Case No: 2502489/2019 (V)

EMPLOYMENT TRIBUNALS

Claimant: **Normand**

Respondent: **Whitbread Group Plc**

Heard at: **Newcastle (CVP)** **On: 15-19 February 2021**

Before: Employment Judge O'Dempsey, Mr Stead & Mrs Johnson

Representation
Claimant: Brien of counsel
Respondent: Bowne, solicitor

JUDGMENT

1. The claimant's claim under sections 20 and 21 of the Equality Act 2010 that the respondent failed to make a reasonable adjustment in respect of requiring her to pick up cigarette butts on 15 March 2019 is well founded.

2. The Respondent shall pay to the claimant £1200 for injury to feelings. The claimant is entitled to this sum together with interest. She is entitled to interest which runs from the date of the discriminatory act (15 March 2019) to the date of calculation, 19 February 2021 ((regulation 6(1)(a)). The rate is 8% p.a. The daily rate of interested is £0.26 per day for 699 days giving total interest of £181.

3. In all other respects the claimant's claims for breaches of the Equality Act 2010 are dismissed as presented outside the limitation period, the tribunal considering that it is not just and equitable to extend the limitation period.

REASONS

1. By a claim form presented on 11 August 2019, the claimant makes a claim of disability discrimination and other unlawful acts under the the Equality Act 2010 ("EqA 2010"). She entered into the early conciliation process and the certificate was issued on 13 July 2019.

The law

2. The relevant parts of the EqA 2010 are as follows:

Section 15 EqA 2010: Discrimination arising from disability

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

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

21Failure to comply with duty

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

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

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

26Harassment

(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.

(2)A also harasses B if—

(a)A engages in unwanted conduct of a sexual nature, and

(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b)the conduct has the purpose or effect referred to in subsection (1)(b), and

(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

(5)The relevant protected characteristics are—

- …
- disability;
- …

[The tribunal notes that the effects referred to in subsection (1)(b)(ii) are referred to later on as the “proscribed environment” in these reasons].

27Victimisation

(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.

…

123Time 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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a)the period of 6 months starting with the date of the act to which the proceedings relate, 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.

The claimant's case as pleaded and developed in case management

3. The claimant started employment as a receptionist on 10 June 2018. In her claim form box 8.2 the claimant said that she was making a claim for disability discrimination which cut across multiple sections of the EqA namely sections 15, 19 and 20. She essentially complained that following a serious accident at work in July 2018 she had been referred to occupational health which made various reasonable adjustment recommendations. Her then manager agreed to honour the commitments but warned her that this could cause animosity within the team because others in the team might view it as the claimant getting preferential treatment.

4. The claimant complained that the making of these adjustments resulted in harassment from her colleagues. This was in relation to something arising from disability namely dissatisfaction with the reasonable adjustments that had been accorded to her.

5. In her pleadings she complained about name-calling, talking behind her back, spreading rumours about her, critiquing her work, reporting concerns to her managers, making unfounded allegations, giving her contradictory advice on how to do things in order to set her up to fail, altering her shifts and managing her shifts and holiday entitlement, viewing her contract and reading her private and confidential occupational health report without her consent.

6. Again in her pleadings she recounts that she went off sick as a result of this. She then says that she returned to work in November 2018 and reported the bullying to her manager. Unfortunately however soon after that her manager was made redundant.

7. She said that in December 2018 she escalated her concerns and contacted human resources and the regional operational manager John Fairburn. She told them that things were becoming intolerable for her at work. A meeting was arranged between herself and a temporary site manager (Mr Roberts). Mr Fairburn took details of the harassment and the claimant's concerns about lack of confidentiality in the recent data protection breaches she alleged. She recounts in the claim form that Mr Fairburn made some changes to staff confidential document storage and agreed to look into the bullying. She says, however, that this did not happen and Mr Fairburn then transferred to another site.

8. The claimant's claim form then says that in April 2019 she tried to raise the issue again with the new managers but to no avail. She alleged that her managers questioned whether she should be in work at all if she was disabled. In the claim form she says that she submitted a grievance against these new managers in relation to this and became very frustrated and upset when the managers advised her that they were as she says changing the rules. She also alleged that they began questioning her physical ability to do the job. She then says that she was suspended at that point.

9. The respondent's grounds of resistance resisted all of the claims. It accepted that there had been a review meeting on 14 September 2018 and that adjustments had been agreed with the claimant. The respondent said that there had been considerable and prolonged managerial turnover at the site. This again appears to be something that the parties agreed on. The respondents relied on the findings of the grievance manager Elaine Broome dated 8 April 2019. However its main case was that the claimant's harassment/discrimination claim including discrimination arising from disability had been presented outside the three month time limit. In its grounds of resistance the respondent said that this was because it appeared to date back to July 2018.

10. It asserted, and this does not appear to have been later disputed, the earliest date for an act or omission to be within the three month time limit was 14 March 2019. The respondent's primary submission therefore was the tribunal had no jurisdiction to hear the claim on this basis. By the time the claim was before this tribunal no claim for indirect discrimination was pursued by the claimant.

11. The respondent also denied that it had failed to make reasonable adjustments. Its primary submission was that it had made repeated adjustments which had been agreed with the claimant.

Case management of this case

12. On 31 October 2019 EJ Aspden conducted a case management hearing which identified the 10 different types of unfavourable treatment relevant to the case. The claimant was specifically directed to provide particulars of each incident of harassment/unfavourable treatment (see paragraph 6 the Case Management summary). It emerged during the course of that hearing that the date of the suspension from work was 15 of March 2019 and the claimant said that she had alleged that the respondent was discriminating against her at that time. She described the event as "I raised my voice and said what you are doing is discrimination and I'm taking it further and they told me to get out and I'm suspended. They rang me that evening and said they had made a mistake and I wasn't suspended".

13. The claimant was given permission to amend the claim to assert in the alternative that the suspension was an act of victimisation within section 27 of the EqA 2010.

14. In paragraph 9 of the Case Management summary the Employment Judge summarised the understanding of the claim in relation to failure to make reasonable adjustments. The details of that are set out at paragraphs 9.1 – 9.5 that document.

15. By consent the claim form was amended to set out the claimant's claim in those terms. It was also directed that there was no need for the claimant to file an amended claim form. Thus we read the claim form alongside the Employment Judge's note of the case management hearing as she suggested.

16. The respondent was given permission to file an amended response to address the clarified allegations and did so.

17. The order of the Employment Judge contain the details of the claimant's claim being amended at paragraph 5.1.

18. Importantly the Employment Judge gave orders relating to witness statements. At paragraph 9.2 the Employment Judge made the point that "the witness statements must be typed in numbered paragraphs and signed by the witness. They should set out in logical order the facts about which the witness wishes to tell the tribunal." The claimant's witness statement was in many places vague as to chronology and details of events.

19. After that the claimant provided a chronology of incidents which appears at page 39 of the bundle. The respondents set out its case on all aspects of the claim in its amended response. They complained that the additional information provided by the claimant, the chronology, went well beyond the bounds of what had been ordered by way of further information. The respondent pointed out that insofar as the claimant had gone beyond the content of the pleaded claim the tribunal had no jurisdiction to deal with those issues.

20. In the course of that amendment the respondent clearly made it submission concerning conduct extending over a period of time. The respondent went on to submit that therefore these were discrete individual acts complained of which, if out of time, were outside the tribunal's jurisdiction.

Witnesses called

21. For the respondent we heard from Ms Broome who was the grievance investigation manager and from Julie Reeves (JR) who was the hotel manager and at the time operations manager and John Fairburn currently the regional operations manager and Mark Brennan regional operations manager for the respondent. We heard evidence from the claimant, and for the claimant from a Ms Ellitson (housekeeper at the hotel at the relevant time) and from Mr Close, a temporary assistant manager in late 2018 who did the job for around a month.

The list of issues

22. At the start of the hearing the tribunal asked the parties to tell them what the agreed list of issues was as the case management orders in the case had required the parties to agree a list of issues to be determined at the final hearing. At the case management hearing in June 2020 the parties were reminded of the need to include at the very front of each copy of the final hearing bundle an agreed chronology, cast list and list of issues.

23. The parties had not done this. It was only on the second day of the hearing (16 February 2021) that the parties finalised the agreed list of issues. This ran to 4 pages.

Findings of fact

24. The claimant's impairment did not cause her difficulties of any significance until starting work on 3 June 2018 for the respondent. She filled the health questionnaire for the respondent stating that she had suffered from recurring back problems that she had a back problem that affected her ability to lift or to do manual handling. She had also confirmed that she had undergone corrective back surgery.

25. Working as a receptionist she would find that she would be working alone and on late shifts between 3 PM and 11 PM after the domestic staff gone home if the rooms were not made up she had to make them up herself. This involved a lot of lifting and pulling.

26. In July 2018 she had an accident at work as result of which she was referred to occupational health. There was a welfare meeting with the claimant this took place on 18 July 2018 and was a meeting with her then manager DC. The claimant described that she had ongoing back problems but could usually manage it. She had to take medication and it flared up causing sciatica. The doctor had described the condition as "boom and bust". This means that if she did too much then it could flare up or bust. She said it was a question of knowing her own limitations. The manager asked whether it had happened before and she said that it had in Café Nero. She said that she reached down for her handbag and her back went. An ambulance had to be called and she needed to have gas and air. The manager commented that it appeared that it was quite unpredictable. She agreed with this. During that meeting the claimant said that she loved the job was going to struggle with the late shift and housekeeping being absent because she could not make beds because it could affect her back.

27. During that meeting, the tribunal accepts that the claimant was told by her manager that if reasonable adjustments had to be made it could be seen as the claimant getting preferential treatment and might cause animosity. This was reflected in an email sent on 19 July 2018 by the claimant to her manager.

28. The claimant went to occupational health and the occupational health produced a report which was at page 70 – 76 in the bundle. On 14 August 2018 the occupational health team produced a report stating that she was fit to continue in her role with work adjustments to help manage long-term conditions. The report in summary stated that she had declared a long-term condition which was recently aggravated at work while she was lifting heavy cotton bed linen. "She is currently in work avoiding heavy lifting. She may need to refrain from heavy lifting on a permanent basis."

29. In its opinions and recommendations (page 76) the report stated that it would recommend that the claimant refrained from heavy lifting as that might aggravate her back and impact performance and attendance. The report also stated that the claimant could be allocated to work late shifts but ensuring that family rooms are all made up by the domestic staff said that the claimant did not have to do any heavy manual handling when she is working alone. The respondent was told to consider putting the claimant on the early shift because there were domestic staff who would be able to do all the room setup including cop beds if needed.

30. The report also stated this: "a risk assessment of her activities that may require heavy manual handling is advised." This does not appear to have occurred. The report then stated "a chair that offers good lumbar support and neck support is recommended for use on a long-term basis." The report also recommended that the claimant should not stay in a sedentary position for too long but should take regular mini breaks from her desk to stretch her back and ensure good body posture at all times.

31. The claimant stated that throughout August 2018 she was working with a team member described as ND on crossover shifts. When the claimant told her that she would not be able to make up beds for guests and explained that she had a back problem the tribunal accepts that ND said "well I have a bad arm, but I just get on with it". And still I make beds". This was of course before the Occupational Health report had been sent.

32. The claimant described that ND would often "half and puff" and then say "okay, I suppose I will have to make these beds up then, if you can't". ND would bark at her saying "you get on with this whilst I do the beds". ND made it clear, we accept, that she was unhappy about the claimant's reasonable adjustments as a result of the way in which she expressed herself by these sorts of comments.

33. Another example given by the claimant in her witness statement was ND telling her "they wouldn't have hired you if they had known you had a disability and that you couldn't make beds".

34. There was a shift in the mood in some of the team's attitude towards her after the adjustments had been made. The claimant complains that she would find that conversations would stop when she walked into a room or that she would be ignored by some reception and housekeeping staff.

35. The claimant complains, and we accept, that ND read the claimant's occupational health report which had been left lying open to view in the back office. This occurred, we find, sometime in September. A colleague told the claimant that ND was unhappy with the claimant because ND was now having to do most of the late shifts. She was unhappy because it meant that she had to pay for a taxi home. The person who was talking to her (called Ned) explained that he thought that manager DC had messed up by hiring claimant.

36. The handover from one shift to another became difficult for the claimant because ND would often be curt and challenge her decisions. The claimant complained that ND would tell her to do things one way and then DC would say that she was doing it wrong. The tribunal did not hear sufficient evidence on this

point to be able to make a finding that this happened or that it was because the claimant had adjustments in place. In any event we understand that DC was made redundant in November 2018, so these incidents could not have occurred after that date.

37. We accept that ND would be curt and challenge the claimant's decisions but it is not clear to us that the reason why DC would be critical of her was due to the fact that adjustments had been made and the team were unhappy about it. We find that this is unlikely because DC is the very person who had warned the claimant that there might be an adverse reaction to the reasonable adjustments DC was going to make for her.

38. The claimant says that ND would make unfounded allegations to managers. Of this we could see no evidence save for the matters concerning shift handover records. ND would put information on staff shift notes for all staff including the team manager to see naming the claimant as somebody who had not done something for guests and, for example, saying that she had needed to compensate guests for a failing by the claimant. The respondent did not disclose any of these handover notes and we accept the claimant's evidence that this treatment, namely identifying someone as having made a mistake and blaming them, was unusual.

39. It was difficult for the tribunal to establish a proper chronology of the claimant's evidence, and for example it appears that all these matters were going on during August and at the start of September because the claimant's witness statement (after telling about these matters) then referred to the 8 September 2018 when she told ND that she struggled to balance the audit sheets. ND, rather rudely, said that the claimant was "thick" if she could not work it out. On this occasion ND mocked the claimant in front of another colleague and the claimant felt humiliated by this. We accept however that both before and after the adjustments were made officially, from the point that the claimant made it clear that she could not do certain thing as a result of what was her disability (in August) she was subjected to this and similar treatment.

40. On 14 September 2018 DC and the claimant agreed that housekeeping would make up spare twin rooms so that the claimant did not have to carry linen or make up beds for them.

41. We accept the claimant's evidence that in October she heard housekeeping staff saying "that receptionist that is on the desk this morning is thick, you would think she would know the job by now, she's been here a while." Another stated "yes I know she is useless". The claimant stated, but there was no evidence to support this on this issue that the staff were being influenced by ND. We do not think that it is probable that ND did influence them in this way.

42. In October 2018 the claimant raised this with DC and the fact that the prediction about the dissatisfaction of the rest of the team over her adjustments was realised. We accept that DC did nothing to address the issue. At that same time it appears that the claimant raised an allegation that ND was doing the monthly rota and "cherry picking" shifts for herself and her daughter who was also a receptionist there.

43. In November 2018 the claimant went sick due to a combination, she stated, of sitting in an unsuitable chair for several months and the stress of bullying and harassment. She said that this aggravated her back and neck condition because stress caused her muscles tension and tense painful muscle spasms occurred. She also had spondylitis migraines.

44. In November DC was made redundant. Mr Close, from whom we heard, was appointed as a temporary assistant manager. Although the claimant raised matters with Mr Close it appears that these were not addressed. However the claimant did, as she was requesting at that time to start working two days per week. The claimant learnt indirectly that ND had said that she was furious about the claimant's contract being reduced to non-consecutive days.

45. In December the claimant says that her holiday request was removed from the rota. ND, allegedly did this because she did not think it correct that the claimant should have time off after returning from sick leave. ND when challenged by the claimant admitted removing the requests for holiday because "you can't just request time off, you must specify reasons, so that I can organise shift allocation and to ensure staff leave is fair". We were unable to find any evidence that suggested that ND's treatment of the claimant was related to the claimant's disability in this respect.

46. In relation to the holiday booking requests (paragraph 60 of the claimant's witness statement). We accept that Ms Broome looked into this during the course of the grievance and we find that the claimant had not booked the holiday properly. We note that the first time that the claimant contacted employee relations (page 215) was 18 December 2018.

47. On 27 December, the claimant contacted Mr Fairburn and he arranged a meeting between the claimant and another temporary manager James Roberts. In her text message to Mr Fairburn she stated that she was having a hard time with the team in terms of victimisation and harassment. She said it was becoming intolerable.

48. The claimant met with Mr Roberts on 29 December. Mr Roberts said he would address the harassment and bullying issues with the team.

49. In January 2019 the claimant appears to mention, but she does not complain about, being advised that all unused holidays had to be taken before the end of February 29, 2019 or the staff would risk losing them.

Events in March 2019

50. The claimant's narrative does not recount any acts of discrimination, failure to make reasonable adjustments, or victimisation during the month of January 2019.

51. On 14 February 2019 SC was appointed as the claimant's manager. The claimant says that SC told her to pick up litter from outside which C had noticed on her way in. This was SC's first day and there was no reason why on that first day she should have read the occupational health report or known that the

claimant was a disabled person, there was also no reason why she should have supposed that any impairment that the claimant might have would have prevented her with the ordinary litter clearing tasks that all members of staff, including managers, undertake.

52. The claimant says that SC should have not asked her to pick up litter because the respondent was aware that the claimant had back issues. We do not accept that this was the case in the circumstances.

53. There then appears to have been a further gap until March 2019 when three managers arrived whilst the claimant was on shift. The claimant complained that the managers made it virtually impossible for her to do her job as they took possession of computers and front desk telephones. The claimant was not clear on what date the three managers arrived in and we do not accept her account of the events on 8 March. We prefer JR's evidence in this respect that the three managers were on site on 15th March.

54. At some point the claimant asked to speak to her new manager, SC when ND made a remark on the shift notes. We were not told what this allegation was, or whether there was any substance to it, or whether it was alleged by the claimant that this allegation against her had been made because of the reasonable adjustments that had been made for her. We find that there was a remark on the shift notes but we do not think it is likely that it was made as a result of the reasonable adjustments that had by this stage been in place for some time.

55. This meeting took place in the reception area and the claimant asked whether SC was aware of what had been going on in terms of harassment and staff bullying over the reasonable adjustments and disability. According to the claimant SC told her that Mr Roberts given her a brief overview and told her a little bit about it. We consider that this conversation between SC and the claimant must have been a passing remark, and was not one which would have commanded SC's attention. There is no evidence that the claimant went into any details with SC at this point.

56. On 4 March the claimant claimed that the three managers had come into the reception while she was working on the morning shift. The tribunal concluded that this was not the date on which all of these events had occurred. We accept that JR started as manager on 8 March and was not in on 4 March 2019. We accept that JR had been to the site in January on a day when the claimant was not on shift. The claimant disclosed her diary entries late in these proceedings having claimed that the visit on 4 March including JR was noted in her diary. She was taken to these diary entries (page 219) and accepted that the entry on 4 March did not refer to the presence of JR. We find accordingly that the claimant's recollection of this event is not accurate and we accept JR's account. We conclude that on this occasion SC told the claimant that she had checked her contract and the claimant was contracted for three days and not two. SC asked why the claimant was predominantly working morning shifts and why beds were being made up in advance. SC stated that she would have to look into this because she was not sure that the claimant could be kept on predominantly early shifts.

57. The claimant said to SC that it was recommended that she did predominantly early shifts. She could do some late shifts so long as beds were made in advance. SC stated that she did not think that they could continue making beds for the claimant in advance. The claimant pointed out that this had been agreed by occupational health. We find that this, and the comment "should you even be working at all then if you are disabled? Wouldn't you be better off on the sick?" reflected SC's ignorance at that stage of the adjustment arrangements that had been made. She was not threatening to remove any adjustments. She was still seeking to obtain information about her staff and the workplace. Ms Ellitson witnessed this exchange.

58. According to the claimant at this point SC asked how she would deal with a disabled guest using an evacuation chair in the event of a fire. The claimant stated that she did not think she could manage it alone. We do not accept that this is when this happened. We think it more likely that this happened later when JR had spoken to SC about training requirements for staff, including on evacuation procedures. We do not accept that SC spoke to the claimant about invoking capability procedures at this point, or later.

59. The claimant says that there is a result of these matters she submitted a grievance. The grievance of that date does not however go into the matters that the claimant now says she raised on that date. It is on page 82 of the bundle in an email dated at 6:12 pm 4 March 2019. It deals with six matters. The claimant complained about health and safety issues. She complained about a serious breach of confidentiality. She complained about having raised several informal complaints about matters with various managers and the employee relation team on three occasions. She complained about her holidays and shifts continuing to be managed by the person that she believes is bullying her. She states that as a result she has had holidays denied and altered. She also complained about the fact that reasonable adjustments were made for her in terms of a change to the contract and shift pattern, and reducing working hours. She says "this caused animosity and resentment/bullying within the team towards me: comments, critiquing my work, monitoring my time off, gatekeeping shifts and holidays." She also complained about disability discrimination which she described as ongoing. In particular she stated "during an informal meeting today 4 March 2019 with my new manager (SC) I was advised that I am no longer able to do a.m. shifts and that she intends to alter shift pattern. I am concerned that she has decided to do this without consulting occupational health or carrying out risk assessment? SC also made a discriminatory comment by asking me whether or not I should be even working at all if I am disabled and have a serious back condition? The grievance was investigated by Ms Broome, from whom we heard evidence. We note the way in which the complaint about SC's remark was phrased which reinforces our view that it was not unwanted conduct relating to disability but a genuine question being asked by a manager who was being told about a serious back condition and who was ignorant of what had been done to adjust working conditions to accommodate the claimant's needs.

60. On 8 March 2019 the managers, according to the claimant, came on to the claimant's morning shift. The claimant complains that there was no comfortable chair available for her and she was again asked to pick up litter from outside the hotel complained the reception area. On this occasion JR according to the claimant told her that she was planning evacuation training. JR explained that this would involve planning a large amount of linen on a chair for the employees

to practice evacuation procedures. The claimant was upset by this because she felt that JR was deliberately setting her up to fail. However the claimant told JR that she could not participate because she had problems with her back. According to the claimant JR replied that this was compulsory training which needed to be completed by all staff. According to the claimant JR then went on to question her again about how she would managed to evacuate disabled guests. The claimant explained that she had sought advice about this and had been advised that she did not need to evacuate disabled guests but only get them to a refuge point. According to the claimant JR disagreed with this and told her she could not leave a disabled guest who is frightened at a refuge point. To this the claimant replied that she did not know how she would deal with it because she could not get them down the stairs herself.

61. When cross-examined on paragraph 79 of her witness statement the claimant confirmed that her complaint in relation to March 2019 was that other people were sitting on all the available chairs. That meant she did not have a chair to do her job.

62. We find that what happened on 8 March was as follows. Where there is a conflict between the account given by the claimant and JR's account, we prefer JR's account. We accept that the claimant asks JR to help her with a few things on 8 March and JR did this. We accept JR's evidence that there were conversations about matters such as the evacuation process because these were things that needed to be done on the site. The documentation shows that the claimant was someone whose need for refresher training had been noted. There was reference to the refresher training in which the managers would put linen on a chair to add a little bit of weight to it. However these conversations were between the managers and they were part of the ordinary management processes. We also accept that JR was not aware of the claimant's condition. We do not accept that these remarks were unwanted conduct related to the claimant's disability. In particular we do not accept that any of the remarks were made in a pointed way or made in order to make the claimant feel uncomfortable as a result of the adjustments that had been made in her favour, or for any other reason related to her disability, nor do we consider that they objectively relate to the claimant's disability. The claimant asked for assistance with the front desk system. We reject the idea that the question of refresher training was put specifically to the claimant and it was not suggested to her that the training that she would be involved in would involve placing linen on a chair. This was simply a conversation that the claimant overheard and upon which she made assumptions which were not warranted.

63. We accept that JR did not ask the claimant to do anything that day and in particular we accept that she did not ask the claimant to pick up litter on 8 March, and nor did anyone else. In particular we do not accept that the claimant told JR anything about her bad back that day. JR noted that the claimant was having problems with the glitches on the "bart" reservation system.

64. On 14 March 2019 there was a meeting with Ms Broome and the claimant at which Ms Broome took notes and agreed to investigate. It is unfortunate that notes of the grievance investigation were only very lately disclosed by the respondents. The claimant says that on 15 March the managers turned up again whilst she was on shift. Once again there was no supportive chair.

65. The claimant states that SC once again asked her to pick up litter from outside and in particular SC told the claimant to concentrate on picking up cigarette butts/"tabs". It was a cold day and blustery and the claimant said that she was struggling to use the grabber to pick up small cigarette butts and her back was hurting.

66. When the claimant explained to SC that she could not use the grabber for the cigarette butts the manager SC told her to use gloves. When the claimant said she could not find any she was told to go to the nearby restaurant and get some. The claimant said that she could not do this because her back was hurting. Ms Ellitson's evidence on this point was somewhat vague as to the date, but we accept that she regarded picking up the cigarette butts as one of her jobs so she did not understand why the claimant was being asked to do it. We concluded that she was thinking about this episode, although unable to give us a precise date.

67. There was also that day an unannounced fire alarm practice. We find that this had nothing to do with the claimant or her disability but was as a result of having a new manager on site (Jack) who SC and JR thought might benefit from having such a drill.

68. Following this the claimant says that the managers were in a playful mood and JR turned to her and said "you don't look happy Amanda. We like to have fun when we are at work, don't we Simone?" The pair continued to giggle. JR then asked the claimant do you like to have fun Amanda? And the claimant describes JR is using a high-pitched patronising voice to address her. The claimant replied that sometime she did but she felt, she reported to the tribunal, that the managers were goading her. She complains about being asked "do you like sitting all of the time Amanda?" After observing her with a guest JR said to the claimant "I think you need training on reception Amanda". This is the claimant's account. The claimant disagreed and told the managers that she felt under pressure and felt intimidated having three managers overseeing her. JR stated "I will organise for you to have some training with Nicola". JR told the claimant "you are making lots of mistakes and it's clear to us you are struggling with the role". The tribunal heard JR's version of this and reaches its findings below. The claimant said she got angry and challenged the managers about how she felt about their behaviour which she said was goading.

69. However SC stated that JR had identified that the claimant needed training and C agreed. The claimant said that she had not been making any mistakes and asked them what basis there were making this judgement. According to the claimant JR stated from what she had seen so far and also that the claimant did not know where a stapler was the other day. The claimant says that she told the managers that she felt this was a smokescreen and they were trying to get rid of her because she was disabled. The claimant stated at this point SC said that she should stop getting all defensive and that she was taking it to personally. SC stated that it was all in the claimant's head, and that she was not disabled, she only had a bad back. She also stated that the "thing with ND bullying you is all in your head too".

70. It was at this point, according to the claimant, that she told managers that she had submitted a grievance about them as well because she believed they were discriminating against her and harassing her. The claimant then says that

she was told to leave immediately and was verbally suspended. JR stated according to the claimant: "Right Amanda you are suspended is of immediate effect, you will get a letter in the post". The claimant said that she was upset about this and rang the grievance officer who advised her that she would sort it out. The claimant in the meantime had continued to defend her position stating that she was disabled. SC told her that she needed to leave. The claimant contacted employee relations. She also states that the respondent knew she was upset because she received a message from Simone (page 85).

71. The respondent's account of 15 March is somewhat different. We accept that JR was not aware on 15th of March that the claimant had raised a grievance or that she had spoken to Ms Broome. We accept that the first time, JR became aware that the claimant had any back problems was on the 15th when the claimant winced slightly as she got off a chair. The claimant then told her that she had a bad back. It was only later in the discussion that took place in the office that the claimant told JR that it was more than a bad back and about the other issues with the other team members.

72. JR had not read the occupational health report and we accept that she read it about a week after 15 March 2019. On 15th March she did not have effective access to the personnel files because it was her first day in as new manager.

73. At some point during the day JR stated that she did not mind standing. This was not a comment aimed at the claimant, and we find that although the claimant may have perceived it as such, in the circumstances it was not a reasonable perception for her to have. JR did not asked the claimant whether she liked sitting all the time. JR did not say something about introducing a new rule that receptionists should stand whilst dealing with guests. We accept her evidence that she said it was more professional to stand up when greeting guests. We accept JR's account that CS offered her a chair and JR said that she preferred to stand because she thought it was more professional. This was not conduct related to disability.

74. JR did say something about liking to have fun when she is at work. This was not done in order to goad the claimant and JR did not make the comment that the claimant looked unhappy. We find that the remark about having fun at work was not related to disability.

75. We accept JR's evidence that all staff have problems with the Bart system. The complaint appears to be that it can be quite unstable at times and staff have to know what the glitches are with the system and the ways to work around those glitches. In other words the remarks made to the claimant about whether she felt capable on the system (which did not go beyond that) were not related to disability in any way.

76. In relation to whether the managers stopped the claimant from using computers we accept JR's evidence that the claimant had access to one of the computers although it is correct that the managers took over the other one. We do not accept therefore that the claimant was prevented from using the computers.

77. We accept JR's evidence that it would be unlikely that a receptionist would feel under scrutiny with the three managers there. This is because the managers

were doing payroll and other things around the site. In other words it was the performance of ordinary management functions. We accept JR's evidence that when she talked to the claimant about whether she felt capable using Bart, she also made it clear that it might be a "Bart" issue, or it might be that the claimant needed support. There was nothing in JR's manner that would have suggested that she was saying that the claimant could not do her job.

78. JR did accept that it was possible that the claimant had asked why she was asking the question. We do not accept that there was a disagreement about the level of training that the claimant needed. When the claimant and JR went to the back office voices were not raised. JR's intention was to discuss further training needs. The claimant disagreed that she needed further training and was frustrated. However the "training", consisting of sitting next to someone who knows more about the glitches and work arounds, was about the peculiarities of the system rather than the claimant's capability in general. By raising the query JR was not implicitly saying that there was an issue as to the claimant being able to carry out a job as a receptionist. It was not a suggestion that the claimant was struggling with the role. We find that Julie Reeves was clear that it was a question of needing specific training on the system itself. Finally on this point we reject the claimant's evidence that JR ever made reference to the claimant not being able to find a stapler on a previous occasion. We accept JR's evidence that the claimant and she talked about these training needs in a professional way. It was at this point that the claimant raised further details about her back condition.

79. During this conversation the claimant said to JR that she had felt for a while that she was being pushed out and the claimant said words to the effect that because she had got an issue, she felt as if everyone got at her. JR explained that because at that time she knew very little of the claimant she did not comment. It was left that they would need to go through matters.

80. The conversation moved back to the reception area, and by this stage SC was aware of what the conversation was about. SC agreed that the claimant needed further training. The claimant became upset at this point. SC said to the claimant that she should stop getting defensive. We do not accept that SC said, "you only have a bad back,". JR was clear that no words like that were spoken and she referred us to the grievance notes that were taken a week afterwards. JR described trying to get the claimant back into the back office but that the claimant would not come there and did not want to talk further about it. She was agitated. JR agreed that she made the decision to suspend the claimant and explained that the claimant was very irate and angry. Her idea was for the claimant to have a cooling down period. The claimant was not in a listening frame of mind and it is clear that JR rejected the idea of the claimant just taking 10 minutes outside to calm down. The claimant did say to the two managers that she was going to put a grievance in and that this was while she was getting upset, but it was equally clear that it was after the decision to suspend her had been taken.

81. We accept Julie Reeves's evidence that the claimant's disability had no bearing at all on the decision to suspend her.

82. We do find that SC on 15th March 2019 required the claimant to pick up cigarette butts outside.

83. One matter which was the subject of cross examination but which does not feature in the list of issues was in respect of the privilege card. We accept Julie Reeves's account that her requirement for the claimant to come in and sign for the card was policy at the time, and that this was not related to the claimant's disability.

Conclusions

84. The parties had not agreed a list of issue by the start of the hearing, but did manage to do this during the course of the first day. The resulting list of issues was as follows and we have structured our decision around these issues.

DISABILITY

85. R admits C was disabled at all material times by virtue of her degenerative disc disease, prolapsed spinal discs, arthritis of the spine, cervical spondylosis and sciatica.

S.15 DISCRIMINATION ARISING

86. Did R treat C unfavourably by:

i. Name calling; (yes)
ii.
iii. Talking behind her back (yes);
iv.
v. Spreading rumours about her (in some instances);
vi.
vii. Critiquing her work (in some instances);
viii.
ix. Reporting concerns to managers (none distinct from the above);
x.
xi. Making unfounded allegations (none distinct from the above);
xii.
xiii. Giving her contradictory advice on how to do things in order to set her up to fail (no);
xiv.
xv. Altering her shifts and managing her shifts and holiday entitlement (yes);
xvi.
xvii. Viewing her contract and reading her private and confidential occupational health report without her consent (yes);
xviii.
xix. Questioning her ability to do her job (in some instances).
xx.

87. Was this unfavourable treatment of C because of the following "*somethings*":

a. The reasonable adjustments that R had put in place;
b.

88. Did these "*somethings*" arise in consequence of C's disabilities? (Yes)

89. Were the following legitimate aims which the treatment was a proportionate means of achieving:

c. Ensuring the job was done properly; and
d.
e. The business of R's hotel was run properly (No)
f.

Limitation issues

90. C contends that the conduct critiquing her work and questioning her ability to do her job) took place on 15th March 2019 and is brought in time. We have found that there were some earlier instances of critiquing her work. The issue for the tribunal in relation to limitation was whether the other conduct referred to constituted conduct extending over a period of time until 15th March 2019 and therefore brought in time? (We have found that although there was conduct extending over a period of time, it did not continue into March 2019 but ended in December 2018).

91. If any part of this claim is out of time, is it just and equitable for the ET to extend time in respect of this claim? (We found that it is not just and equitable).

HARASSMENT

92. Did the conduct listed above under s 15 take place? (see above)

93. To the extent the answer is yes, is that conduct related to C's disability? (In some instances – see below).

94. Did that conduct have the purpose or effect of:

a. violating C's dignity;
b.

c. creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

d.

(In some instances only).

95. The same questions arise in respect of limitation on the events claimed to be harassment as under section 15 above.

REASONABLE ADJUSTMENTS

Making up beds

96. Did R apply a PCP requiring C to make up beds and getting rooms ready? (initially yes but not after July 2018 at latest).

97. Did that PCP put C at the following substantial disadvantages in comparison with reception staff who were required to make up beds and get rooms ready and lacked C's disabilities?

a. Difficulties with bending, lifting and twisting?

b.

(Yes)

98. Would R taking the following steps have avoided the disadvantages:

c. permitting C to work predominantly morning shifts when housekeepers were working who could prepare rooms for guests;

d.

e. ensuring the rooms were prepared by others if C was working in the afternoon

f.

(Yes, and these adjustments were made).

99. If the adjustments identified above would have avoided the disadvantages, were those adjustments ones which it was reasonable for R to have to take to avoid the disadvantages? (yes)

100. Did R make those adjustments? (yes)

101. Did R withdraw those adjustments? (No)

102. On what date was R first in breach of any duty to make those adjustments? (Does not arise as the respondent was not in breach).

Picking up cigarette butts

103. Did R apply a PCP requiring C to pick up cigarette butts from outside the hotel? (yes on 15 March 2019).

104. Did that PCP put C at the following substantial disadvantages in comparison with non disabled reception staff? (We have reformulated this issue in order for it to make sense).

a. Difficulties with bending, lifting and twisting? (yes)
b.

105. Would R taking the following steps have avoided the disadvantages:

c. Not requiring C to pick up cigarette butts; (yes)
d.

106. If that adjustment would have avoided the disadvantages, was it reasonable for R to have to take it to avoid the disadvantages? (Yes)

107. Did R make those adjustments? (No)

108. Did R withdraw those adjustments? (Does not arise)

109. On what date was R first in breach of any duty to make those adjustments? (15 March 2019).

Consecutive Shifts

110. Did R apply a PCP requiring C to work consecutive days? (No)

111. Did that PCP put C at the substantial disadvantages in comparison with reception staff who lacked her impairments and who were so required, in that she had insufficient recuperation time for her arthritis? (yes)

112. Would R taking the following step have avoided the disadvantages:

a. Not requiring C to work consecutive shifts (yes)
b.

113. If the adjustments identified above would have avoided the disadvantages, were those adjustments ones which it was reasonable for R to have to take to avoid the disadvantages? (yes)

114. Did R make those adjustments? (Does not arise, but if wrong about the application of the PCP to the claimant, we find that the respondent did make such an adjustment)

115. Did R withdraw those adjustments? (No)

116. On what date was R first in breach of any duty to make those adjustments? (Does not arise)

Chair

117. Did R apply a PCP requiring C to be present on reception? (Yes, but no PCP was applied that the claimant needed to be sitting or standing for any particular period of time. The claimant provided no evidence of such a variation on this PCP)

118. Did that PCP put C at the following substantial disadvantages in comparison with reception staff who were required to be present on reception but lacked C's disabilities? (No)

a. Prolonged periods of sitting and standing causing her pain?
b.

119. Would R taking the following step have avoided the disadvantage:

c. Providing C with a chair that offered good lumbar support and allowed C to adjust her position frequently (Yes).
d.

120. If the chair identified above would have avoided the disadvantages, was the provision of a chair reasonable for R to have to take to avoid the disadvantages? (Yes)

121. Did R make those adjustments? (Does not arise)

122. Did R withdraw those adjustments? (No)

123. On what date was R first in breach of any duty to make those adjustments? (By November 2018, being the date on which it would have been reasonable for the respondent to have complied with the duty arising out of the occupational health report).

VICTIMISATION

124. Did the Respondent subject the Claimant to a detriment by suspending her because she had done a protected act as per paragraph 7 of EJ Aspden's case management summary, namely alleging that the Respondent had discriminated against her? (No).

125. We set out our conclusions by reference to the identified issues, indicating where we did not feel it necessary to continue with a set of issues having made particular findings of fact.

Disability

126. There is no dispute on this.

Harassment and s 15 treatment

127. The claimant's was called names by various members of the respondent's staff and they were talking behind her back. They were making remarks, such as that she was useless or that she was thick. We find that this type of behaviour arose after the claimant had started to make her co-workers aware that she needed adjustments and in particular after the claimant's occupational health report had been read in September 2018. This created a poor atmosphere, essentially because there was resentment of her resulting from the fact that she would not be required to do things like make beds and, in other words, that certain reasonable adjustments had been made on her on her behalf.

128. We find also that there was an element of critiquing the claimant's work. In particular we were concerned that the shift notes had not been provided in disclosure to us. We do draw an adverse inference from the fact that these notes do not appear to have been disclosed and we infer that they do show that the claimant was identified particularly as having made errors.

129. On this question of what was on the shift notes we had no real evidence except the oral evidence and we accept that the claimant was being critiqued or singled out by being named in those notes. We do not accept however that when any instance of criticising the claimant occurred in the hand over notes this was because of animosity towards her due to the making of reasonable adjustments.

JR's "criticisms of the claimant's capability"

130. There were two parts to the issue of critiquing the claimant's work however. The claimant complains that JR criticised her work in terms of her capability. This was said to occur on 15 March 2019.

131. Although we understand why the claimant took the view that she did of what was going on (due to the treatment her co-workers had given her up to about December 2018) we find that what was actually going on was as follows.

132. On 8th March 2019 and on 15th March 2019 Julie Reeves had noticed a couple of glitches in the reservation system (the "Bart system") causing the claimant problems. On 15th March 2019 she asked the claimant whether she felt capable using the system.

133. We find that what JR meant by this form of training was the "trainee" sitting alongside somebody with more knowledge of the system so that her the claimant could be enabled to work around those glitches.

134. Objectively we find on the evidence the claimant was not being criticised and in particular we find that JR's action was not related to disability. When the remarks were made JR had no knowledge of the claimant's disability, nor did those remarks come as a consequence of something arising out of disability. We understand that as a result of what she perceived to be critical treatment from her co-workers the claimant had some basis for believing that this was criticism aimed at her, but in all of the circumstances we conclude that the remarks were not unwanted conduct relating to disability nor were they related to something arising out of the claimant's disability.

Concerns reported to managers

135. Next we look at the allegation that there was an incident in which concerns about the claimant were reported to her managers. We find that although the claimant refers to this in her evidence, it was not likely to have happened because no complaint was made by the claimant about it as far as we can see in any way. We accept that the claimant gave evidence concerning the handover sheets, but we cannot see evidence of any other concerns being reported to managers. So we find that this did not occur over and above the vague allegation relating to the hand over sheets.

Unfounded allegations

136. The next sub-issue was the making of unfounded allegations and as far as

we were able to discern, this amounts to the same allegation about what was in the handover sheets which we have already commented on. We do not accept that there were other unfounded allegations made against the claimant therefore.

Contradictory advice – being set up to fail

137. We considered the allegation that the claimant was set up to fail as it was put. We could not find any evidence of the contradictory instructions that the claimant was given other than a very vague allegation that this happened. Hence we find that this did not happen. We do not accept the claimant's evidence on this point because it never had sufficient detail for the tribunal to be able to understand it as a distinct allegation. The claimant has not established the primary facts from which an inference could be drawn under any of the sections relevant to this case.

Altering the management of the claimant's holiday entitlement.

138. We considered the allegation that the respondent's employees altered the claimant's shifts and the complaint she made about the way in which her holiday entitlement was managed. We note that the respondent could have called the co-worker ND. Nonetheless we found that although ND gave the claimant the explanation that the claimant sets out in her witness statement, she gave Ms Broome a different explanation. We accept that the explanation given to Ms Broome was in fact the real explanation. The claimant had not booked her holidays in accordance with the respondent's procedures and had not marked them as holidays, but as N/A.

139. We found that the claimant probably did fill the forms in inaccurately and this was the explanation for the treatment, albeit ND may have told the claimant something else.

Shifts

140. In relation to the shifts we reject the claimant's allegation that any were cancelled (see p 109). We accept that the claimant was not booked for two consecutive shifts. She had not mentioned this matter in the further details provided to the tribunal on page 45. We also note another document which ought properly to have been disclosed by the respondent and which was not. The rota became available midway through the hearing. This supported the idea that the claimant was not booked for two consecutive shifts. We therefore reject the contention that this ever happened.

Cherry picking of shifts and holidays

141. Paragraph 51 of the claimant's witness statement dealt with the cherry picking of the shifts and holidays. We accept that this occurred and on the claimant's evidence appears to have lasted until November. The claimant's evidence on this was vague and so we are unable to put a precise date on these acts. We find that they probably occurred no later than November 2018. We find it was probably late November 2018. We find that this was not unwanted conduct relating to disability and that it was not something related to the claimant's having had reasonable adjustments made in her favour. We find it much more likely that the explanation was that ND was engaging in favouritism to her family (as the claimant at one point indicated was the complaint).

Reading the claimant's occupational health report

142. We find that this occurred in September 2018. ND read the report without the claimant's consent because it was left around in the office. Reasonable adjustments had been made in August of that year. It is most likely that the people who looked at the report, looked at it because of disability, so that it is related to disability. We find nobody viewed the claimant's contract because, as far as we can see, no evidence was presented to us of that allegation.

Questioning the claimant's ability to do the job: insults

143. Next we looked at the allegation that ND and others had questioned the claimant's ability to do her job. We accept that as a result of resentment over the reasonable adjustments that had been made, and probably in the period September to November, but not later, ND picked up on perceived faults of the claimant and described her as thick and useless. We think that constitutes questioning her ability to do her job. We find that there are no complaints of that type of behaviour after December 2018.

Questioning capability to do the job – March 2019

144. There is then the question about whether her capability to do the job was being questioned on 15 March 2019 and on that we find that it was not.

145. We prefer Julie Reeves' account. It was not unwanted conduct, but ordinary management of the claimant. It was not related to disability, as JR was unaware of the claimant's disability when she made the remarks that we found she did make. These were not questioning the claimant's capability to do the job, but simply noticing that some form of informal training on a glitchy reservation system was needed. This was not something which, in all the circumstances of the case it was reasonable to conclude had the effect of creating the proscribed environment referred to above.

146. We have set out our conclusions on causation in both the s15 and the s26 setting above in respect of these acts or omissions.

Does the respondent have a defence under section 15(2) EqA 2010?

147. We looked at the respondent's alleged defence under section 15 (2) and we accept that ensuring the job was done properly was, insofar as that is a discernible legitimate aim, a legitimate aim. Equally to ensure the business of the hotel was run properly is a legitimate aim, insofar as it is discernible as an aim of any substance whatsoever. However both of those aims involve highly evaluative elements to them. However we then have to look at whether the unfavourable treatment was a proportionate means of achieving those legitimate aims. We have no hesitation in rejecting the idea that these means were appropriate. Far from achieving the aims they militate against them. You do not treat staff in that way if you are going to be seeking those aims.

148. Therefore the respondent's attempted justification under section 15(2) fails.

Harassment

149. We looked at the question of harassment with our findings in respect of the conduct that did or did not take place above. We were conscious of the principles in **Tees Esk and Wear Valleys NHS Foundation Trust v Haslam & Oths** UKEAT/0039/19/JOJ that we must employ a test of causation which is broader than the question of whether the unwanted conduct was 'because of' disability, but includes acts that were 'associated with' the protected characteristic (§21-22).

150. We found that the conduct found by us to constitute unfavourable treatment for the purposes of section 15 also constituted unwanted conduct for the purposes of section 26 of the EqA 2010. We also find that that such conduct as we found had occurred did have the effect of violating in certain cases the claimant's dignity (the insults). We were clear that in relation to the name-calling the behaviour comes very close to being behaviour that has that purpose. Nonetheless for our purposes it is enough that it had that effect. In particular we do not find it necessary to make a finding on purpose as it makes no difference to liability (these claims failing on limitation issues).

151. It also had the effect of creating a hostile working environment and we note the fact that there are a number of comments made over time. There was not, as far as we could see, evidence of it happening every day but that makes no

difference in our view: it had the effect of creating a hostile environment.

152. In relation to whether it was reasonable for the unwanted conduct to have that effect we considered all of the circumstances of this case. We felt that it was reasonable, having regard to the claimant's perception, to conclude that the conduct complained of and found by us had the effect of creating a hostile environment.

153. We want to make one point very clear. The claimant was not oversensitive in relation to the later incidents in March. We understand why she interpreted them in the way she did. We have concluded in respect of the capability matter and JR's comments on the Bart system that they were not related to disability.

154. One of the circumstances which we noted is that the respondent did not appear to have stability in management for a considerable period of time and we find that this contributed to a situation where this kind of harassment could take place. We note that it was a situation in which there were a number of different temporary managers up until we think around February 2019 when SC came in. That had the effect of there having to be peer-to-peer management. Throughout that period there were different temporary managers: Mr Close and Mr Roberts being two.

Bed making

155. We next turn to the reasonable adjustments. The question was whether the respondent applied a provision criterion or practice requiring the claimant to make up beds and get rooms ready. We find that initially (June 2018) this was being applied. However very quickly (we think it was within about a month of starting, it ceased after the claimant's accident). In particular after the occupational health report, the claimant was never required to make up a bed.

156. When cross-examined on paragraph 32 of her witness statement the claimant accepted that she had not needed and had not been required to make up beds after the adjustments were made in her favour. The expectation was that she would have a housekeeper in place to help her. We accept that the claimant told the occupational health specialist (page 155) in October 2019 about a week before the case management hearing in this case that she had been exempted from making beds since 2018.

157. We could also find no evidence that there was any threat to remove this adjustment.

158. We accept that the provision criterion or practice would have put the claimant at a substantial disadvantage, namely that she would find this more difficult as a result of difficulties with bending lifting and twisting and accept that permitting the claimant to work predominantly on the morning shifts when housekeepers were working (who could prepare rooms for guests) could have avoided it. But we find that this is what actually happened. Likewise the adjustment of ensuring the rooms were prepared by others if the claimant was working in the afternoon happened and was not removed. Those adjustments were made in around August or September 2018. There appears to have been after that time no expectation that the claimant and would make beds. The evidence of Ms Ellitson in particular pointed the other way. She made it clear that the adjustment was put in place and maintained. She ensured that the claimant would not have to undertake these tasks.

Picking up cigarette butts

159. Turning next to the reasonable adjustment of not picking up cigarette butts. The issue here is whether the respondent applied a provision criterion or practice requiring the claimant to pick up cigarette butts from outside the hotel. We accept that on 15th March the claimant was asked to pick up litter from outside and that she was told to concentrate on picking up her tabs or cigarette butts. We accept that this was done on a blustery cold day. Ms Ellitson's evidence supported this. SC was not called by the respondent and we find that she did require the claimant to pick up butts on one occasion, on 15 March 2019. The claimant was told to use gloves when she said that she had difficulties in picking up the butts using the tongues provided.

160. We turn to the question of whether the provision criterion or practice put the claimant at the disadvantage which a nondisabled person would not have had in this context of having difficulties with bending lifting and twisting. We find that it did put the claimant at that disadvantage and that a person without her impairment would not have experienced this disadvantage.

161. We find that if the respondent had not required the claimant to pick up cigarette butts that would have avoided the disadvantage. We asked ourselves then in the light of that, whether that adjustment was one which was reasonable for the respondent to take in all the circumstances in order to have avoided the disadvantage.

162. SC had been in place for about a month by 15th March 2019. One of the circumstances to which we should have regard is the fact that she ought reasonably to have read the occupational health report during that time. She

should have appreciated that there were potential difficulties for the claimant with bending and twisting. We note, also, that there does not appear to have been a defence on the part of the respondent that it was unaware of the substantial disadvantage or that the claimant was likely to be placed at the disadvantage referred to in sections 20-21 (see Schedule 9 part 3 paragraph 20 of the EqA).

163. We looked at the question of whether the respondent ought to have known at that time whether the claimant would be disadvantaged and we note that the report itself does not mention her difficulties with bending and twisting. We also noted that there had been an earlier meeting with an earlier manager DC referring to this in which the claimant had referred to the difficulties that she had with bending and twisting. She recounted an episode in Café Nero when simply bending and twisting round to pick up her handbag had caused a flareup. That was recorded by DC.

164. One of the documents which was disclosed very late in proceedings by the respondents, and which appeared to us to be wholly relevant to the case, was the interview between SC and the investigator Ms Broome on 21 March 2019. SC was asked whether she had been aware of the reasonable adjustments and the claimant's back trouble. She said something to the effect that it may have been mentioned by James Roberts (one of the and earlier temporary managers). She said that it was mentioned that there was an occupational health report. The respondent was put on notice, at least from the handover from Mr Roberts to SC (in February we think) about the occupational health report. We consider that the respondent ought to have looked at it and any manager looking at that report would have wanted to talk to the employee. Had that happened we think it is most likely that the claimant would have told SC about the problems that she had with bending and twisting. So we conclude that it was reasonable for the respondent to make that adjustment in those circumstances and we find they did not.

165. However once the matter was drawn to the attention of the respondents we do not see any evidence that the claimant was asked to pick up butts again after 15 March 2019. We do not see any evidence that the adjustment was withdrawn. We have rejected the claimant’s evidence that she was asked to pick up cigarette buts on any other occasion on which it would have been reasonable for the respondent to make this adjustment. We do not consider that the circumstances of SC on 14 February 2019, when she was not on notice of the claimant’s disability were such that she ought to have been on notice of them. Whilst the respondent has not pleaded the Schedule 9 defence, the tribunal has to consider all of the circumstances when considering whether, on any particular date it would have been reasonable for the respondent to have taken the step of making the adjustment in order to remove the disadvantage. We find that on 15 February 2019, in the light of the rapid succession of managers, it was necessary to look at whether SC’s ignorance of the claimants condition created a circumstance in which it was not reasonable for the respondent to have to make the adjustment. We have concluded that the claimant did not tell SC of her

condition on that day and hence it was not reasonable for the respondent to have to make the adjustment in those circumstances. The circumstances altered between 14 February and 15 March because by the latter date the claimant had mentioned her back, and the handover with Mr Roberts had taken place (albeit we were not told on what date this took place). By that time SC should have read the earlier manager's notes and the occupational health report.

Adjustment of not working consecutive days

166. Next is the question of whether the respondent applied a provision criterion or practice requiring the claimant to work consecutive days. We find there is no evidence that they did and we simply find that it was never applied to her. However it there was such a provision criterion or practice, the respondent had made the adjustment not requiring the claimant to work consecutive dates. There was no evidence that the adjustment was withdrawn. The one time that the claimant alleged that the adjustment was withdrawn, it is very clear that nothing of the sort occurred, and that the claimant's recollection of that event is inaccurate.

The adjustment relating to the chair

167. In relation to the provision of a chair we find that the respondent did apply a provision criterion or practice requiring the claimant to be present on reception. This is the way the adjustment was set out in the list of issues. We cannot see how this in itself could have caused anyone a disadvantage, let alone a person with the claimant's impairments. Nothing was said about the way in which the person was to be present on reception. There was no formulation of a provision criterion or practice involving sitting or standing for prolonged periods of time, and the claimant does not appear to have formulated this provision criterion or practice by reference to prolonged periods of sitting or standing. Although that would be sufficient to determine this aspect of the case against the claimant, we considered that the provision criterion or practice was in fact one involving presence, sitting or standing for prolonged periods of time.

168. We find that the latter, but not the former, provision criterion or practice would cause substantial disadvantage to the claimant, namely prolonged periods of sitting and standing would cause her pain due to condition and we find that providing a chair that offer good lumbar support and allowing the claimant to adjust her position frequent frequently would have avoided the disadvantage. We also find that it would have been reasonable for a chair to have been provided.

169. We then look at the question of whether the respondent made those adjustments. The claimant's case was articulated in the case management hearing and an amendment was allowed specifically to plead a particular way of

putting the case. This was that the chair adjustment was withdrawn. We do not agree with the respondent's submission that we need to look at this as a matter of pleading technicality, in the light of **Chandok**. That approach is simply incorrect in respect of the question of what adjustments are reasonable to make. The question of what adjustments it is reasonable to make are matters for the tribunal to find objectively. It is a well-known principle that as a matter of fairness the claimant may be asked to provide particulars of the adjustments that she relies upon, but that is a wholly different principle to the **Chandok** principle which we find has no application in respect of the question of analysing reasonable adjustments.

170. However the claimant's case is that the chair adjustment was withdrawn, and it appears that from her evidence that the withdrawal occurred by managers sitting in the chairs. We found that the managers did not prevent the claimant sitting.

171. In so far as the claimant might be permitted to argue that the failed reasonable adjustment was the failure to provide a chair with lumbar support, we consider that such a failure would have occurred by November 2018 at latest as this is the point in time by which it would have been reasonable for the respondent to have complied with the duty to make reasonable adjustments in this respect. Time, for limitation purposes would run from there. Although the claimant's case was clearly not presented on this footing, for the avoidance of doubt we have found that the claim was presented outside the limitation period and we have considered it as part of the considerations relating to conduct extending over a period. In that regard the continuing conduct (which can be taken to include this allegation) continued to December 2018 but not beyond.

Victimisation

172. Turning next to the question of victimisation, we asked ourselves whether the respondent subjected the claimant to a detriment by suspending her because she had done a protected act (which we find she did) namely saying that she had been discriminated against by the respondent on 15 March 2019.

173. We find that the claimant did do the protected act but she was not suspended because of it. We find that JR wanted to ensure that the heat which had entered into the discussions cooled off. We think she used a poor choice of words. She said that she was suspending the claimant when what she was seeking to do, we can see this from the interviews (for example with SC) was trying to get the claimant to calm down. This was the reason the claimant was told to go home. It had nothing to do with the claimant making an allegation of discrimination and (although this is not determinative of the issue) we find that the allegation of discrimination was only made *after* the claimant had been told to go home. We accept Ms Broome's evidence that when the claimant called her on

the day she was very upset and told Ms Broome that she had been suspended because she raised her voice or words to that effect. We find that this is what the claimant told Ms Broome when she called her from the car park and Ms Broome told the claimant that she would find out what was going on. We reject the claimant's assertion that she made it clear to Ms Broome that she had not raised her voice.

174. So for that reason we find that causation is not made out. We have considered the way in which the burden of proof must shift between claimant and respondent in these cases. We find that the explanation for that suspension is innocent of victimisation.

Limitation issues

175. In considering the effect of section 123 of the EqA 2010 we considered **Hendricks v Metropolitan Police Comr** [2002] EWCA Civ 1686 paragraph 51. We considered whether there was "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts.

176. The respondent referred us to s123(3)(a) EqA 2010, **Aziz v FDA** [2010] EWCA Civ 304 para 33 (the relevance of whether the same individuals or different individuals were involved), and **Greco v General Physics UK Ltd** UKEAT/0114/16/DM (para 39, merely illustrative).

177. The respondent pointed out that an all or nothing approach is not necessary. Some acts can be grouped whilst others are unconnected (**Lyfar v Brighton & Sussex University Hospitals Trust** [2006] EWCA Civ 1548). Each individual act alleged to be part of an act extending over a period must actually be discriminatory. If one is not then it cannot form part of a continuing act (**South Western Ambulance Service NHS Foundation Trust v King** [2020] IRLR 168, para 33).

178. An allegation about conduct extending over a period which is otherwise out of time cannot be rescued by acts not relied upon as being allegedly discriminatory within the primary limitation period (**Lyfar-Cisse v Brighton and Sussex University Hospitals NHS Trust** UKEAT/0100/19, para 59). Finally the respondent submitted that no conduct after the date of the Claimant's ET1 may be taken into account in considering whether there was a continuing act (**Bexley** , para 21). On that last point the tribunal does not accept that where there has been a properly allowed amendment to permit the inclusion of later occurring acts, they may not be taken into account, and this is not the intention of the passage from Bexley. However in the ordinary case where there is not such amendment, the principle, so far as it goes, must be right.

179. We noted that although they are individual unlawful acts under the EqA 2010, acts can form a continuing act if they are linked by a common personality (**Veolia Environmental Services UK v Gumbs** UKEAT/0487/12) and regardless of whether they occur three months or more apart (**Southern Cross Healthcare v Owolabi** UKEAT/0056/11).

180. We have considered the question of limitation at the end of the process of determining whether the acts complained of constitute (absent limitation) acts of unlawful discrimination. In doing so we were mindful of the fact that the claimant seeks to argue that there was conduct extending over a period. The acts going to make up such conduct extending over a period (if not the application of a policy) must themselves be unlawful acts of discrimination. If our finding in relation to any particular acts which the claimant has specified is that it is not unlawful under the EqA 2010, it cannot go towards the construction of conduct extending over a period of time.

181. We find that there was a series of acts which do constitute conduct extending over a period. We find that that period of harassment and, for that matter, breach of section 15 of the EqA 2010 ended in December 2018. The claimant's evidence was simply too vague for a more precise date to be given to the end of that period, but we accept that the evidence suggests that the incidents tailed off in December, albeit that the claimant continued to want to complain of her treatment due to matters which we have found did not constitute unlawful acts under the EqA 2010.

182. We find that the unlawful harassment/s.15 treatment was likely to have ended at the end of December. The conduct extending over a period came to an end at that point. We found no unlawful acts by any of the people who were involved in the period of harassment/s15 treatment of the claimant after that time. The one unlawful act after that date was the result of SC asking the claimant to pick up cigarette butts. This forms a separate and isolated act in our view.

183. None of the factors that we mention are conclusive but they are matters that we have taken into account. We take into account the fact that the actors involved in the two different pieces of behaviour were different. In March it was the managers but earlier it was peer to peer harassment taking place. There is an appreciable gap after the end of the year where there does not appear to be unlawful acts of harassment before the 15 March matter. We reject the claimant's evidence that there was an incident with JR on 8th March. Whilst it is possible for acts to form conduct extending over a period where there is a very large gap, it does not follow that because there is a short gap it renders the collection more likely to be conduct extending over a period. We looked at all of

the factors, including the nature of the acts, the personalities involved, as well as the fact that there was a gap where no complaint of acts or omissions is being made or upheld.

184. So we find that there are two discrete acts to which the complaint relates for the purposes of the time limit provision, and that the earlier period of harassment and discrimination arising from disability is time-barred, subject to the question of extension of time.

Extending time

185. s123(1) EqA 2010 requires complaints brought under the provisions of that Act to be brought within:

a. 3 months starting with the date of the act to which the complaint relates; or

b. such other period as the Tribunal thinks just and equitable.

186. We were mindful of the principles in **Community Centre (t/a Leisure Link) v Robertson** [2003] IRLR 434, at para 25.

"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

187. This does not mean, however that we have to find exceptional circumstances. We have to take seriously the fact that there are limitation defences that parliament has made available to respondents.

188. We considered, in relation to the question of extending the limitation period **Olufunso Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, and in particular paragraph 37: "The best approach is to assess all the factors in the particular case which [the tribunal] considers relevant to whether it is just and equitable to extend time, including in particular, the length of and the reasons for the delay." We also were mindful that it is for the claimant to produce evidence on the basis of which the tribunal can exercise its discretion.

189. The claimant submitted on this point that in all the circumstances of this case, it would be just and equitable for extend the time by reason of the following:

i. she was initially without the benefit of legal advice;

ii. the claimant did raise an internal grievance on 4th March 2019 [82], the outcome was sent on 18 April 2019 [96], which involved mediation on 20 May 2019 [97]. It was only after that mediation proved ineffective to the claimant , that she contacted ACAS on 13 June 2019;

iii. the claimant was on sick leave from 15 March 2019 until 11 June 2019; and

iv. The respondent did not contend that the delay has impacted on their ability to call evidence from ND or SC.

190. We have to ask ourselves whether it is just and equitable to extend time. The earlier period of harassment is approximately eight months out of time. We know that the claimant was represented by her union and either from January or March 2019 for these purposes. If we suppose that union representation became available to the claimant in March there is a gap from December through to March when nothing appears to have been done but that might be accounted for by the fact of no representation by a union.

191. For the reasons that will become apparent, it does not matter which of those dates is the correct date and by February 2019 and ND was no longer the peer-to-peer manager or in control of activities in relation to the claimant.

192. We took account of the fact that there was union representation in this case but there does not appear to be a good explanation, or indeed evidence offered by the claimant as to what was happening up until March. We note that the claimant was on sick leave from March to June and we are not clear as to the detail or nature of that sick leave or the impact of that sick leave on the claimant's ability to present a claim. The claimant simply did not provide any evidence to suggest that this period of sick leave had any effect on her ability to start a claim.

193. It is a matter for the claimant to produce evidence that will convince the tribunal on the balance of probabilities as to what the explanation was for the delay. In this regard we note also that the claimant was going through a grievance process the outcome of which did involve some mediation. However this was a process which had the support, on its face at least, of the trade union and we have not had an adequate explanation as to why proceedings were not started timeously. There was no suggestion that the claimant was ignorant of her

rights. The respondent submitted on this issue that the claimant had presented no evidence or explanation to the Tribunal, instead simply relying on a continuing act to bring her claim within time. Consequently it was argued there is no basis on which the tribunal could consider the reasons for delay or whether any length of delay was permissible and an extension should be refused.

194. We consider that this way of putting the point is incorrect. Whilst it is true that the claimant must provide an explanation for the delay, the materials on which the tribunal can exercise its discretion are not simply limited to what appears in the witness statement of the claimant. On that point the respondent is right, the claimant provided no explanation or evidence relating to the discretion to extend time. However there was evidence, to which the claimant's submissions referred and which we have evaluated above. We do, however have to base our discretion on what evidence there is which might constitute an explanation. To that extent, the claimant has failed to provide an adequate explanation for the primary part of the delay, particularly in the context of having union representation at the relevant times.

195. Finally we also noticed that there is a gap which again remains unexplained from the 13th of July or thereabouts through to 11th of August when the claim was presented.

196. For those reasons we do not think it is just and equitable to extend time.

Remedy

197. One act of discrimination occurred within the primary time limit. So we then considered the question of compensation in relation to the cigarette butts incident and we cannot see any evidence of a connection between the particular incident that we found occurred and the sickness absence. So there is no financial loss stemming from it to which our attention was drawn.

198. We looked at the incident itself and we consider that it falls towards the lower end of the lower Vento scale because it is a one-off incident. The issue with which the claimant was concerned appears to have been rectified quickly. There appears to be no repetition or any threat of repetition as far as we can see so we accordingly award £1200 for injury to feelings. The claimant is entitled to this sum together with interest. She is entitled to interest which runs from the date of the discriminatory act (15 March 2019) to the date of calculation, 19 February 2021 ((regulation 6(1)(a)). The rate is 8% p.a. The daily rate of interested is £0.26 per day for 699 days giving total interest of £181.

Case No: 2502489/2019 (V)

Employment Judge **O'Dempsey**

Date 10 April 2021