A Asphall

Respondent: Homeserve Membership Ltd

FINAL HEARING

Heard at: Birmingham (in public; partly by CVP) **On:** 30/11/20 to 4/12/20 & (deliberations in private) 7/12/20

Before: Employment Judge Camp Members: Mrs B E Hicks
Dr G C Hammersley

Appearances
For the claimant: in person
For the respondent: Mr S Purnell, counsel

RESERVED JUDGMENT

The claimant's claims fail and are dismissed.

REASONS

Introduction

1. The claimant worked for the respondent as a Customer Service Representative at its call centre in Walsall from 15 February 2010. She was dismissed for ill health incapability on 27 November 2019[1], having been off sick from 30 January 2018. She has made two claims to the Tribunal and they have been dealt with together. In relation to the first, the claimant went through early conciliation from 29 April 2019 to 13 May 2019 and presented her claim form on 19 July 2019. The second claim form, which followed early conciliation in a single day, on 6 February 2020, was presented on 26 February 2020.

2. What directly and indirectly led to the claims was the respondent's introduction, in mid-2016, of what it described as "*Shift Optimisation*". Shift Optimisation was an attempt to standardise shift patterns and working hours. The default position became a "fully flexible" 40 hour week. Employees like the claimant, who worked

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[1] The claimant's dismissal would not have taken effect until it was communicated to her, which was several days after 27 November 2019. The correct effective date of termination was not discussed or mentioned during the hearing and nothing turns on it.

fewer than 40 hours a week with fixed shifts on fixed days, and who did not want to work 40 hours a week with no fixed shifts or even fixed working days, had to go through an application process. That process was started by them making a formal request on a "*Flexible Working Request Form*". The claimant completed her form on 18 July 2016.

3. The claimant evidently enjoyed her job with the respondent and seems to have been good at it; there have certainly been no suggestions of any performance issues whatsoever. We think it is a crying shame that she should have ended up losing that job and should find herself at an Employment Tribunal final hearing in 2020 essentially because the respondent decided more than 4 years ago not to fully grant her request for 'flexible working'. However, that does not mean she or the respondent is at fault; nor, if she is not to blame, does it mean that the respondent has breached her employment rights, let alone breached them in the ways she alleges.

Claims & Issues

4. The claimant's Tribunal complaints and the issues arising in them were clarified at two preliminary hearings.

5. The first was before Employment Judge Battisby on 3 December 2019. In his written record of that preliminary hearing, he identified four types of complaint that were going forward to a final hearing:

   5.1 direct race discrimination, about (in the Judge's words) the "*refusal to adjust* [the claimant's] *working hours as requested*";

   5.2 racial harassment and harassment related to "*disability by association*" under section 26 of the Equality Act 2010 ("EQA") – 12 complaints labelled a. to l., each of which is about things that are said to be both types of harassment;

   5.3 flexible working complaints under section 80H of the Employment Rights Act 1996 ("ERA").

6. Employment Judge Battisby listed the issues in paragraphs (8) i. to xiii. of his Case Management Summary. With one or two changes, explained below, we adopt his list, which we shall refer to as the "List of Issues" and which we won't repeat in these Reasons.

7. Judge Battisby made an order that the parties should tell the Tribunal if his list of issues was inaccurate or incomplete in any important way. Only the claimant responded to that order. She made one minor and uncontroversial correction, to harassment complaint vii.: that the alleged perpetrator was just one individual (a Mr Bloomer) and not two as the Judge had thought.

8. The second preliminary hearing was by telephone before Employment Judge Miller on 17 September 2020. He confirmed that as well as the complaints identified by Judge Battisby, the claimant was claiming that she was unfairly dismissed and that her dismissal was an act of victimisation under EQA section 27. In his Case Management Summary, Judge Miller stated that the issues were as set out by Judge Battisby, with some additions which he listed. We also adopt Judge Miller's list (and, again, won't be setting it out here).

9. On day 1 of this final hearing, which was largely taken up by us reading into the case and on which we heard no witness evidence, the claimant told us that, from her point of view, the Lists of Issues produced by Employment Judges Battisby and Miller were complete and correct. However, at the start of day 2, she said that she wanted to pursue a disability discrimination claim based on her being a disabled person, rather than on so-called associative disability discrimination. We noted that she hadn't mentioned this proposed claim at either preliminary hearing, and explained that if she wanted to pursue such a claim, she would either have to persuade us that such a claim was before the Tribunal already – and our preliminary view was that it wasn't – or she would have to apply successfully to amend. After some discussion, she decided to take it no further.

10. Also on day 1:

10.1 the claimant confirmed that her direct race discrimination and racial harassment claims were based on "*colour*" (EQA section 9(1)(a)) and were to the effect that she was treated as she was because she is – using the word she herself uses – black;

10.2 we discussed the claims for 'harassment related to disability by association', and, in particular, that "disability by association" is not one of the protected characteristics covered by the EQA. It was agreed that the List of Issues should be read as if the reference to "*the protected characteristic of …. disability by association*" was simply to "disability". The claimant's case, as we understand it, is that the alleged harassment took place in the course of a process or series of processes that related to her request for particular working hours to accommodate her need to look after her disabled daughter, and that the respondent was aware of that need and of her daughter's disabilities, and therefore that the harassment was disability-related. The Employment Judge noted that for a claim of disability-related harassment to succeed, it is the respondent's conduct itself that must be related to the protected characteristic of disability;

10.3 respondent's counsel, Mr Purnell, confirmed the respondent had conceded that the claimant's daughter was at all relevant times a disabled person under the EQA;

10.4 we discussed the claim under ERA section 80H. The claim relates to two flexible working applications of sorts: that of July 2016, mentioned above; one of 16 June 2017. The issues to be dealt with in that claim are not quite as set out in the List of Issues. In particular, "*Did the respondent have reasonable grounds for refusing the entire application?*" is not an issue in the case, as a respondent does not necessarily have to have reasonable grounds for refusing an application, so long as it complies with ERA section 80G(1). The issues are in fact as follows:

10.4.1 were the applications, or either of them, valid flexible working applications under ERA section 80F? If so –

10.4.1.1 were they dealt with in a reasonable manner?

10.4.1.2 did the respondent notify the claimant of the decision on the application within the decision period (ERA section 80G(1)(aa))?

10.4.1.3 to the extent the respondent refused either application, did it do so because it considered that one or more of the grounds (i) to (ix) in ERA section 80G(1)(b) applied?

10.5 we also discussed time limits. The unfair dismissal and victimisation claims do not have time limits problems, but the other claims do. The List of Issues refers correctly to EQA section 123 in connection with time limits, but to the wrong time limits provisions in ERA. The relevant part of ERA is section 80H(5). We reminded the claimant that where complaints were presented outside the primary 3 month (plus early conciliation extension) time limit, it was for her to persuade us, with evidence, to extend time rather than being on the respondent to persuade us not to;

10.6 finally, it was agreed that the only remedy issues we might deal with in this hearing were:

10.6.1 the so-called 'Polkey issue' – the question of whether any compensation and damages should be reduced because of any possibility that the claimant would have been dismissed fairly and without victimisation in any event;

10.6.2 in relation to unfair dismissal, contribution and fault under ERA sections 122(2) and 123(6);

10.6.3 whether and if so to what extent compensation should be increased or decreased for failure to follow a relevant ACAS code, under section 207B of the Trade Union and Labour Relations (Consolidation) Act 1992.

11. In the event, because the claimant's claims failed, and the only remedy issue we have dealt with to any extent (for the sake of completeness) is the Polkey issue.

The law

12. The Lists of Issues, amended as explained above, accurately reflect the law.

13. A summary of the law relating to time limits is set out in the "*Time Limits*" section of these Reasons, below.

14. In relation to unfair dismissal, we note, first and foremost, the wording of section 98 of the Employment Rights Act 1996. It is for the respondent to satisfy us that the principal reason for dismissal was indeed capability / long term absence. If we are satisfied that it was, we then have to consider whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. In terms of case law in relation to that, we have considered in particular:

14.1 the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. That test applies in all circumstances, to both procedural and substantive questions;

14.2 the fact that we may not substitute our view of what should have been done for that of the reasonable employer, have to guard ourselves against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v

Small [2009] IRLR 563 at paragraph 43), and remind ourselves that only if the respondent acted as no reasonable employer could have done was the dismissal unfair;

14.3 Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677 and the fact that the band of reasonable responses test is not infinitely wide, that it is important not to overlook ERA section 98(4)(b), and that Parliament did not intend the Tribunal's consideration simply to be a matter of procedural box-ticking.

15. On the Polkey issue, we note the Polkey case itself (Polkey v AE Dayton Services Ltd [1987] UKHL 8), paragraph 54 of the EAT's decision in Software 2000 Ltd v Andrews [2007] ICR 825, and Chagger v Abbey National plc [2009] EWCA Civ 1202.

16. In relation to the discrimination and victimisation complaints, we again begin with the wording of the relevant legislation, in particular sections 13, 23, 26 and 136 of the EQA.

17. In terms of case law, our starting point is paragraph 17, part of the speech of Lord Nicholls, of the House of Lords's decision in Nagarajan v London Regional Transport [1999] ICR 877. We also note paragraphs 9, 10 and 25 of the judgment of Sedley LJ in Anya v University of Oxford [2007] ICR 1451.

18. So far as concerns the burden of proof, a succinct summary of how [the predecessor to] EQA section 136 operates is provided by Elias J [as he then was] in Islington Borough Council v Ladele [2009] ICR 387 EAT at paragraph 40(3), which we adopt. We have to start by looking for "*facts from which the court could decide, in the absence of any other explanation*" that unlawful discrimination has taken place.

19. Although the threshold to cross before the burden of proof is reversed in accordance with EQA section 136 is a relatively low one – "*facts from which the court* could *decide*" – unexplained or inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status[2] and/or incompetence are not, by themselves, such "*facts*"; unlawful discrimination is not to be inferred just from such things – see: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33; Chief Constable of Kent Police v Bowler [2017] UKEAT 0214_16_2203. Further, section 136 involves the tribunal looking for facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred. See South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23.

20. Generally, in relation to the burden of proof, we have applied the law as set out in paragraphs 36 to 54 of the decision of the Court of Appeal in Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913.

[2] i.e. the claimant can point to someone in a similar situation who was treated better and who is different in terms of the particular protected characteristic that is relevant, e.g. is a different age, race, sex etc, or, in a victimisation case, is someone not subjected to the same detriment and who did not do a protected act.

21. As to case law relating to harassment, we thought it was unnecessary for us to look beyond Richmond Pharmacology v Dhaliwal [2009] ICR 724, at paragraphs 7 to 16, read in conjunction with paragraphs 86 to 90 of the judgment of Underhill LJ in Pemberton v Inwood [2018] EWCA Civ 564.

22. In relation to the flexible working claim, it is a sufficient summary of the relevant law for present purposes for us to remind ourselves – again – of the wording of the relevant parts of ERA (sections 80F, 80G and 80H) and to note what we have already stated, in paragraph 10.4 above, about such claims.

Factual background

23. Some of our findings of fact are made later in these Reasons, in sections dealing with particular claims and issues.

24. We refer to the respondent's cast list and chronology, which should be deemed to be incorporated into these Reasons.

25. We had witness evidence on the claimant's side from the claimant herself and from a former colleague, Ms P Hitchen. Ms Hitchen accompanied the claimant to some relevant meetings, but her main role in the proceedings is as a comparator for the purposes of the claimant's race discrimination claims. Like the claimant, she submitted a Flexible Working Request Form in July 2016 because she needed working hours that accommodated her caring responsibilities for her disabled child. Unlike the claimant, she is white and her request was allowed in full. She was dismissed by the respondent in February 2017 for reasons unconnected with the Shift Optimisation / flexible working request process.

26. On the respondent's side, we heard from:

    26.1 Mr S McKechnie, who was employed by the respondent until July 2020 as a Senior Customer Service Manager. He was involved in the Shift Optimisation Process and had a meeting with the claimant about her request in December 2016. The claimant alleges that he harassed her at that meeting and subsequently – harassment allegations d. and e. We note that he is the only witness from the respondent's side who had any dealings with either of the claimant's flexible working requests. The other individuals the claimant specifically alleges harassed her directly in relation to those requests – allegations a., b., c. and g. – such as Mr Bloomer, have left the respondent's employment, mostly some time ago, and they are all apparently either uncontactable or want nothing to do with this case;

    26.2 Ms K Ward, who was Team Manager of the team the claimant was working in from October 2017 until the claimant went off sick in January 2018. Harassment allegations h. and i. involve her;

    26.3 Mr D Taylor, an occupational health specialist nurse practitioner, who has provided in-house occupational health support for the respondent since January 2017 and who in that capacity saw the claimant in May 2018. The claimant alleges harassment against him – allegation j.;

    26.4 Ms K Deacon, who was Head of People Operations at the respondent for about 4 years until March 2020 and had direct dealings with the claimant

between August 2018 and 10 January 2019 and who is named in the claimant's harassment allegations k. and l.;

26.5 Mr J Saul, at the relevant time Head of Customer Relations, who dealt with a grievance the claimant raised in 2019 before she was dismissed. The claimant is not within her claims alleging he harassed or otherwise discriminated against her;

26.6 Ms D Edwards, who is and was a Customer Services Manager, to whom Ms Ward reported, who took the decision to dismiss the claimant, and against whom (with Ms Ward) harassment allegation i. is made. Ms Edwards gave evidence twice – she was, by consent, recalled after the claimant highlighted in closing submissions a possible inaccuracy in her evidence by reference to a document that had not been put to Ms Edwards during cross-examination.

27. All of the witnesses gave their evidence by video (CVP) except for the claimant. After giving evidence, the claimant attended via CVP for the rest of the hearing. Respondent's counsel attended remotely for the whole hearing. The Tribunal were together and physically present in the Tribunal room throughout, watching and listening to evidence and submissions from remote participants via a large video screen. Intermittent technical difficulties across several days probably added a total of 4 hours or more to the length of the hearing, but did not in our view adversely affect the fairness of the proceedings.

28. The claimant sent an email at 5.59 am on 2 December 2020 (day 3 of the hearing) applying for a 2 day adjournment because she was feeling particularly unwell. We were in principle open to such an application. However, the claimant apparently spoke to her GP on the telephone and, although we started late on that day, she attended the hearing via CVP and she did not pursue the application.

29. There was an agreed file of documents with over 400 pages in it, many of which we were, and many of which we weren't, taken to during the hearing. We did not, and did not have time to, read everything in the file. At the start of day 2, the respondent, through counsel, produced 30 pages of previously undisclosed documents relating to Ms Hitchen. Although the explanation for why they had not previously been disclosed was highly unsatisfactory, we decided (without objection from either side) to admit 25 pages in evidence and ignore the other 5 pages, which related to the circumstances of Ms Hitchen's dismissal and which we deemed not relevant.

30. All witnesses were cross-examined, albeit Ms Hitchen was asked only a handful of questions. The claimant was a fluent and seemingly confident cross-examiner. She did, though, sometimes need to be reminded to concentrate on her Tribunal complaints and on the issues arising in them. In her own witness evidence and when asking questions in cross-examination, she focussed a lot of attention on things which were not relevant. She also showed a marked reluctance to put her allegations of discrimination to the respondent's witnesses, to such an extent that we were left wondering whether in her heart of hearts she really believed they were all motivated by racism or prejudice against parents with disabled children. It was on occasions necessary, in fairness to those against whom these serious

(and in some cases potentially career-ending) allegations of discriminatory harassment were being made, for the Employment Judge himself to put them.

31. The general impression we gained of the witnesses, including the claimant, was that, with limited exceptions, no one was lying to us and everyone gave their evidence honestly, and to the best of their recollection. This does not, however, mean that what everyone told us was true and accurate.

32. It is possible, for example, for a respondent witness to do something that is unlawful race discrimination because of unconscious racial bias. If someone like that said they were not guilty of discrimination, it would not be a lie, because they honestly believed what they were saying was true.

33. When considering the claimant's own evidence, we bear in mind that much of it is about what happened several years ago, and that during those years, she has become increasingly dissatisfied with the respondent, has brought these Employment Tribunal proceedings, and has been dismissed. The brain is not a neutral recording device and memory is unreliable at the best of times. Everyone sometimes mishears and misunderstands what is said, and misinterprets how things are said, body language, and other non-verbal cues. Memories fade and change over time. How people feel, and their perceptions, affect all of this considerably. We often hear and see what we expect to, rather than what is actually there. And if we are involved in a legal dispute, we tend to remember things in a way that fits our case, and to reject and forget things that don't fit our case. None of this is meant as a criticism of the claimant; it is simply an aspect of human nature.

34. We shall now set out the relevant facts.

35. The claimant moved from full to part-time – 16 hours a week – in or around February 2012, on her return from maternity leave. Around April 2016, she agreed with her manager a new fixed shift pattern, working Mondays and Tuesdays from 9.30 to 4.30 and Wednesdays 9.30 to 4, totalling 20 hours per week.

36. The respondent's plans for Shift Optimisation were finalised in or around mid June 2016 and consultation with staff began in the first half of July 2016. All the paperwork relating to it doesn't seem to have been made available to us, if it still exists, but we do have what appears to be an internal management paper dated 16 June 2016 explaining what was to happen and why, and to which we refer. In short, the respondent felt that the hours staff were working didn't fit with customer requirements and was inefficient, and that Shift Optimisation would save significant amounts of money.

37. Consultation consisted of collective meetings with staff followed by a series of individual meetings, particularly with staff like the claimant who did not want to move to working a "fully flexible" 40 hour week and who made a "Flexible Working Request". Different managers chaired different meetings, but every, or almost every, member of staff who had made a request had a meeting with a decision-making panel that included Mr McKechnie or another relatively senior manager called Mr L Barrett.

38. Around 400 to 500 members of staff were affected, of whom about half made a request. This meant that Mr McKechnie and Mr Barrett each had hundreds of

meetings. Understandably, Mr McKechnie has very little independent recollection of any particular meeting, but there are contemporaneous written notes of all of them.

39. On the evidence, the aim of the process, and the aim of the meetings, looks to us as if it was more about persuading staff to accept however much of their request the respondent would agree to, rather than there being genuine negotiations with a view to a compromise solution that was equally acceptable to both sides. Nevertheless, the process was successful, in as much as only two people left the business as a result of it. Everyone else, the claimant included (however reluctantly), reached agreement with the respondent as to what their shift pattern would be going forward.

40. The claimant made her application on the respondent's application form on 18 July 2016. She wrote little to explain why she felt she needed to continue to work her preferred hours. Her application can be compared and contrasted with that of Ms Hitchen, made on 15 July 2016, which had attached to it two pages of detailed information about her and her disabled son's particular circumstances.

41. Ms Hitchen had at least three individual consultation meetings, on 15 and 20 July and 21 September 2016. Her application, which was to work 25 hours per week, Monday to Friday, 9.30 to 4.30, and one in four Saturdays, was approved.

42. The claimant had individual consultation meetings on 18 July, 1 August, 10 and 24 October and 6 December 2016, and 5 April 2017. We note the following in connection with those meetings:

    42.1 The respondent had no difficulty accommodating the claimant working 20 hours per week and the claimant was willing to do a shift during one in four weekends. The essential difference between its and her positions was that the respondent wanted the claimant either to work one 'late' (i.e. to 8 pm) during the week or to work one day every other weekend rather than one in four, and the claimant felt she could do neither of those things.

    42.2 At the meeting on 24 October 2016, the claimant provided the respondent with a copy of a letter from a Consultant Immunologist who had seen the claimant's daughter as an outpatient on 13 September 2016. The letter confirmed that she had various conditions which were not causing particular difficulties at that time, that the claimant was looking after her well, and that the next appointment would be in 12 months time.

    42.3 The meeting on 24 October 2016 was billed as the "*Final Individual Consultation Meeting*". The claimant was told that her options were to choose between doing a late and working every other weekend and she was not prepared to choose. The meeting was adjourned, presumably to give her an opportunity to think about it. The meeting on 6 December 2016, chaired by Mr McKechnie was the "*Reconvened Final Individual Consultation Meeting*". It was confirmed to the claimant that her request had been declined to the extent that, although she could work 20 hours per week, on fixed days during the week, it was a requirement that she either work 1 late per week – which could be on a fixed day – or work every other weekend. If she was unwilling to sign up to one of those options, she would be given notice of dismissal on the basis of "*SOSR*" ("*some other substantial*

reason" under ERA section 98(1)(b)). She was told there was an appeal process. There was no suggestion that the decision that had been reached in relation to her application was other than final. However, she was given, and took, the option of going away to discuss it with her family, following which the meeting was to be reconvened a second time.

42.4 At least one attempt was made to hold the re-reconvened meeting in early 2017, but by March 2017 it still hadn't taken place. In March 2017, there was an exchange of emails between the claimant and Mr McKechnie, in which the claimant said she would agree to work to 8 pm on Mondays, in accordance with a suggestion Mr McKechnie had made. At the meeting on 5 April 2017, what the claimant had put forward in March was officially agreed by the respondent. The gist of the claimant's evidence about this, which we entirely accept, was that she agreed to it only because she understood that (as was indeed the case) if she didn't she would lose her job.

43. Finding working late on Mondays very difficult to manage, the claimant put in a flexible working request on 16 June 2017. The request she put in was made under the respondent's flexible working procedure and on the face of it stated in terms that it was a statutory request for flexible working. What she was asking for was for her late working day to be to 6.30 pm rather than to 8 pm.

44. The claimant's request was refused, on the basis that, "*it would have a detrimental effect on our ability to meet our customers' needs*". The date it was refused is unclear, but we assume it was in mid to late August 2017, because the claimant was given 7 days to appeal the outcome, appealed it by a letter dated 25 August 2017, and the appeal was not rejected as out of time.

45. On 19 September 2017, the claimant emailed a Senior HR Business Partner effectively telling her that she was going to start working 9.30 to 6.30 on Mondays instead of 11 to 8 as had been agreed in April 2017. The immediate need for the claimant to do this arose from the fact that her mother, who undertook childcare for the claimant on Mondays, was about to start a new job and would be going to work at 7 pm. There was never a reply to the claimant's email and those were the hours the claimant worked from then until she went off sick in January 2018.

46. The claimant's flexible working appeal meeting was on 31 October 2017. Notes were taken, to which we refer. As with the process in 2016, the gist of the discussion was the respondent wanting the claimant either to work one late a week or to work 1 in 2 Saturdays rather than 1 in 4. The reason she put forward for not being able to work 1 in 2 Saturdays was lack of childcare. Again, the claimant was told of the potential for dismissal if she was unable to work as the respondent wanted her to.

47. The respondent provided a letter declining the claimant's appeal around 15 November 2017. The letter stated, "*You have now exhausted the internal processes available to you and you have no right of appeal*", and ended, "*we will hold a separate meeting to discuss the next steps. The details will follow*." For reasons that are unclear, although possibly it was something to do with the fact that the claimant had only just started in a new team, working under Ms Ward, no details of any separate meeting were ever sent and no such meeting took place.

Meanwhile, the claimant continued to work only until 6.30 pm on Mondays, as if her appeal had been successful. Ms Ward appears not to have noticed that the claimant was working this unauthorised shift pattern (she didn't know until the claimant told her, in or around January 2018) and no action was ever taken against the claimant as a result of her doing so.

48. At around the end of 2017 or the beginning of 2018, the claimant told Ms Ward what the outcome of her appeal was. We are unable to say on the evidence who instigated this conversation, but we don't think it matters. If it was Ms Ward, we note that she, as the claimant's manager, had every right to know and that the claimant had no right to withhold this information from her. There were discussions between Ms Ward and the claimant that resulted in the creation, around 18 January 2018, of a "*Timeline*" document, which was a chronological narrative of what had happened from the claimant's point of view in relation to her requests to work particular hours since July 2016. That document was passed on to Ms Edwards and to Mr Barrett, who was Ms Edwards's line manager, with a view to them having an informal meeting with the claimant to discuss what was to happen next.

49. There was some uncertainty from the claimant's perspective as to what the proposed meeting with Ms Edwards and Mr Barrett was to be about. Concern about the meeting seems to have been the immediate cause of the claimant going off sick from 30 January 2018 onwards. The GP fit notes give "*Stress at work*" as the reason for her not being fit for work.

50. There was an absence review meeting between the claimant, Ms Ward and Ms Edwards on 14 March 2018. It took place off the respondent's premises, at a neutral venue – a hotel – at the claimant's request. We shall discuss the meeting further when dealing specifically with harassment complaint i., which relates directly to it. We note that it was confirmed to the claimant at the meeting that if and when she returned to work she could continue to work the hours she had been working since September 2017 for at least the following six months, i.e. to September 2018.

51. There was an occupational health appointment with Mr Taylor on 16 May 2018. In his short report, apparently prepared on the day:

    51.1 he stated that the claimant was, "*currently absent due to work related issues*" and "*only likely to RTW* [return to work] *once these issues have been resolved*";

    51.2 in answer to the question, "*Is the health problem likely to recur or affect future attendance?*", he wrote, "*This seems to be more of a managerial issue related to her working hours*";

    51.3 he advised that, "*a meeting be set up with her direct line manager and HR to openly discuss any support options her employer may be able to offer her.*";

    51.4 he expressed the view that the claimant did not have a disability under the EQA.

52. The claimant was dissatisfied with Mr Taylor's report and thought it was biased against her. She wrote a detailed critique of it, over several pages, in late June 2018, which she sent to Mr Taylor and copied to Ms Ward. The following day, Mr Taylor replied briefly and appropriately to the claimant, and, so far as we are aware, had no further involvement in her case until these Tribunal proceedings.

53. Apart from that appointment with Mr Taylor, 14 March 2018 was, to the best of our knowledge, the last time during her employment that the claimant met with or even spoke to anyone at the respondent. There can therefore be no factual dispute about what happened, as all interactions between the claimant and the respondent were in writing – in emails, letters, and a handful of text messages.

54. For the rest of 2018, the respondent, initially through Ms Ward, then through one of Ms Deacon's subordinates (a Ms Walker), and then through Ms Deacon herself, made strenuous efforts to have meetings with the claimant to discuss a way forward. The claimant was unwilling to meet, or to speak to anyone over the phone. There was lots of correspondence backwards and forwards, and a number of things were discussed, but we think it could fairly be summarised as: the respondent trying to draw a line under what had happened in 2016 and 2017 and to look at what could be done to facilitate the claimant's return to work (and in particular encouraging the claimant to make a new flexible working request, with every indication being given to the claimant that the outcome might well be different this time) and to discuss this at an informal face-to-face meeting; and the claimant not wanting to do that but instead to have what she described as "*a restorative meeting*". The culmination of that correspondence was an exchange of letters in late November 2018. We refer to the claimant's letter of 21 November 2018 and Ms Deacon's reply of 28 November 2018, which speak for themselves.

55. In her letter of 28 November 2018, Ms Deacon had arranged a meeting with the claimant on 13 December 2018. The claimant replied on 10 December 2018 to say she could not make it. There was then some further correspondence before, on 10 January 2019, Ms Deacon emailed the claimant to say that the respondent would "*now be following the absence management process*" and that the claimant would shortly be hearing from Ms Edwards about that. That was the end of Ms Deacon's involvement.

56. Ms Edwards attempted to begin a formal absence management process with the claimant by writing to her on 16 January 2019 to invite her to a meeting on 21 January 2019. The claimant did not attend, and did not tell anyone that she would not be doing so. Correspondence then passed between Ms Edwards and the claimant. Ultimately, Ms Edwards arranged a meeting on 2 April 2019, which she wrote would take place in the claimant's absence if she did not attend, which it did because the claimant did not.

57. The claimant's given reasons for refusing to attend were not that she was too unwell to do so, or anything of that kind. Instead, it was (in her own words, in a letter of 1 April 2019), "*I have been wronged …. I have been caused a lot of distress, I have been put in hardship, for the first time in my life I have been forced to go off sick like this …. Hence, I see restorative approaches to be a way forward … There are no restorative approaches either in the purpose of the … meeting that you have suggested … or the discussion points that you have put forth*".

58. Ms Edwards wrote a fairly long and detailed meeting outcome letter to the claimant on 8 April 2019. It included this: "*I need you to be clear on whether or not you are willing to attend a meeting to discuss your change of hours request, or whether you will be putting in a new flexible working request. To be clear, the business has given you an indication that they are minded to look on your request favourably, but this cannot be done without meeting with you. …. Additionally, you make specific reference to 'restorative' solutions and I would like you to be clear as to what you believe those restorative solutions to be so that I can give that full consideration.*"

59. The claimant never explained to anyone at the respondent what she meant by "*restorative*" solutions.

60. Also on 5 April 2019, the claimant was written to asking for her consent to write to her GP or treating consultant for an up to date medical report. The claimant did not reply. At least one other similar letter was sent to her by occupational health, in October 2019. She did not reply to that one either.

61. The next thing that happened after 5 April 2019 was that the claimant raised a formal grievance in writing, on 22 April 2019. She started early conciliation a week later. The grievance is substantially replicated in the first claim form.

62. The claimant has not made a claim about the grievance process or outcome. It was dealt with by Mr Saul. He was no more successful at getting the claimant to come to a meeting than other managers had been. He, too, ended up having to deal with things in her absence. He wrote to her with his decision on her grievance on 15 August 2019. Although he was critical of procedural aspects of the Shift Optimisation and flexible working processes as they were applied to the claimant, he was not persuaded that anything substantive had been done wrong. As an outcome, he proposed that the claimant return to work on the claimant's preferred shift pattern "*that I am now able to agree*" and that mediation take place between the claimant and the management team. He added, "*If this is not what you believe to be restorative action, please be explicit in your response to me as to what you feel restorative action is*". The claimant did not accept the outcome. Her letter responding to his decision ended with, "*As this matter is already being dealt with by the employment tribunal, as you are already aware, I prefer to let them proceed with its jurisdiction*."

63. On 26 September 2019, Ms Edwards wrote to the claimant inviting her to a second formal absence review meeting on 8 October 2019. Ms Edwards's letter warned the claimant that the meeting might proceed in her absence and that, "*one of the potential outcomes of this process could be the decision to terminate your employment on the grounds of ill health*". The claimant did not reply and did not attend. The meeting went ahead in her absence. On 15 October 2019 she was sent the meeting notes and was invited to a third formal absence review meeting on 27 November 2019. Again she was warned that it would go ahead in her absence if the respondent did not hear from her further. She was told that, "*a decision may be made to terminate your employment on the grounds of ill-health*". There was, once again, no response from the claimant.

64. The meeting on 27 November 2019 went ahead in the claimant's absence. There is a typed meeting record signed by Ms Edwards on the day. Ms Edwards wrote

to the claimant on 3 December 2019 with the outcome, which was dismissal "*on the basis of ill health*" with pay in lieu of notice. The claimant did not exercise her right of appeal.

Time limits

65. We are, as already mentioned, looking at two time limits under different pieces of legislation: EQA section 123 and ERA section 80H. What they have in common is that:

    65.1 the primary time limit is 3 months (plus any early conciliation extension) from the date of the thing the claim is about;

    65.2 there is a discretion to extend time. The basis upon which the discretion to extend time can be exercised is different under the EQA from under ERA, but in relation to both, the starting point is that the primary time limit applies, and that it is for the claimant to persuade the Tribunal that it should not apply and that time should be extended.

66. Unfortunately for the claimant, despite time limits always having been in the List of Issues and despite us having reminded her of this at the start of the hearing, she provided us with no explanation at all for why much of the claim was made late, or any other evidence on time limits issues. She did not make submissions on the point, or otherwise comment on it during the hearing.

67. Even if the claimant had actively argued that we should extend time, it would be highly relevant to whether or not we should do so that the respondent has suffered genuine prejudice as a result of the late presentation of the claim form. Significant numbers of people involved in the events the claim is about had left the respondent even before the claimant raised a grievance. And so far as concerns the claims relating to the Shift Optimisation process, the people in the meetings with the claimant, even if they could be tracked down by the respondent and were willing and able to give evidence, could not reasonably be expected to remember a handful out of hundreds of meetings that took place years ago. Had the claimant made a claim in 2016 or 2017, the evidential picture would probably have been very different.

68. There is no proper basis for us to extend time. The primary time limit is therefore the time limit that applies.

69. Going back 3 months plus the applicable early conciliation extension from the date the first claim form was presented takes us to 5 April 2019. If a claim dates from before then, it is out of time.

70. The Shift Optimisation process about which the first flexible working claim is made ended on 6 December 2016, when the respondent communicated to the claimant a firm and final decision not to grant her request. Even if that is not right, the last meeting about it was in April 2017, more than 2 years before the cut-off date for time limits purposes of 5 April 2019.

71. The second flexible working process ended with the appeal outcome of 15 November 2017, nearly 18 months before the cut-off date.

72. Precisely what the claimant's direct discrimination claim, about a "*refusal to adjust her hours as requested*", relates to was not immediately obvious to us. However, we have come to understand it as being about, and only about, not granting the claimant's two requests. As set out above in relation to the flexible working claims under ERA, the dates when the respondent decided not to grant the those requests were December 2016 and November 2017.

73. Even on the claimant's own case taken at its highest, and taking into account her oral evidence, by late 2018 the issue for her was no longer about her working hours, but was instead about why the decisions had been made in 2016 and 2017 not to grant her requests. To put it another way, she stopped asking for flexible working during 2018 and started asking for other things. She had no outstanding flexible working request after November 2017. She was actively encouraged to make a further one in 2018, and refused to do so.

74. On any reasonable view, the direct discrimination claim is out of time.

75. The only one of the claims a. to l. in the List of Issues that is potentially in time is l. Employment Judge Battisby when he prepared that List understood claim l. to be about alleged conduct of Ms Deacon from August 2018 to April 2019. However, as explained above (and in accordance with the claimant's own evidence at this final hearing), Ms Deacon had no significant involvement with the claimant or her employment after January 2019. This means that all of the claimant's discriminatory harassment claims are also out of time.

76. In summary:

    76.1 all of the claims in the first claim form were presented outside of the time limits that apply, the Tribunal has no jurisdiction to deal with them, and they therefore fail;

    76.2 the only claims that were presented within the relevant time limits are unfair dismissal and victimisation by dismissal.

77. We shall nevertheless consider all of the claimant's claims on their merits, as if they had all been presented in time.

Flexible working under ERA

78. Although the respondent used the language of a flexible working process under ERA in relation to the Shift Optimisation process in 2016, it was no such thing. The process under ERA is for when an employee wants to change their terms and conditions, for example by working different hours or working from home. The claimant wanted her terms and conditions to stay the same. Under the Shift Optimisation process, it was the respondent who was proposing to change them. In 2016, the claimant never made a flexible working application under ERA and there is no basis for a claim under ERA.

79. The situation in 2017 is different. The claimant was applying to change her working hours and her request of 16 June 2017 did say that it was a "*statutory request for flexible working*". To be a valid application in accordance with ERA section 80F(2), the request also had to include "*the date on which it is proposed the change should become effective*" and to "*explain what effect, if any, the employee thinks making the change applied for would have on* [their] *employer and how, in* [their] *opinion,*

any such effect might be dealt with". The claimant's request did not specify a date – the claimant wrote, "*ASAP*". We do not think that was sufficient (although the point is arguable), but even if it was, the request did not begin to "*explain what effect …* [etc]". It was therefore not a valid application under ERA and no claim under ERA could be made on the basis of it.

80. Even if we were wrong about that, and if the claimant's claims about the second request did not have insurmountable time limits problems, the only valid claim under ERA the claimant would have would be that the application was not dealt with within 3 months, in accordance with ERA section 80G(1B)(a). Apart from the time it took the respondent to deal with it, it was dealt with in a reasonable manner, i.e. the respondent followed a reasonable process, and it was refused on one of the grounds under ERA section 80G(1)(b). As explained above (and as we explained to the claimant during the hearing), a Tribunal deciding whether a flexible working application has been dealt with in a reasonable manner under ERA section 80G does not look at whether the substantive decision made by the respondent is reasonable.

Harassment

81. There is no factual dispute in terms of what meetings happened when. Such disputes as there are relate – to some extent – to whether particular things were said and – more so – to how things were said and/or how people were towards the claimant.

82. In relation to allegations a., b., c., f., and g., we had no witness evidence from the people the allegations were about. Nevertheless, for reasons explained above, the fact that we only have the claimant's evidence about what happened, and that we unhesitatingly accept the claimant told us the truth as she sees it, does not mean we automatically accept everything that she told us is accurate.

83. In addition to the reasons explained above for why the claimant may be mistaken in her beliefs about what happened to her, we note that there are allegations – k. and l. principally – that are purely about things the respondent wrote to the claimant. She alleges that that correspondence was harassment under the EQA, i.e. that it had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. In her witness evidence, she also used the same language when discussing that correspondence – in particular describing things as "*dismissive*" – to the language she uses in relation to allegations a., b., c., f., and g. We can and have read the correspondence for ourselves, and formed our own view of it. In short, the claimant's criticisms of it, and her perception that it violated her dignity or created an intimidating [etc.] environment for her, and that in it the respondent was being dismissive towards her, is not objectively based. This causes us to think that the claimant's perceptions about other things – for example about how people were towards her at meetings – may well be similarly inaccurate.

84. A number of the claimant's allegations are about the way things were said to her or how people interacted with her. How people come across to us is profoundly subjective and affected by our perspectives. The claimant's perspective was – understandably we should say, but even so – significantly affected by her belief that the respondent was obliged to allow her to work flexibly if she needed to do

so in order to accommodate her daughter's needs; and that there could be no reasonable basis for the respondent to refuse her flexible working requests in those circumstances. Essentially, she saw – or, perhaps, now sees with the benefit of hindsight – managers suggesting to her that those requests might not be granted as dismissive and hostile, whatever they said to that effect and however they said it.

85. We note that as a matter of law: there is no right to flexible working to look after a disabled child; and it is not necessarily discriminatory for an employer to refuse to grant a particular flexible working request even if refusing it means the employee making the request can't both do their job and carry out their caring responsibilities. It seems to us that, regrettably, the claimant did not grasp this at the time of the events with which this case is concerned; possibly she still doesn't accept it.

86. Precisely what happened at individual meetings is practically impossible for us to determine with any confidence at this distance in time. The only contemporaneous documents we have are the meeting notes, but these don't purport to be word-for-word. Based on the evidence we do have, we think there was a mismatch of expectations and lack of mutual understanding from the outset. The claimant seems not to have realised that the default position was for everyone to work full time hours and for anyone doing, as she was, 20 hours or so a week was to work a late and/or at weekends; and that the onus was very much on her to persuade the respondent to do something different; and that for her to be permitted to do something different would be exceptional.

87. The claimant went into the Shift Optimisation process assuming her request would be granted. That is what appears from the way she filled in her flexible working request form. Her form is sparse. She ticked only one of the boxes on it: the "*Single Parent*" box. She did not tick the "*Caring Responsibilities*" box. She did not explain why her need to look after her daughter meant she could not work any hours other than those she was doing. For example, she did not say why she was able to work one Saturday a month but not two. (We note that in her evidence before us this remains substantially unexplained). In terms of the amount of detail and explanation, the contrast between her application and that of her comparator Ms Hitchen is stark.

Allegation a.

88. We turn to the specific allegations, starting with a., which is a general allegation that a Ms R Egan, who was a Customer Service Manager who was involved in dealing with the claimant's 2016 request, was hostile and unsympathetic to that request from the start of the meeting on 1 August 2016. In her claim form, the claimant suggests she was not allowed to explain herself properly, that Ms Egan was "*dismissive*", that, "*She carelessly said that I would have to do one in two weekends a month. She added, 'you need to look for alternative employment'.*"

89. So far as concerns the allegation of hostility and dismissiveness, we repeat paragraphs 83 and 84 above. The comment about what was "*carelessly*" said reflects the claimant's evident expectation that her request would automatically be granted; or at least that it would be an equal negotiation. As recently as Spring 2016, she had spoken to management and increased her working hours, on her

own terms, with no difficulties at all. Given that expectation, it is understandable that she would see management effectively telling her from the start that she could not have what she wanted as hostility. There was probably no way of giving the claimant this information that would have come across otherwise.

90. We are not in a position to judge the merits of the respondent's business decision to impose this change on its staff. We do have some sympathy for the managers who had to implement it in relation to particular individuals, especially given the numbers involved. There were apparently around 200 employees who made flexible working requests, each of whom would have had to have had at least three meetings. We know from Mr McKechnie that management overall did not want to lose staff through this process. We also know that management succeeded in this, albeit that they did so, seemingly, by having as many meetings with affected staff as was necessary to persuade them that accepting what the respondent wanted was better than losing their job.

91. Ms Hitchen's case is evidence of how extreme someone's circumstances had to be in order to persuade the respondent to allow them not to do at least two weekend shifts a month or one late shift a week. It would be inappropriate for us to go into the detail of what she told the respondent in this decision, which is a public document, but she provided a great deal of information and explained clearly what her particular issues were. If her request had not been granted in full, it is difficult for us to envisage a plausible scenario in which any such request would have been. And notwithstanding this, Ms Hitchen still had to go through the process and, in her words, "*I still had to provide evidence and sit through a meeting with a lot of invasive questions and being spoken to in an impersonal way …. having to relive our darkest time*". We note that she describes what she was allowed to do as having been "*granted … under exceptional circumstances*".

92. In her claim form, the claimant adds, "*I was not allowed to explain further what I had written on the form or communicate what my problem was properly*". We are sure that that is how the claimant genuinely felt, but suspect this resulted: from her having an expectation, which was not met, that there would be a collaborative process of negotiation; from her thinking she was not being listened to, something that in turn stemmed from her mistakenly thinking that she was entitled to these hours because she needed them in order to look after her daughter – that the only possible explanation for her request not being granted was that no one was listening to her.

93. Ms Egan may well have said that the claimant would have to do one in two weekends a month – because that was indeed what the respondent wanted her to do. It is also possible that she said something about the claimant seeking alternative employment, again reflecting the respondent's position, which was that, ultimately, if employees would not agree to work a shift pattern that was acceptable to the respondent, the alternative was dismissal.

Allegation b.

94. In the List of Issues, this is an allegation that Ms Egan and Mr Bloomer dismissed the letter from the claimant's daughter's consultant as irrelevant and that she was told that the next meeting would be with Mr McKechnie and this it would "*be real*".

95. The allegation in the claim form is in fact that Ms Egan was, "*hostile and very dismissive saying that it* [the letter] *is not going to make any difference anyway*". Having considered all of the claimant's evidence around this allegation, we think what she really means is that Ms Egan was "*hostile and very dismissive*" simply by saying, "*It is not going to make any difference anyway*".

96. If this was said, we can understand why it was said, albeit it could have been put more gently and kindly.

97. Without wanting, in this decision that will be publicly available, to go into any great detail, the claimant's daughter has a number of serious health conditions that mean she is a disabled person under the Equality Act 2010. From the claimant's evidence and other medical evidence we have seen (which was not available to the respondent at the time), managing her daughter's care has required considerable time and effort and emotional resilience. We do not for a moment seek to underplay how difficult things have been for the claimant; and we understand how frustrating and upsetting it must have been for her to be unable to get this across to the respondent.

98. However, what this letter from the claimant's daughter's consultant shows is no more and no less than: what conditions the claimant's daughter has; that thanks to the claimant's dedication, those conditions are well controlled; that she is recovering from a recent episode, and is not going to be seen again for 12 months. To someone experienced in HR and/or employment law, it would suggest that, potentially, the claimant's daughter is a disabled person. The claimant evidently thought that that was all she needed to prove to the respondent. In her witness statement, discussing this letter, she states, "*I could not comprehend why this information could not inform a decision in my favour*". She believed that if she showed her daughter was disabled, the respondent would be obliged to grant her flexible working request. She was mistaken about this.

99. From the limited evidence we have as to what the respondent's managers' thought-processes were at the time, they don't seem to have been focussed on whether a disability was involved, but instead on whether there was anything that completely prevented the employee from working the respondent's preferred shift patterns. The doctor's letter of 4 October 2016 contains no information at all that would help the respondent to understand why the claimant could not work a late or two weekends a month.

100. So far as concerns the allegation that Ms Egan said that, "*the next time it will be real*", if this was said, it was in all likelihood a ham-fisted attempt to communicate to the claimant that she would have to choose between accepting what the respondent was proposing and dismissal.

Allegation c.

101. This allegation in the List of Issues is that at the meeting on 2 November 2016, Mr Bloomer "*was dismissive of the claimant's stressful situation and said she'd signed up for the changed hours*". This is not an allegation that is made in the claim form.

102. We are not sure what the allegation about Mr Bloomer telling the claimant she had signed up for the changed hours relates to. The allegation does not appear in the claimant's witness statement. The more general allegation of Mr Bloomer being

dismissive arises, we think, from him communicating the respondent's decision to refuse her request. The claimant was extremely distressed at that meeting and afterwards, because her request was refused. To her, there was no way the respondent could legitimately have reached that decision had they considered all her evidence. Once again, we think it unlikely that Mr Bloomer could have communicated that information in a way the claimant would have found acceptable.

Allegations d.

103. Allegation d. is a set of similar allegations about hostility and dismissiveness at a meeting, in this instance the meeting of 6 December 2016. No specifics are given in the claim form. Yet again, we think these allegations stem from the claimant's flexible request not being granted in circumstances where she believed she was entitled to have it granted.

104. In relation to this meeting, we have the advantage of having heard directly from Mr McKechnie and of having a fairly detailed contemporaneous meeting note. From that note, we can see that (as the claimant alleges), she did indeed ask what the point was of her making a flexible working request and that Mr McKechnie did indeed say something the gist of which was that if she hadn't made one she would have been on a fully flexible 40 hour a week contract. The notes do not say that he added "and you can't do that can you?", as the claimant alleges, but he might well have done. It would have been a factually correct statement. We think the claimant perceived as unfriendly and hostile any communication to her made in the context of the respondent's decision to refuse her request.

105. General allegations against Mr McKechnie are also made within d. We don't know what alleged behaviour the allegation of him being unfriendly outside of the meeting consists of. Nothing about it was put to him in cross-examination by the claimant. The only thing in the claim form this might relate to is the allegation that forms allegation e., which we shall come onto in a moment. The contemporaneous correspondence contains nothing that is objectively inappropriate.

106. In summary, we are not satisfied that Mr McKechnie displayed undue hostility or lack of friendliness towards the claimant at any time.

Allegation e.

107. Allegation e. is said to be about April 2017, but by the end of the evidence it had become common ground that it related to June 2017. The allegation in the List of Issues is that, "*when further asking about changing her hours in response to an email*" Mr McKechnie "*was again dismissive and hostile, telling her to put in a new formal request*".

108. We repeat what we said about previous allegations: the claimant may have perceived hostility and dismissiveness, but we are not satisfied that her perception is objectively based. There was nothing inherently wrong with telling her to put in another flexible working request – indeed, it was, in accordance with the respondent's practices and procedures, the right advice if she was unable to work the hours that she had (reluctantly) agreed to earlier in the year.

Allegation f.

109. This allegation is about "*dirty looks*" and a "*bad atmosphere*" between August and October 2017.

110. We are not satisfied that the claimant's belief that she was being given dirty looks and that there was a bad atmosphere is based on anything other than her subjective perceptions. She did not complain about this at the time, nor in her grievance. The allegation is not in the claim form either. She has not proved to us that she was subjected to any less favourable or unfavourable or detrimental treatment in this respect.

Allegation g.

111. This allegation g. relates to a meeting on 31 October 2017. There are only two specific allegations that we can identify from the List of Issues. The first is that Ms Egan professed to know nothing about the claimant's case. We think the claimant must have misinterpreted something that Ms Egan said to her. Why would Ms Egan say any such thing when it is clear, from the history of Ms Egan's involvement, and from the meeting notes, that Ms Egan was fully appraised of the claimant's situation? From the way in which the claimant describes this in her witness statement (in paragraph 36.3) we think all Ms Egan was saying to the claimant was that she [Ms Egan] was not party to the decision-making of the panel who rejected her second flexible working request.

112. The second specific allegation we can identify – which is not in the claim form – is that Human Resources told the claimant at the meeting that if the claimant did not accept the hours being proposed by the respondent she would be dismissed for "SOSR". There is a theoretical distinction between, on the one hand, the respondent telling the claimant that if agreement as to hours could ultimately not be reached the respondent could dismiss the claimant and offer her re-engagement on the respondent's proposed hours, and, on the other, telling her that she would be dismissed if she did not accept the respondent's proposed hours. In practice, the distinction between the former and the latter was one without a difference. It is certainly a distinction that would have escaped the claimant.

113. The respondent accepts that it told her the former. It had to do that in accordance with its own policies. Although the message was undoubtedly unwanted from the claimant's point of view, we think that any reasonable employer in that situation would have done the same. The respondent had to be straight with the claimant at this stage.

Allegation h.

114. There are two allegations, neither of which we can locate in the claim form.

115. The first is that Ms Ward, "k*ept on prying to find out about the claimant's case*". To the extent this allegation is made anywhere in the claimant's witness statement, it appears in paragraph 42, which begins, "*Karen then wanted to know about a timeline…*". This appears to be about an incident that occurred during a single shift, on a date that is not identified. Even if we accepted the claimant's version of events – and Ms Ward's account is rather different, as well as being

much clearer than the claimant's – we do not know what the claimant is complaining about here. Ms Ward was her line manager. She had every right to ask the claimant questions relating to the flexible working request, particularly when the claimant apparently raised with Ms Ward her concern that she had never had a final outcome.

116. The second allegation in the List of Issues is that in January 2018, Ms Ward told the claimant that Ms Edwards and Mr Barrett wanted to have a meeting with her "*but would not say what it was about*". In her witness evidence, the claimant agrees that she was told it was, "*an informal meeting*". In her oral evidence, she said her allegation was that Ms Ward knew what the meeting was about and deliberately (and presumably maliciously), because of her race, refused to tell her.

117. We find the notion that any manager would deliberately not tell a member of staff what a meeting was about, and do so to get at them, almost preposterous. What could that manager possibly hope to achieve by doing this? Ms Ward's oral evidence only strengthens our conviction that the claimant's allegations are misplaced. We have no good reason to doubt what Ms Ward told us the meeting was going to be about: just an informal catch-up.

118. We speculate that what may well have happened was a conversation in which the claimant pressed Ms Ward to tell her precisely what was going to be discussed at the meeting and Ms Ward was unable to say more than that the meeting was an informal catch-up. In any event, we are satisfied that nothing untoward occurred.

Allegation i.

119. This relates to the meeting on 14 March 2018. Nothing specific in this part of the List of Issues appears to be in the claim form.

120. The first allegation is that the claimant, "*had to repeat the whole history of her case*". It is not clear to us what the claimant means by this; she does not substantially explain it in her witness statement. The meeting was an informal absence management meeting in which Ms Ward and Ms Edwards were trying to find out what could be done to get the claimant back to work. It seems to have been the claimant rather than them that wanted to talk about the past.

121. The complaint in the claim form is that they could not tell the claimant at that meeting why her flexible working request had not been granted. But neither of them had made the decision not to grant it; and that was not the purpose of the meeting from their point of view.

122. The second allegation is that the claimant was told she should not be doing the hours she was working. As well as not being in the claim form, we cannot find this allegation in the grievance, and despite the claimant annotating the meeting notes herself, it isn't in there either. Ms Ward vehemently denies it. On balance, we find this allegation not proven. But even if it was said, it would be a perfectly reasonable thing to say: the claimant had unilaterally changed her working hours without the respondent's approval. Many reasonable employers would have disciplined her for doing this.

123. The third allegation is another general one of people being "*dismissive*" and "*hostile*". Suffice it to say that even if we accepted the claimant's evidence about

this meeting as 100 percent factually accurate, we do not accept the allegation. For example, telling the claimant that she can work her preferred shifts for at least the next 6 months, which is what she was told, is objectively a positive message and the fact that the claimant did not know what would happen at the end of the 6 month period does not turn it into a negative one.

Allegation j.

124. Allegation j. is made against the occupational health practitioner, Mr Taylor. The sole allegation about him in the claim form is that, "*he wrote a negative and biased report on me*". We have read the report. We are unable to identify anything in it that could fairly be described as negative, and we do not know what the claimant is referring to as "*biased*". There is no explicit or implicit criticism of the claimant in it. She may not agree with his professional assessment that she was not a disabled person, and that what was keeping her off work was a managerial rather than a health problem, but that does not invalidate the report, nor make it negative and biased.

125. It seems to us that the claimant had unrealistic expectations of occupational health. In her grievance and claim form, she stated, "*I hoped that his intervention would be conducive to addressing all the issues that I highlighted to him*". Even by the end of her oral evidence, we were unclear what, specifically, she thought he should have written in his report that would have addressed – and gone a significant way to resolving – her issues.

126. There is an additional allegation in the List of Issues that does not appear in the claim form: that Mr Taylor made a comment that the claimant was physically well. She again uses the adjective "*dismissive*" to describe the comment. We think what she means here is that him making that comment in her view suggested he had not listened to her when she had described physical symptoms.

127. Mr Taylor has no recollection of making such a comment, although he accepts he might have done.

128. In our view, if Mr Taylor said anything along these lines, it was not an unreasonable comment to make, in circumstances where his professional opinion was that the claimant's health problems were primarily mental rather than physical, albeit producing physical symptoms.

Allegations k. and l.

129. As explained above, allegations k. and l. relate to purely written communications from the respondent, all of which we have read. None of these communications is to us in any way unreasonable, unfair, or otherwise inappropriate. On the contrary, the respondent went significantly further to try to reach out to the claimant than most employers would do in a comparable situation.

130. The claimant's principal complaint is that the respondent was (quoting from the claim form), "*dismissive of*" her "*suggestion to initiate a restorative process*". The first explanation of what she might have meant by this was contained in her witness statement: a "*restorative approach aims at bringing together all the parties involved in a conflict so that they can sit down, listen to one another with respect as to how conflict was caused, and then try to repair the aftermath of wrong doing*".

If she had been willing even to speak informally over the telephone to Miss Walker, Ms Deacon, or, subsequently, Ms Edwards, she could have explained this. She was not willing.

131. We explored with the claimant what, in practical terms, she was after, with specific reference to a "*restorative process*". It became clear to us that nothing short of the respondent openly and fully acknowledging that particular individuals had mistreated her, through racial prejudice, would have sufficed. She seems to have had in mind a restorative justice model, with her in the role of the victim of crime and the respondent's managers in the role of the criminals. It is highly unlikely, to say the least, that the respondent would have agreed to this, and the respondent would have been acting reasonably had it rejected a specific request from the claimant for this, but she never made one.

Harassment – decision on the issues

132. In relation to all of the allegations of harassment, we would say this:

132.1 there was unwanted conduct of various kinds. However,

132.2 nothing that we are satisfied happened had the requisite purpose or effect under EQA section 26;

132.3 there is no evidence at all on the basis of which we could find that what happened was related to the claimant's race. The sole basis identified by the claimant is the fact that her flexible working request was turned down whereas her colleague's, Ms Hitchen's, was not. As a matter of law, we cannot infer discrimination simply from a difference of treatment and a difference of protected characteristic. There is no more reason to think that the claimant's race had anything to do with this than there would be to think that her age, or any other protected characteristic of hers different from Ms Hitchen's, was the reason for the treatment. Because of how long ago the relevant decisions were taken, there is no longer any evidence to show specifically why Ms Hitchen's application was accepted when the claimant's was not. However, just from looking at the applications ourselves, and comparing the detail in Ms Hitchen's application with the lack of detail in the claimant's, we do not think that the difference of treatment calls for an explanation or is in any way suspicious. The needs of different parents caring for different disabled children are not necessarily going to be the same – and indeed Ms Hitchen's needs and the claimant's were not the same. An employer can legitimately differentiate between flexible working applications made by parents of different children with different disabilities;

132.4 the allegation that any relevant treatment related to disability is misconceived. What the claimant seems to mean by this allegation is that her flexible working request related to a need to care for a disabled child and that the respondent was aware of this. But that does not make any of the treatment "*related to*" the protected characteristic of disability in accordance with EQA section 26;

132.5 Ms Hitchen's case demonstrates that the respondent was willing and able to grant flexible working requests of employees who needed particular working hours to help them care for their disabled children;

132.6 the claimant's disability-related harassment claim is in reality a type of claim that does not exist in law: a claim that the respondent failed to make reasonable adjustments to accommodate the disability of someone for whom an employee was caring.

Direct race discrimination

133. The direct discrimination claim relates solely to the respondent's, "*refusal to adjust*" the claimant's "*hours as requested*". For reasons just explained:

133.1 we are not satisfied that this was less favourable treatment. The claimant's circumstances and those of her comparator, Ms Hitchen, were not materially the same in accordance with EQA section 23;

133.2 in any event, there is no good reason to think that the claimant's request was refused because of anything to do with her race or with the protected characteristic of race more generally.

134. We should like to make clear, for the benefit of those who the claimant has publicly accused of unlawful discrimination as part of her claim, that we have found the accusations to be without foundation.

Unfair dismissal & victimisation

135. The only thing that might conceivably make the claimant's dismissal unfair would be if a significant part of the reason for the decision to dismiss were victimisation. In every other respect, it was handled in a way that we would describe as exemplary were it not for the fact that the respondent went much further to accommodate the claimant and to tolerate her non-engagement than probably 9 out of 10 employers would have done.

136. There is only one potential basis in the evidence for us to find that the decision to dismiss was victimisation. This is the fact that there were seeming inconsistencies in Ms Edwards's evidence at the hearing on a significant point.

137. We mentioned above that Ms Edwards gave evidence twice. The first time, she stated categorically that she knew nothing of the claimant's Employment Tribunal claim when she made her decision to dismiss the claimant. If this were true it would be a cast-iron defence to the victimisation claim, which relies as the protected act on the claimant issuing Tribunal proceedings.

138. However, the claimant in her closing submissions drew our attention to a statement in the written record / notes of the meeting of 27 November 2019 between Ms Edwards and HR at which the decision to dismiss was made (notes prepared by HR but which Ms Edwards signed as a "*true and an accurate record*" on the day) that: "*We are aware of pending Employment Tribunal claim with a preliminary hearing arranged for 03/12/2019*" [sic].

139. Ms Edwards was re-called as a witness and was shown the statement. She then told us that she had no recollection of having read that part of the meeting notes; that she was sure the claim had not been discussed with HR at the meeting; and that she still recalled the first time she knew of the claim as being when she was asked to diarise the Tribunal hearing dates, dates that were not fixed until the preliminary hearing on 3 December 2019.

140. We think the existence of the Tribunal claim was at least briefly discussed between Ms Edwards and HR on 27 November 2019. It is the most likely explanation for why it would be mentioned in the meeting notes, which HR was expecting Ms Edwards to check, approve and sign. We therefore ask ourselves whether she was honestly mistaken when she told us so unequivocally that there was no discussion about it, or whether she was simply not telling us the truth.

141. We disagree on this question.

142. The Employment Judge and Tribunal Member Mrs Hicks, in the majority, give Ms Edwards the benefit of the doubt, and are prepared to accept that Ms Edwards's memory was genuinely playing tricks on her. This is on the basis that there were no issues with any other part of her evidence, and that people generally do their best to tell the truth when in court or tribunal because of the potentially serious consequences of not doing so, at least where, as here, telling the truth is not going to cause them any significant problems.

143. Tribunal Member Dr Hammersley thinks Ms Edwards was probably not telling us the truth, on the basis that: she signed the notes on the day confirming they were correct; the notes are short and she must have read them before signing them (and agrees she did so); it is unlikely she would not have seen the relevant part of them. Dr Hammersley would have decided that when Ms Edwards initially told us she had no knowledge of the Tribunal proceedings on 27 November 2019, she was lying, having forgotten the incriminating part of the notes (which the respondent's representatives had evidently not noticed), because she thought that doing so would strengthen the respondent's case and her own defence to the allegation that she, personally, had victimised the claimant.

144. On the basis of the decision of the majority that Ms Edwards had genuinely forgotten knowing of the Tribunal proceedings on 27 November 2019 and was not lying to us about this, there is no basis in the evidence for the burden of proof in relation to victimisation to shift onto the respondent, pursuant to EQA section 136. The victimisation claim therefore fails.

145. Further, we unanimously agree that even if Ms Edwards had wilfully not told us the truth about her knowledge of the Tribunal proceedings and the burden of proof in relation to victimisation had shifted onto the respondent, the respondent would have discharged the burden on it. In no sense whatsoever was the decision to dismiss anything to do with the fact that the claimant had brought a Tribunal claim of discrimination.

146. If Ms Edwards was not telling us the truth about one thing, it would not mean that we should reject her evidence about everything else. The respondent clearly did not want to dismiss the claimant and, through Ms Edwards, tolerated the claimant refusing to engage with the absence management process in a way that most employers would not. The process culminating in dismissal was instigated as far back as January 2019, when Miss Deacon passed everything on to Ms Edwards. It proceeded smoothly and consistently. The only time it did not proceed in this way was when the claimant raised a grievance alleging discrimination. But that did not lead to an acceleration – quite the reverse. The claimant raising that grievance delayed dismissal. Similarly, there was no discernible acceleration of the process or rush to judgement when the claimant presented her claim form.

There is nothing at all in the contemporaneous documentation or in what happened between January and November 2019 that even hints at Ms Edwards acting vindictively towards the claimant or being at all angry or concerned about the claimant bringing proceedings under the EQA.

147. Given the claimant's refusal to meet or co-operate or meaningfully engage or discuss things with the respondent, dismissal was inevitable. Ms Edwards made the decision that virtually anyone in her position would have made, and that she would have made even if she had been completely unaware of the claimant ever making allegations of discrimination, let alone bringing a claim. We are entirely satisfied that her decision-making was unaffected by her knowledge of the Tribunal proceedings.

148. In accordance with the findings we have just made, if the decision to dismiss was victimisation and if this was therefore an unfair dismissal, this would be one of those rare cases where there would be no unfair dismissal compensatory award, and where damages for victimisation would be limited to an award for injury to feelings, because there is no significant chance that the claimant's employment would have continued after 27 November 2019 come what may.

Summary

149. The claimant's claims fail. Most were brought too late, but even if they had all been brought in time they would have failed on their merits.

150. The claimant's dismissal was fair and was not an act of victimisation. Nothing the respondent did was done because of anything to do with the claimant's race or with her daughter's disability.

EMPLOYMENT JUDGE CAMP

08/02/2021