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EMPLOYMENT TRIBUNALS

Claimant		*Respondents*
Ms E Isik	**AND**	**The Trustees of the London Clinic**

Heard at: London Central (By CVP videolink and in person)

On: 18 - 21 May 2021 & 25 May 2021 (In Chambers)

Before: **Employment Judge Brown**
Members: **Ms O Stennett**
Mr D Shaw

Representation:

For the Claimant: **In person**
For the Respondent: **Ms M Tutin, Counsel**

JUDGMENT

The judgment of the Employment Tribunal is that:

1. **The Claimant does not have sufficient service to bring a claim for unfair dismissal.**
2. **The Respondents did not subject the Claimant to direct race discrimination, contrary to *s.13 Equality Act 2010* ("*EqA*");**
3. **The Respondents did not subject the Claimant to direct or indirect religion or belief discrimination, contrary to *ss.13 & 19 EqA*;**
4. **The Respondents did not subject the Claimant to sex harassment or direct sex discrimination, contrary to *ss.13 & 26 EqA*;**
5. **The Respondents did not subject the Claimant to direct disability discrimination, discrimination arising from disability and/or failure to make reasonable adjustments, contrary *to ss.13, 15 & 20 EqA*;**
6. **The Respondents did not subject the Claimant to victimisation, contrary to *s.27 EqA;***
7. **The Respondents did not make unauthorised deduction from the Claimant's wages, contrary to *s.13 ERA*.**
8. **All the Claimant's claims are therefore dismissed.**

REASONS

The Claim and the Issues

1. The Claimant brings complaints of:

    a. Unfair dismissal, contrary to *s.94 Employment Rights Act 1996* ("*ERA*");
    b. Direct race discrimination, contrary to *s.13 Equality Act 2010* ("*EqA*");
    c. Direct or indirect religion or belief discrimination, contrary to *ss.13 & 19 EqA*;
    d. Sex harassment or direct sex discrimination, contrary to *ss.13 & 26 EqA*;
    e. Direct disability discrimination, discrimination arising from disability and/or failure to make reasonable adjustments, contrary *to ss.13, 15 & 20 EqA*;
    f. Victimisation, contrary to *s.27 EqA;*
    g. Unauthorised deduction from wages, contrary to *s.13 ERA*.

2. The factual issues in the claims had been established at a Preliminary Hearing before EJ Burns on 9 September 2020.

3. Ms Tutin, Counsel for the Respondent, helpfully added the relevant legal tests to those factual issues, to produce a complete list of legal and factual issues for this hearing. The legal and factual issues to be determined at this hearing were therefore:

Unfair dismissal

1. Does the Claimant have sufficient qualifying service to bring such a claim, within the meaning of s.108(1) ERA? The Respondent says that she does not, as she was employed for less than two years.

Discrimination

Race discrimination

2. Was the Claimant treated less favourably than an actual or hypothetical comparator in materially similar circumstances in that:
    (1) She was allegedly obliged to work in patient-facing roles from July 2019 to February 2020? She relies upon the following as actual comparators: Shahla Rostami, Ben Price and Gabriella Grant.
    (2) She was not paid overtime during 2019. She relies upon Helena Dos Santos as an actual comparator.

3. If so, was any less favourable treatment because of the Claimant's (Turkish) race?

Religion or belief discrimination

Direct discrimination

4. Was the Claimant treated less favourably than a hypothetical comparator in materially similar circumstances in that:
   (1) She was allegedly forced to work in a back office where there was food present for the second two weeks of Ramadan during May to June 2019?
   (2) In January 2020, her request to take annual leave to celebrate Eid al-Adha starting on 31 July 2020 for 11 days was refused?

5. If so, was any less favourable treatment because of the Claimant's (Islamic) religion?

Indirect discrimination

6. Alternatively, did the Respondent apply the following provisions, criteria or practices ("**PCPs**"):
   (1) Allowing food to be present in the back office and/or requiring employees to work in the back office where food was present?
   (2) Requiring employees to work during Eid?

7. If so, did those PCP(s) put Islamic employees at a particular disadvantage when compared with non-Islamic employees? What is that disadvantage?

8. Did it put the Claimant at that particular disadvantage?

9. Can the Respondent show that the PCP(s) were a proportionate means of achieving legitimate aim(s), namely:
   (1) Not restricting the activities of its employees by prohibiting eating in the office and/or seeking to protect the operational needs of the business by requiring the Claimant to return to work in her usual location and her usual duties?
   (2) Seeking to protect the operational needs of the business by ensuring adequate cover?

Sex harassment or discrimination

Harassment

10. Did the Respondent engage in unwanted conduct in that, at the Christmas party held at the Holiday Inn in Camden in November/December 2019, the Claimant's manager, Dustin Zambon, told another manager to tell Armin Sabotic that the Claimant was dangerous and they should keep away from her?

11. If so, was such conduct related to the Claimant's sex?

12. If so, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In considering whether conduct has the proscribed effect, the Tribunal must consider: (1) the Claimant's perception; (2) the other circumstances of the case; and (3) whether it is reasonable for the conduct to have that effect.

Direct discrimination

13. Alternatively, was the Claimant treated less favourably than a hypothetical comparator in materially similar circumstances by way of the alleged conduct set out at paragraph 11 above?

14. If so, was any less favourable treatment because of the Claimant's sex?

Disability discrimination

Disability

15. Was the Claimant a disabled person with the meaning of s.6 EqA at the relevant time? The Respondent accepts that her conditions of stress, anxiety and depression amounted to a disability at the relevant time. However, it does not accept that the Claimant's nasal problems amounted to a disability. Consequently:
    (1) Did the Claimant have a physical impairment, namely nasal problems?
    (2) Did that impairment have an adverse effect on the Claimant's ability to carry out normal day to day activities?
    (3) Was that effect substantial?
    (4) Was that effect long-term?

16. Did the Respondent know, or should it have known, of the Claimant's alleged disabilities at the relevant time?

Direct discrimination

17. Was the Claimant treated less favourably than a hypothetical comparator in materially similar circumstances in that:
    (1) She was not granted sick leave and sick pay for her week's absence in November 2019, during which she had a nose operation and for which she had to take annual leave?
    (2) She was not allowed to fully participate in or have sight of the risk assessment which was written about her in December 2019?
    (3) She received a final written warning because she was absent from work on 30 and 31 December 2019, having flown to Turkey to attend a follow-up meeting on 28 December 2019 with her nasal consultant following her nose operation?
    (4) She was dismissed, having provided a three-month conditional fitness to work note on 17 January 2020?

18. If so, was any less favourable treatment because of the Claimant's alleged disabilities?

Discrimination arising from disability

19. Did the following "things" arise in consequence of the Claimant's alleged disabilities:
    (1) She was absent from work in November 2019 during which she had a nose operation?
    (2) A risk assessment was produced?
    (3) She was absent from work on 30 and 31 December 2019, in order to attend a follow-up meeting on 28 December 2019 with her nasal consultant?
    (4) She was unable to face patients?

20. Do the acts and/or omissions identified at paragraph 18 above amount to unfavourable treatment?

21. If so, did they occur because of the "things" arising in consequence of the Claimant's alleged disabilities? (Each "thing" identified at paragraph 20 corresponds to each alleged act of unfavourable treatment set out at paragraph 18.)

22. If so, can the Respondent show that such treatment were proportionate means of achieving legitimate aim(s)? (Each aim corresponds to each alleged act of unfavourable treatment set out at paragraph 18.)
    (1) The fair and consistent application of its absence policy?
    (2) [The justification defence is not advanced as to the alleged treatment identified at paragraph 18(2).]
    (3) The requirement for annual leave to be properly authorised and/or upholding appropriate standards of conduct?
    (4) Maintaining appropriate standards of conduct and performance in the workplace and/or ensuring that the intrinsic responsibilities of the contractual role can be fulfilled.

Failure to make reasonable adjustments

23. Did the Respondent apply the following PCP(s):
    (1) The Claimant was not paid sick pay when she was absent for a nose operation in November 2019?
    (2) The Claimant was disciplined for her absence on 30 and 31 December 2019?
    (3) The Claimant was required to face patients for three weeks in January and February 2020?

24. If so, did the application of the PCP(s) put the Claimant at a substantial disadvantage in comparison to non-disabled employees? Was the

Respondent aware the Claimant was put, or likely to be put, to such a disadvantage?

25. Did the Respondent take such steps as would have been reasonable to avoid the disadvantage? The Claimant says the Respondent ought to have taken the following steps (each step corresponds to the alleged PCP(s) identified at paragraph 24):
    (1) The Respondent ought to have paid her sick pay during her absence in November 2019.
    (2) The Respondent should have authorised her leave for her absence on 30 and 31 December 2019 and/or not disciplined her for her absence.
    (3) The Claimant should have been relieved from facing patients in her duties.

Victimisation

26. The Claimant says that in February 2020 she told Donna Shanks in the Respondent's HR function that she was going to bring a grievance about the way in which the Respondent had responded to her health issues. Did this amount to a protected act?

27. Did the Respondent dismiss the Claimant because she had done a protected act, or the Respondent believed she had done, or may do, a protected act?

Limitation

28. When did the alleged acts and/or omissions upon which the Claimant relies occur? Any act and/or omission which took place more than three months prior to the date of presentation of the claim on 13 March 2020 (subject to Acas Early Conciliation) is potentially out of time.

29. Are the alleged acts of omissions based upon a series of unconnected acts or a continuing state of affairs?

30. If any of the acts and/or omissions are out of time, can the Claimant show that it would be just and equitable to extend time?

Unauthorised deduction from wages

31. What sums were properly payable to the Claimant under her contract of employment? In particular:
    (1) Was she entitled to sick pay for her week's absence in November 2019?
    (2) Did she have a contractual entitlement to be paid for overtime worked? If so, how much overtime did she work? The Claimant alleges that she worked a varying amount of 30 minutes or more every time she worked in a patient facing role from 27 February to 24 December 2019.

32. Has there been a deduction, or a series of deductions, from the sums properly payable to the Claimant? If so, what deduction, or series of deductions, has been made and when?

Limitation

33. Was the date of the single deduction, or last deduction if in a series, within the period of three months prior to the date of presentation of the claim on 13 March 2020 (subject to Acas Early Conciliation)?

34. If not, was it reasonably practicable for the claim to be brought within the relevant three-month period? If not, was the complaint presented within a reasonable period?

4. Tribunal was provided with:

a. an indexed Bundle of documents (page references in these reasons are to pages in that Bundle);
b. a Respondent's cast list and chronology and timetable.
c. a witness statement from the Claimant; and
d. witness statements on behalf of the Respondent: from Andrew Osbourne, Customer Services Team Leader; Dustin Zambon, Customer Service Centre Manager; Jagnisha Chohan, Senior HR Business Partner; Luis Pedro, Head of Hotel and Customer Services; and Donna Shanks, former Employee Relations Adviser.

Donna Shanks did not give evidence. The Tribunal was told that Ms Shanks was ill. There was no medical evidence of this. The Tribunal disregarded her witness statement. It took into account contemporaneous documentation in the Bundle which was created by Ms Shanks as appropriate

Conduct of the Tribunal Hearing

5. The first day of the hearing was conducted by CVP videolink. The Claimant had significant connection problems in the morning. There were frequent pauses as the Tribunal waited for her to rejoin. The Claimant moved to a different location by 14.40 on the first day, when her connection difficulties were resolved. It was agreed by all parties that the hearing would need to proceed in person thereafter, because of the Claimant's difficulty in maintaining a stable internet connection at her home.

6. The Tribunal heard evidence from the Claimant and from all the Respondents' witnesses, save Ms Shanks. With the agreement of the parties, Mr Osbourne and Mr Zambon gave evidence in person and Ms Chohan and Mr Pedro gave evidence by remote video link.

7. On the first day of the hearing, the Claimant asked to have her video feed turned off, so that the Respondents' witnesses could not see her. The Tribunal

declined this request for reasons it gave at the time. In the event, the Claimant agreed to attend the Tribunal in person on the remaining 3 days and asked that Mr Osbourne and Mr Zambon also attend in person.

8. The Respondent applied to strike out the Claimant's claim on the first day of the hearing. It was not in dispute that the Claimant had made an unauthorized audio recording of a preliminary hearing in this case, despite being told, by EJ Burns, not to do so. The Claimant had also told EJ Burns, at that hearing, that she had not obtained alternative work, which was not true.

9. The Tribunal did not strike out the claim.

10. The Tribunal considered *Bolch v Chipman* [2004] IRLR 140, EAT. In that case, Burton J said that there were four matters to be addressed in deciding whether to strike out a claim because the Claimant has behaved scandalously, unreasonably or vexatiously. First, there must be a conclusion by the tribunal, not simply that a party has behaved scandalously, unreasonably or vexatiously, but that the proceedings have been conducted by or on his behalf in such a manner: 'If there is to be a finding in respect of [rule 37(1)(b)] … there must be a finding with appropriate reasons, that the conduct in question was conduct of the proceedings and, in the circumstances and context, amounted to scandalous, unreasonable or vexatious conduct.' Second, even if such conduct is found to exist, the tribunal must reach a conclusion as to whether a fair trial is still possible. In exceptional circumstances (such as where there is wilful disobedience of an order) it may be possible to make a striking out order without such an investigation, but ordinarily it is a necessary step to take. Third, even if a fair trial is not considered possible, the tribunal must still examine what remedy is appropriate, which is proportionate to its conclusion. It may be possible to impose a lesser penalty than one which leads to a party being debarred from the case in its entirety. Fourth, even if the tribunal decides to make a striking out order, it must consider the consequences of the debarring order. For example, if the order is to strike out a response, it is open to the tribunal, pursuant to its case management powers under [r 29] or its regulatory powers under [r 41], to debar the respondent from taking any further part on the question of liability but to permit him to participate in any hearing on remedy.

11. The Tribunal considered that the Claimant had committed a criminal offence by making the unauthorized audio recording in breach of *s9 Contempt of Court Act 1981*. That was scandalous and unreasonable conduct.

12. However, the Tribunal accepted that the Claimant was a litigant in person and had made the recording for her own use. She had not published the recording or used it for any other purpose. That mitigated the seriousness of her action on that occasion. If the Claimant made any further recording, the Tribunal might well take a different view. This was not an exceptional case where strike out would automatically follow a finding that the Claimant's conduct had been scandalous or unreasonable. The Tribunal therefore went on to consider whether a fair hearing was still possible.

13. The Tribunal did consider that a fair hearing was still possible. The parties were ready for hearing. While the Claimant's credibility was in doubt, in that she

had mislead an earlier ET hearing, the Tribunal could take her credibility into account in deciding the case. The Claimant could be cross examined on her credibility.

14. The Tribunal lost considerable time on the first day because of the Claimant's connection difficulties. Some time was lost on the second day by the Tribunal setting up equipment to enable a remote videolink to the Respondent's witnesses and solicitor, who were attending the in-person hearing remotely. The Claimant needed substantial guidance in asking questions which were relevant to the issues to be decided. All this presented difficulty in completing the hearing in time. The Claimant was, nevertheless, able to ask all her relevant questions.

15. There was little time for oral submissions on the last day of the hearing. Both parties made submissions. The Claimant made full oral submissions at the Tribunal. The Respondent presented a written skeleton argument. Ms Tutin indicated that she did not need to reply to the Claimant's oral submissions. The Claimant was given permission to respond in writing to the Respondent's written submissions by 9am on 25 May 2021. The Respondent was also given permission to reply - on fact or law - to the Claimant's reply, by 10am that day. Ms Tutin, for the Respondent, kindly agreed to do this if necessary, despite being on annual leave. The Tribunal was grateful for her assistance.

16. On 25 May 2021, the Claimant presented substantial new written submissions, in addition to the full submissions she had already made. She also replied to Ms Tutin's submissions. The Tribunal reminded the parties, in writing, that the Claimant had only been given permission to reply to the Respondent's written submissions. In the event, the Respondent did not reply further.

17. The Tribunal reserved its judgment and asked the parties to submit agreed dates for a provisional remedy hearing.

Findings of Fact

18. The Claimant was employed by the Respondent as a Patient Liaison Administrator from 15 October 2018, p104. The Respondent provides private medical treatment to patients at its hospital clinics. The Claimant is of Turkish ethnic / national origin and is a Muslim.

19. The Claimant's role involved managing patients' insurance and payment arrangements before and during their stay in hospital. She was part of the Respondent's Customer Services Team, which comprised about 7 employees.

20. Customer Services Team members worked in 3 locations: The Respondent's back office at its Park Square West location, and the Respondent's clinics at No.s 20 and 22 Devonshire Place. When working at 20 and 22 Devonshire Place, staff members would interact with patients face to face. At Park Square West, duties included speaking to patients and insurers by telephone.

21. The Claimant's line manager from 4 March 2019 was Andrew Osbourne, Customer Services Team Leader. Mr Osbourne's manager was Dustin Zambon, Customer Service Centre Manager.

22. In 2019 Ramadan lasted from 5 May 2019 to 4 June 2019.

23. It was not in dispute that, when Mr Zambon joined the Respondent in December 2018, he introduced a guarantee that all Muslim staff could take Eid (both Eid al Fitr which falls at the end of Ramadan, and Eid al Adha which falls approximately two months later) as annual leave.

24. Before Ramadan in 2019, Mr Zambon set up an open session for staff to come and speak to him about their preferences for working arrangements when they were fasting during Ramadan, p456. He told staff that he wanted to see if the Respondent could support them during fasting. Mr Zambon told the Tribunal that, while operational needs still had to be met, where possible he wanted to offer shift patterns which would help those who were fasting.

25. The Claimant did not attend the open session.

26. The Claimant told the Tribunal in oral evidence that she asked Ben, who drafted the rotas, to ensure that she did not work at Park Square West ("PSW") during Ramadan, because she was fasting and did not wish to be working alongside colleagues who were eating food at their desks in the office at Park Square West. From her evidence, it appeared that she did not tell Mr Zambon, or Mr Osbourne, this.

27. The rotas for the period indicate that, throughout the period, the Claimant was rostered to undertake duties in 20 and 22 Devonshire Place, p408. There was no record of her being asked to undertake different duties, or raising a complaint about her duties, p456.

28. However, the Claimant told that Ms Osbourne had, in fact, asked her to work at Park Square West in the mornings for the second 2 weeks of Ramadan. She was able to describe, in some detail, her working arrangements for these later 2 weeks. She said that Mr Osbourne asked her to come back to work in Park Square West each morning during this period, until she covered lunch breaks for colleagues at 20 and 22 Devonshire Place. She then worked at 20 or 22 Devonshire Place in the afternoons.

29. Mr Osbourne and Mr Zambon both told the Tribunal that they did not recall the Claimant making any particular request about her working location at this time. However, Mr Osbourne said that any changes would have been due to operational necessity.

30. The Claimant told the Tribunal that employees at Park Square West were eating hot and smelly food at all times of the day, including in the morning. However, she agreed in evidence that she did not complain about being asked to go back to Park Square West; she said that she did not think that her managers would care.

31. The Tribunal concluded that, if Mr Osbourne did ask the Claimant to work at Park Square West for the second 2 weeks of Ramadan in 2019, he did not know that that was against her wishes.

32. The Claimant said that Shahla Rostami, a Muslim colleague, had been allowed to work at 20 & 22 Devonshire Place throughout Ramadan that year. It was put to the Claimant that she was comparing herself with a person who was also a Muslim. She Claimant responded that she was treated less favourably because she was a Turkish Muslim. (This was not her claim).

33. There was no evidence presented to the Tribunal that Muslim employees, in general, felt at a disadvantage if food being consumed in their presence during Ramadan. The Claimant agreed that other Muslims might not feel at any disadvantage; she said she was a "foodie" and that, therefore, other people eating, while she was fasting, did bother her. There was no evidence that Muslim staff, as a group, had asked that other employees not be allowed to eat in the office during Ramadan. Mr Zambon gave evidence that Muslim employees had not made any such requests. He said that, from experience of his own family members, some Muslims may feel a degree of pride from the self-discipline required by fasting when others are eating.

34. The Claimant told the Tribunal that she was required to undertake more duties at 20 and 22 Devonshire place than her colleagues from July 2019 to February 2020. She compared herself with her colleagues, Ben Price, Shahla Rostani and Gabriella Grant.

35. The Tribunal found that Ben Price was initially employed in the same role as the Claimant, but covered for Mr Osbourne in July 2019 when he was absent on paternity leave. Mr Price was promoted to Senior Patient Liaison Administrator shortly afterwards. In that new role, he primarily dealt with patients who had overstayed their authorisation. This work was office based, requiring dialogue between insurers and other interested parties, mainly by telephone. The Tribunal accepted the Respondents' evidence that Mr Price, therefore, did not undertake duties at Nos. 20 and 22. It would not have been practical for him to be greeting patients face to face when, in fact, his role required him to carry out other duties on the telephone with insurers.

36. Shahla Rostani had been employed for a brief period before the Claimant started employment with the Respondents. Ms Rostani then became a bank member of staff, but re-joined as an employee in July 2019. In order to carry out full duties, employees train first at PSW and then at 20 and 22 Devonshire Place. This meant that Ms Rostani did not start working at 20 and 22 Devonshire Place immediately in July 2019. Nevertheless, the rotas for the July 2019 – February 2020, pp410-426, showed that Ms Rostani undertook slightly more patient facing duties at 20 & 22 Devonshire Place than the Claimant after July 2019.

37. Gabriella Grant had a high level of sickness absence due to a longstanding medical condition, which meant that it was difficult to rely upon her for cover and/or she had an incomplete training record. However, the rotas at pp408-426 recorded

that she was rostered for more patient facing duties at 20-22 Devonshire Place than the Claimant.

38. The Claimant did not accept that the rotas were accurate. She said that they had been fabricated for purposes of the Tribunal hearing. The Tribunal had no basis for finding that they had been fabricated. It accepted that the rotas were accurate.

39. On July 2019, the Claimant spoke to Mr Zambon about difficulties she was experiencing in her personal life. She explained that these difficulties, in addition to a nasal problem, were affecting her sleep.

40. The Claimant was clear in her evidence to the Tribunal that she did not tell Mr Zambon or Mr Osbourne, in July – August 2019, that she had depression and anxiety.

41. On 11 July 2019, the Claimant gave a medical certificate to Mr Zambon which supported the Claimant being excused from working early shifts – which started at 7am, p173. The doctor's note said that the Claimant had nasal problems which caused breathing difficulties, particularly at night, and that she was experiencing exceptional circumstances causing stress. He said that both were causing difficulties with the Claimant's sleep. The doctor said that the Claimant had said that she did not think she was capable of doing early shifts. The doctor's note did not say that the Claimant was suffering from depression and anxiety.

42. The Claimant met with Mr Zambon that day. There was a dispute of fact about what was said at the meeting.

43. Mr Zambon offered to transfer the Claimant to the reservations team, which did not undertake early shifts, but she declined that offer. He questioned what the Claimant was seeking – whether she wanted to reduce her hours, and whether she was seeking a permanent change.

44. Mr Zambon did not immediately change the Claimant's working hours. The Claimant sought advice from Donna Shanks in the Respondent's Human Resources department on about 16 July 2019, saying that Mr Zambon was not supporting her change in hours.

45. Ms Shanks and Mr Zambon met with the Claimant on 22 July 2019, p176. At the meeting, Mr Zambon agreed that the Claimant would not start at 7am until the end of August 2019, when the matter would be reviewed. Ms Shanks also told the Claimant that she would refer her to Occupational Health. Ms Shanks sent the Claimant details of the Respondent's Employee Assistance Programme which, she said, "gives some helpful direction when suffering from anxiety or stress/depression." P176.

46. The Tribunal found that Mr Zambon did not, on 11 July 2019, alter the Claimant's working hours in her existing role, to avoid a 7am start time. He did offer the Claimant a move to another team, which would have avoided early starts permanently.

47. The Claimant was referred to Occupational Health ("OH") and an OH report was produced on 1 August 2019. The report said, of the Claimant, "..she had sleep problems, she was unable to fall asleep and when she did this was disturbed and she was unable to get up in time to get to work by 7am. As far as I can gather she has had multiple changes of antidepressants over a very short period of time. Given that the efficacy of these drugs take time, it is unsurprising that Elif feels that 'none of them work'. Clinically her mood is low.. "

48. The OH report advised accommodating the Claimant's request for no early shifts, to be reviewed at the end of August 2019, p178. The Claimant agreed, in evidence, that she was happy with this.

49. By September 2019, the Claimant had no remaining annual leave for the year, but had been arranging with her team colleagues to undertake their Saturday shifts, so that she could build up some annual leave, p186. She had been told that she was not permitted to do this and she sought advice from Donna Shanks in HR again.

50. The Claimant had also been working late and sought to be paid for overtime. The Claimant told the Tribunal that she worked late on 40 occasions in 2019 -2020, when she was working at 20 or 22 Devonshire Place.

51. Donna Shanks, Employee Relations Adviser, informed the Claimant that she could not keep working her colleagues' Saturday shifts "to build up holiday Saturdays in order to build up holiday. All colleagues are rotated to work 1 Saturday in 6 and have a day off in that week".

52. Ms Shanks also said, "The overtime that you have been doing has not been formally authorised or agreed. However, we discussed that it is understandable that sometimes, while working at 20 & 22 DP, you may have late admissions and patients booked on the same day – this would be paid for as overtime. But if you are working late to complete the list for the next day or to cash up, this does not need to be done over and above your regular hours. And understandably, this will not be paid as such."

53. The Claimant told the Tribunal that she could not complete her normal work in normal hours at 20 and 22 Devonshire Place and that it would have been fair for her to be paid for staying back.

54. Ms Zambon and Mr Osbourne told the Tribunal that other employees were able to complete their work in their normal working hours, with occasional exceptions when patients attended the clinic late.

55. The Claimant's contract provided, p119 – 120pa:

"5.7 Time Off in Lieu (TOIL)
There is no automatic entitlement to time off in lieu.

The London Clinic acknowledges that on occasion the demands of the business may require you to work additional hours and you may receive time off in lieu.

Any additional hours that are to be worked are to be agreed with your manager beforehand and you should both keep a written record of TOIL.

Any claim for TOIL that had not been agreed with your manager beforehand may not be redeemable.
No payments will be made to you for TOIL.." .

56. Under the Claimant's contract, she did not have a contractual entitlement to paid overtime, or time off in lieu ("TOIL"). TOIL was permitted only at the discretion of managers and needed to be authorised in advance. The Claimant agreed, in evidence, that her managers did not agree TOIL in advance of her working her 40 hours additional work.

57. The Claimant told the Tribunal that her comparator, Helena Dos Santos, was paid for overtime on one occasion. Mr Osbourne told the Tribunal that he arranged for Ms Dos Santos to be paid overtime on one occasion only, when a team member had called in sick on a Friday, before a Saturday shift, which no one could cover, save Ms Dos Santos. Ms Dos Santos had already worked all her contracted hours that week.

58. The Tribunal accepted Mr Osbourne's evidence concerning this one occasion on which Ms Dos Santos was paid. Mr Osbourne was the manager authorising payments and was likely to know the circumstances in which any payment was made. Even on the Claimant's case, regular payments for overtime were not paid to other members of staff, whether for working late, or on Saturday.

59. Under the Respondent's Sickness Absence Policy paragraph 5.8 Elective Surgery, "Employees who elect to have surgery or treatments which are not available on the NHS and are not necessary for medical or psychological reasons should request annual leave to cover the period of absence for the operation/treatment and convalescence. Individuals should ensure that they have sufficient annual leave to facilitate their undergoing surgery and any anticipated recovery period. Where this is not the case, consideration will be given to granting unpaid leave to cover the deficit." P133

60. The Claimant told the Tribunal that she required an operation on her nose which was not available through the NHS. The Claimant arranged for the operation to be carried out in Turkey in November 2019. She sought leave for this purpose.

61. Mr Zambon agreed that the Claimant could take the time off as unpaid sick leave, in accordance with the Respondent's policy, p196.

62. On 2 October 2019, Mr Zambon invited the Claimant to a meeting to discuss her request for leave in November, pp201.

63. 0n 4 October 2019 at 11:42 Ms Shanks advised the Claimant that she did not have any annual leave left to take, but that the Claimant had been told that she

could either obtain a medical certificate from her GP to say that this surgery was needed for medical reasons, so that the Claimant could then take the leave as sick leave, or that her managers would authorise unpaid leave.

64. On 4 October 2019 at 12.04 the Claimant emailed Ms Shanks, saying that she wished to bring a grievance because she was going for surgery, but her managers were not accepting her medical report and would only authorise her planned absence as unpaid leave, p205. Ms Shanks explained the grievance process to the Claimant, pp203-206.

65. Later the same day, the Claimant told Ms Shanks she had raised the matter with a senior colleague. Ms Shanks asked the Claimant to whom she had spoken, but the Claimant declined to give the name and said that the person would be in contact with HR, p203.

66. On 9 October 2019, the Claimant told Jagnisha Chohan, Senior HR Business Partner, that she was not willing to put anything in writing, p212. Ms Chohan continued to speak with the Claimant and discussed the process for bringing a grievance with her, pp 210-214; 243-244.

67. The Claimant's doctor wrote a letter on her behalf dated 4 October 2019, p202. The letter said that the Claimant had on-going issues with blocked nose which was affecting her breathing. It recorded that she had had a septorhinoplasty in 2014 and a revision septorhinoplasty in 2015. The letter continued, "Her symptoms were getting worse; her nose is persistently blocked which is worse at night and affecting her sleep. She reported that she wakes up most mornings feeling extremely tired from broken sleep and this affects her day to day activities. She was under the care of ENT surgeons at the Whittington, St George's and Charing Cross hospitals. But considering the NHS waiting time and in view of the severity of her symptoms she opted to seek private treatment and was due for an operation on 1st of November 2019.'

68. The Claimant also produced a medical report from her treating GP dated 6 October 2020 for the purposes of these proceedings. It repeated the text of the 4 October 2019 report and said, of the November 2019 nasal operation,

"Unfortunately she developed complications postoperatively and the recovery was delayed. She was complaining of discomfort in her nose and hypersensitivity to cold. She attended the medical practice on the 12th November and was advised to rest and a sick note was issued for 4 days. She was referred to ENT at Parkside hospital for an opinion on the 22nd November 2019 as her symptoms have not improved and was still suffering. She also had a follow up appointment in Turkey in December 2019.

She was seen by ENT Surgeons at Parkside in January 2020 and they reported that she has right alar collapse and anaesthesia of skin and recommended another procedure after six months' time."

69. However, despite the contents of these GP reports, there were no medical reports showing that the ENT surgeons at the Whittington, St George's or Charing

Cross hospitals ever considered that an operation on the Claimant's nose was necessary for medical reasons, or that they had put her on an NHS waiting list for one.

70. The Claimant continued to discuss matters with Ms Chohan, who met with the Claimant 25 October 2019. Following the meeting, Ms Chohan wrote to the Claimant recommending the following,
"• A stress risk assessment completed by Andrew Osbourne, Team Leader to be completed as soon as possible. I will arrange for this to happen.
• For you to consider over the weekend raising a formal grievance so that an independent manager can investigate your allegations and concerns relating to lack of support by your manager and his behaviours towards you
• For you to consider a mediated session with your manager – to which you have said you would not be comfortable with."

71. On 25 October 2019, the Claimant replied to Ms Chohan saying that she had no choice but to go through a grievance, but that this would be after her operation, p243.

72. On 20 December 2019, the Claimant confirmed that she would not be going ahead with the grievance, p287.

73. On 29 October 2019, the Claimant provided a GP Fit note, signing her off work from 29 October 2019 to 10 November 2019, p245, for "gastroenteritis" and "planned septorhinoplasty 1 November 2019."

74. The Claimant's leave was then classified as sick leave, for which she received sick pay, p 293; 339-340.

75. The Claimant told the Tribunal that Mr Osbourne did not pass her Fit Note to pay roll to authorise sick pay. Mr Osbourne told the Tribunal that he entered the details on the Respondent's system, known as "Trent", so that pay roll would automatically have known that the relevant leave was sick leave. From the evidence, Trent did record that period as sick leave, p339. Mr Osbourne told the Tribunal that the Claimant suffered a loss of pay, not because the period was unpaid, but because the Claimant exhausted her 2 weeks' contractual sick pay and received only SSP for some of the period.

76. The Tribunal accepted Mr Osbourne's evidence on this. From the records at the time, the Claimant was recorded as being on sick leave and was paid sick pay for her absence in November 2019.

77. On 22 October 2019 an oncology patient, who had been admitted to hospital by the oncology team, made a complaint regarding the Claimant being rude when requiring payment in advance of admission, p263.

78. The Tribunal accepted the Claimant's evidence that this was a very difficult situation, in that the patient's insurer was not available to deal with the unplanned admission at the weekend, but that the Claimant was required to secure payment before admission.

79. The Claimant sent an email to Mr Osbourne and Mr Zambon on 4 October 2019, p207, “No lunch cover, no time to go for lunch; leaving now. Not that you care.”

80. Mr Osbourne told the Tribunal that, at the end of November 2019, he sought advice from HR regarding the Claimant’s rudeness towards him.

81. It was clear from the Claimant’s evidence to the Tribunal that she did not respect Mr Osbourne; she felt that he was an inexperienced manager.

82. In November 2019, the Claimant was absent from work for 11 working days to have a nose operation in Turkey. The Claimant did receive sick pay for this period pp245; 293; 340.

83. On 18 November 2019 the Claimant and Mr Osbourne had an informal meeting regarding the Claimant’s attendance levels, because the Claimant’s Bradford score had triggered an informal conversation about her absence levels, p252.

84. In December 2019, the Respondent’s Christmas party was held at the Holiday Inn, Camden. The Claimant told the Tribunal that, at the party, Mr Zambon told a colleague to tell Armin Sabotic that the Claimant was dangerous and he should keep away from her. The Claimant said that the colleague was shocked and said they were unsure about whether they should tell the Claimant that this had been said about her.

85. Mr Zambon denied that he had said this. None of the other witnesses said they heard Mr Zambon saying this.

86. There was a conflict of evidence between the Claimant and Mr Zambon. There was no other evidence which assisted. The Tribunal had to decide, on the balance of probabilities, whether it preferred the Claimant’s evidence to Mr Zambon’s.

87. It took into account the following matters:

88. The Tribunal did not consider that the Claimant was a reliable witness. She repeatedly told the Tribunal that she had GP’s Fit Note saying that she should not be patient facing during in October 2019. The Fit Note did not say this, but the Claimant was unwilling to accept this. She therefore appeared to believe things, even when presented with written records which demonstrated that she was wrong. The Claimant appeared to make allegations without any basis for doing so, for example, when she said that rotas had been fabricated for the purpose of the hearing. The Claimant also told the Tribunal that her solicitors had disclosed documents, including a summary of her complaints from October 2019, to the Respondents. When the Respondents said that they had had no contact from any solicitor instructed by the Claimant, the Claimant changed her account, to say that she had disclosed the documents herself. Despite being asked, she never provided proof of this disclosure.

89. On the other hand, Ms Osbourne and Mr Zambon, in particular, were dispassionate witnesses. They appeared to be being careful to tell the truth to the Tribunal.

90. The Tribunal did not prefer the Claimant's evidence to Mr Zambon's on this matter. It decided that, on the balance of probabilities, Mr Zambon did not say the words alleged at the Christmas party.

91. Further to an absence review meeting triggered by the Claimant's high level of sickness absence, p252, the Claimant was seen again by OH on 3 December 2019. On 5 December 2019, a further OH report advised that the Respondent carry out a stress risk assessment, pp273-274.

92. On 20 December 2019 Mr Osbourne carried out a Risk Assessment on the Claimant during her working hours. He did so while sitting in the reception area of Devonshire place with the Claimant, p283 - 285. The Claimant told the Tribunal that she was not allowed to participate in the risk assessment. She said that she did not see the document. She agreed that Mr Osbourne had asked her questions and put her answers on the risk assessment, while typing on a screen near to her. Nevertheless, the Claimant told the Tribunal that not everything she said was recorded by Mr Osbourne.

93. The Claimant said, and Mr Osbourne conceded, that he did not send the Claimant a copy of the risk assessment and that there was no date for a review. Mr Osbourne told the Tribunal that this was an oversight on his part. He also told the Tribunal that he carried out the Risk Assessment during working hours to ensure that it was done sooner rather than later. He said that he believed that the Claimant could see the Risk Assessment as he was typing it in her presence.

94. The Claimant agreed in evidence that, following the Risk Assessment, additional administrative support for patient facing work in Devonshire Place was provided to the Claimant's team in January 2020. She said that this additional support was not provided all the time.

95. On 19 December 2019, the Claimant asked to take annual leave on 30 and 31 December 2019, to attend a follow up medical appointment in Turkey on 28 December 2019. Mr Osbourne refused the request. He reiterated his refusal on 20 December 2019, pp281; 289.

96. Mr Osbourne told the Tribunal that the Claimant had no annual leave remaining. He said that, in addition, this was a popular time for staff to take off, and the Respondents would not have adequate cover for the team if the Claimant was to take those days as leave, even unpaid.

97. The Claimant emailed HR on 20 December 2019, p287, saying that her leave had not been authorised but that she had booked her flights to Turkey, and would be returning to work on 9 January 2020.

98. Mr Osbourne emailed the Claimant again on 20 December at 17:48, p289, saying that, if the Claimant did not attend work on 30 and 31 December, her absence would be unauthorised, and this would result in a disciplinary action.

99. The Claimant told the Tribunal that she attended a follow up medical appointment in Turkey on 28 December 2019.

100. There was no contemporaneous medical evidence of that appointment.

101. The Tribunal noted that Claimant's GP report, produced later, on 6 October 2020 said, "She also had a follow up appointment in Turkey in December 2019." However, the Claimant's GP did not provide a Fit Note covering the appointment at the time.

102. There was no appointment letter from the Turkish Surgeon. There was also no medical evidence from the Turkish Surgeon detailing the Claimant's treatment, or the need for the appointment, or the outcome of the appointment. Nor was there any medical evidence that the Claimant needed to attend an appointment in December 2019, rather than in January 2020, or in any of the following 6 months before the further potential operating date.

103. The Tribunal did not accept that the Claimant, in fact, attended a medical appointment in Turkey on 28 December 2019.

104. On 30 & 31 December 2019 the Claimant was absent from work without authorisation.

105. On 9 January 2020, the Claimant was invited to a disciplinary hearing to discuss her absence from work without authorisation, p298-299.

106. On 15 January 2020, Mr Osbourne conducted the Claimant's disciplinary hearing. The Claimant was given a final written warning for misconduct, p300-303.

107. Mr Osbourne told the Tribunal that he considered that the Claimant had taken the leave without authorisation, in the knowledge that she had no annual leave remaining, and had done so when she was aware of the consequences. He said that he felt that this was serious misconduct and he decided that it warranted a final written warning.

108. The Claimant appealed against the final written warning on 20 January 2020, pp 323-325. The Claimant's appeal took place on 30 January 2020, but was not upheld, p348-349 and p355-356.

109. On 17 January 2020 that Claimant provided a Fit Note suggesting she undertook a "non-patient facing role/department" by way of amended duties, p316-317. The Fit Note said that the Claimant was suffering from stress, anxiety and depression. The Claimant told the Tribunal that patient facing roles meant working in 20 and 22 Devonshire Place, where she found it difficult to complete all her tasks in normal working hours. She said, that while she enjoyed interacting with patients,

"It got to a stage where my stress levels were overboard and work was adding to it. It was a 2 person job patient facing. The workload was adding to stress."

110. The same day Mr Zambon arranged further OH appointment for the Claimant, p321. He emailed the Claimant saying, "In order for us to review the consideration for a change in role/department we will book an Occupational Health appointment for you next week. Once we receive the report from Occupational Health we will be able to discuss the next steps."

111. Mr Zambon did not alter her duties immediately when the Claimant presented her note.

112. The Tribunal asked Mr Zambon why he did not adjust the Claimant's duties immediately on receipt of the Fit Note. Mr Zambon said that he did not know what the note meant – he considered that all the Claimant's existing duties were patient-facing.

113. Mr Zambon had emailed Ms Chohan about the Claimant's Fit Note at the time, on 17 January 2020, p319. In his email he said, "My concern is firstly to understand if she is well enough to be at work. Essentially we do not have any non-patient facing roles within the Patient Liaison, as the back office duties are very telephone heavy to patients/customers. Please can we discuss urgently."

114. The Claimant attended the OH appointment on 6 February 2020. The resulting OH report was disclosed by the Respondents to the Claimant on the last day of the Tribunal hearing, after the Tribunal made clear that it considered that the OH report was relevant to the issues in the case and should be disclosed. The Claimant was able to make comments on it.

115. The report was dated 11 February 2020. It said, amongst other things,

"Elif reports no change in her circumstances since the last meeting in Occupational health and her symptoms are still on-going which she feels that she has not been supported in the workplace. Elif states that she is still struggling to complete her tasks on time when patient facing due to the amount of patients coming into the office or appearing at the desk. As you are aware, Elif also suffers from a condition which is likely to be exacerbated by stress and she will require frequent access to welfare facilities when symptoms flare up and this is difficult when she is doing patient facing duties.
……..
Due to her presenting symptoms you may wish to consider allocating a member of staff to work alongside Elif or cover for breaks temporarily when she is doing patient facing duties or avoid patient facing duties for at least a month whilst she is having additional support to overcome her main stressors. I have also suggested that she might benefit from cognitive behavioural therapy (CBT) and should speak to her GP for a referral to be arranged."

116. The Respondents provided an email showing that the OH report had been sent to the Claimant at the London Clinic the day after her dismissal. The OH adviser had also emailed the Respondents on 21 May 2021, saying that the

Claimant had not responded providing consent to release the report to the Claimant's line manager.

117. The Claimant told the Tribunal in evidence that she had informed the Occupational Health Advisor that she did not consent to the report being released to Mr Osbourne.

118. The Tribunal noted that the OH report implied that patient facing duties meant 20 – 22 Devonshire Place, because it said that the Claimant reported, ".. struggling to complete her tasks on time when patient facing due to the amount of patients coming into the office or appearing at the desk." If Mr Zambon had seen the report it would therefore have resolved any confusion about the meaning of "patient facing duties".

119. The Tribunal noted that, as a result of Mr Osbourne's stress risk assessment, the Respondents were already providing the Claimant with one of the options presented by the OH report – allocating additional staff to provide administrative support at 20-22 Devonshire Place.

120. In January 2020, the Claimant requested 11 working days holiday 31 July – 14 August 2020. Mr Osbourne told her that she would be permitted to take leave for Eid but that he could not authorise the following 5 days because another colleague had already booked that week as holiday. The Claimant would be allowed to take the last 5 days she had requested.

121. On 21 January 2020, the Claimant raised the matter with Mr Zambon by email, "I wanted to forward the emails from HR to make you aware of what was discussed about annual leave for the eid on 31st of July; is there any chance that I can get the time off to spend eid in turkey from 31st July Friday until 14th of august so it will be 11 working days? Andrew did say that I can have the eid day off for 31st July & advise[d] that Ben will be off for the 1st week of august so I couldn't have it off. " P334.

122. Mr Zambon confirmed that the Claimant could take Eid off (on 31 July 2020) but that the period 3 – 7 August was already booked, p334.

123. Both Mr Osbourne and Mr Zambon said that, generally, they did not permit more than 1 member of the Customer Services Team to take leave in any one week. They said, however, that Christmas was a quiet time and that more people were able to take time off then.

124. The Claimant agreed that Christmas was a quiet time. She told the Tribunal that this was one of the reasons why Mr Osbourne should have permitted her to take leave on 30 & 31 December 2019.

125. The Respondents' Leave Policy provides,

"**5.3 Annual Leave**

"..Where there are conflicting annual leave requests, priority will be given to those who submitted their requests first, subject to business needs. .."
…

"5.8 Leave for Cultural or Religious Observance

Any employee who requires time off for Cultural or Religious observance may request flexibility in arrangement of working hours and / or annual leave, time off in lieu or unpaid leave…

All managers should be sympathetic to such requests and accommodate whenever is reasonably practicable to do so.

If managers receive a high volume of requests from their staff with dates that clash, managers may have to consider approving requests on a first come first serve basis."

126. At the Tribunal, the Claimant said that Eid lasted for 4 days and that her managers had only granted her one day, on 31 July 2020.

127. However, the Tribunal found, from the Claimant's contemporary email, that she considered Eid to be on 31 July 2020. She had referred to "annual leave for the eid on 31st of July…. The eid day off for 31st July.. ".

128. The Tribunal considered that the Claimant's request was for leave for Eid on Friday 31st July, followed by 2 weeks' holiday.

129. The Claimant did not present evidence that others, of a different religion, would automatically be permitted to bolt on 2 weeks of annual leave after their relevant religious holiday.

130. The Claimant pointed out that she had not been permitted to take annual leave on 30 & 31 December 2019, partly because so many other people were on leave on those dates. She said that Christians were permitted to take extended leave after Christmas.

131. The Tribunal noted that it was not in dispute that many people were on leave in the week after Christmas 2019, including on 30 & 31 December 2019. The parties agreed that 3 people were on leave on 30 & 31 December 2019. However, the Claimant did not give evidence about who had booked this time off – and whether they were Christian, or of another religion. There was no evidence that employees had been permitted to have a whole week's, or 2 weeks', leave following Christmas day.

132. On 21 January 2020 a further complaint was made regarding the Claimant's alleged insensitivity in requiring insurance payments before admitting an ill patient, p358; 369.

133. On 5 February 2020 the Claimant emailed Dona Shanks saying that she was unhappy about the disciplinary appeal outcome and that she was intending to bring

a grievance, “Now it’s time to go through grievance as It is obvious that my health, supporting letters, not fit to work certificates, adjustments to my shifts/roles and time off for medical follow ups are not taken serious by the London clinic. It has been 3 weeks since I provided a not fit to patient face certificate and I am still being forced to patient face ever since regardless of OH reviews & stress assessment done in December”, p365.

134. The Claimant told the Tribunal that she believed that she had been dismissed because she had told HR that she intended to bring a grievance. She put it to Ms Chohan, and Ms Chohan agreed, that Ms Shanks had shown the Claimant’s email of 5 February 2020 to Ms Chohan. Ms Chohan advised Mr Pedro later in relation to the Claimant’s dismissal.

135. On 6 February 2020, following the Claimant’s attendance at the OH appointment, she emailed Mr Osbourne, copied to Mr Zambon, saying, “I have had my OH appointment today at 12:30; I will no longer be patient facing from next week as I have provided a not fit to patient face certificate on the 17th of Jan and nothing has been actioned since then so tomorrow is the last day I will be patient facing. What time would you like me to start my shift on Monday at psw?”, p372.

136. Mr Zambon referred the Claimant’s email to Luis Pedro, Head of Hotel and Customer Services. Mr Zambon told the Tribunal that he felt that the Claimant’s position with the Respondents was becoming untenable. He said that many issues and concerns had come to a head: the Claimant was on a final written warning; she was rude and unprofessional in her dealings with her manager, Mr Osbourne; she was the subject of complaints from patients; and she was unable to carry out the function that constituted the majority of her role.

137. Mr Pedro decided to dismiss the Claimant. He told the Tribunal that he made the decision before meeting her on 10 February 2020. He said that he had taken advice from Ms Chohan, but that he had made the decision himself. At the meeting on 10 February 2020, he informed the Claimant that she was being dismissed with immediate effect, with a payment in lieu of her two months’ notice, pp 376-377.

138. In his letter of dismissal, Mr Pedro listed the reasons which he said were behind his decision, “ * Failure to follow reasonable management instruction, and taking unauthorised leave * multiple, persistent complaints and concerns raised about management and The London Clinic. Despite being advised on several occasions to raise a formal grievance to address your concerns, you have told us you do not wish to – meaning the Clinic cannot investigate your ongoing, persistent concerns formally and help you * Refusal to carry out “patient facing” element of job role, which in the long term is not sustainable as this constitutes 80% of the role you are employed to * Unprofessional tone of emails and conversations with management, colleagues and patients * Unprofessional handling of calls with internal colleagues * The above behaviours, and your attitude are in conflict with the Clinic’s values * Ultimately my loss of trust and confidence in your ability to effectively carry out the role of Customer Service Advisor (Patient Liaison).”

139. Mr Pedro told the Tribunal that he considered that there had been a breakdown in the relationship between the Claimant and the Respondents. In

evidence he said, “It was a big decision because we would have to train another person to do the job. The relationship had completely broken down. She said that managers hated her – I have never heard anyone else say anything like that before in my team. Sometimes people make mistakes and things go wrong but at this point the whole history was saying the best outcome was dismissal. She hated everything and thought people hated her. I no longer had trust and confidence in her ability to carry out her role of Customer Service Advisor. Termination of employment was of course always a last resort, and it was not a decision I took lightly. I felt, however, that we had no alternative. The type of work Elif was prepared to do was very limited; her manner of interaction was unacceptable; and she had become extremely difficult to manage. As I recall, she wanted to do secretarial work (which would not have been patient facing), but there was no suitable vacancy available. Unfortunately, I felt termination was the only option. There were no other roles available.”

140. Mr Pedro told the Tribunal that he believed that the whole role of the Claimant’s existing role was patient facing, including her work at Park Square West. He agreed with Mr Zambon that the Park Square West duties involved interaction with patients and insurers by telephone. He said that it was therefore impossible to remove the Claimant from patient facing duties in her role.

141. The Tribunal accepted Mr Pedro’s evidence about the reasons in his mind for deciding to dismiss the Claimant. His evidence was consistent with his letter of dismissal. The Tribunal found Mr Pedro to be very frank in his evidence. He was a straightforward and credible witness.

142. The Tribunal considered that Mr Pedro’s evidence, that the Claimant believed her managers hated her and that “she hated everything”, was consistent with the way in which the Claimant had expressed herself in the months leading to her dismissal. For example, the Claimant’s email to Mr Osbourne and Mr Zambon on 4 October 2019, p207 said, “No lunch cover, no time to go for lunch; leaving now. Not that you care.” Mr Osbourne had also sought advice from HR regarding the Claimant’s rudeness towards him. The Claimant had told OH on 6 February 2020 that she did not consent to the OH report being shared with Mr Osbourne. The Claimant did not respect Mr Osbourne and made this plain during her evidence to the Tribunal.

143. The Tribunal accepted Mr Zambon and Mr Pedro’s evidence that they considered the whole of the Claimant’s role to be “patient facing” – her work at PSW involved speaking to patients and their insurers by telephone and therefore involved substantial interaction with the public. The GP’s note did not specify further what the GP meant by “patient facing”.

144. The Claimant cross examined Ms Chohan about the Claimant’s email dated 5 February 2020, in which she said that she would raise a grievance. The Claimant put it to Ms Chohan that this was why she had been dismissed. Ms Chohan said, “There were several reasons the relationship could not continue and it was not the grievance. [The Claimant] had been advised that she could raise a grievance but she didn’t want to.”

145. Ms Chohan was later asked what she had discussed with Mr Pedro before he dismissed the Claimant. She said, "We spoke about everything she had been offered – that she had been offered an alternative role but refused – the grievances and complaints and number of times when [the Claimant] had raised concerns but not gone through with grievance process and also her continuous changes of mind - she did want to raise a grievance then she didn't – she had exhausted our mechanisms to support her. There was her general insubordination and complete lack of trust. We couldn't see how things could work out. The conversation was that the situation was untenable. It had reached the point where we had done everything."

146. In answer to the Claimant's cross examination about her intention to bring a grievance, Mr Pedro said, " I did not know that you wanted to file a grievance on the Monday [10 February]. You had been given several opportunities."

147. The Claimant contacted ACAS following her dismissal. The ACAS Early Conciliation period was from 10 February 2020 -10 March 2020. On 13 March 2020, the Claimant presented her ET1 to the Tribunal, pp 9-20.

The Claimant's Nasal Condition

148. The Claimant told the Tribunal that that she had had nasal problems since 2013. She suffers from a persistent blocked and runny nose which interferes with her sleep. The Claimant told the Tribunal that she had only ever been offered nasal sprays by way of treatment on the NHS, despite being seen by a number of UK hospitals. She said that she had had to pay for a private operation in 2014 and 2015, but that her nasal problems had recurred.

149. On 11 July 2019, the Claimant's doctor's note said that the Claimant had nasal problems which caused breathing difficulties, particularly at night, and that she was experiencing exceptional circumstances causing stress. He said that both were causing difficulties with the Claimant's sleep.

150. The Claimant told the Tribunal that, by July 2019, she had been suffering with a sleeping disorder since the end of February 2019, compounded by a delay to a nose operation, so that she had been struggling to fall asleep and had been waking up almost every hour until her alarm went off, so that she had been trying to nap on her lunch breaks.

151. There was little medical evidence as to the extent to which the Claimant's sleeping problems were caused by her nasal problems, on the one hand, and her anxiety/stress on the other. The OH report dated 1 August 2019 did not mention the Claimant's nasal problems at all. It appeared to suggest that her sleep difficulties were caused by her low mood and/or domestic and housing problems.

152. The Tribunal observed, from its everyday experience, that blocked and runny noses occur very commonly in the population during the winter months because of coughs and colds and during the summer months because of hay fever.

Law

Disability

153. By By *s6 Equality Act 2010*, a person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

154. The burden of proof is on the Claimant to show that he or she satisfies this definition.

155. *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011).

156. Whether there is an impairment which has a substantial effect on normal day to day activities is to be assessed at the date of the alleged discriminatory act, *Cruickshanks v VAW Motorcrest Limited* [2002] ICR 729, EAT.

157. Section D of the *2011 Guidance* gives guidance on adverse effects on normal day to day activities.

158. D3 states that day-to-day activities are things people do on a regular basis, examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food.., travelling by various forms of transport.

159. D22 states that an impairment may not directly **prevent** someone from carrying out one or more normal day to day activities, but it may still have a substantial adverse long term effect on how he carries out those activities, for example because of the pain or fatigue suffered.

160. A substantial effect is one which is more than minor or trivial*, s 212(1) EqA 2010*. Section B of the Guidance addresses "substantial" adverse effect.
161. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

162. Where an impairment ceases to have an effect but that effect is likely to recur, it is to be treated as continuing, *Sch 1 para 2, EqA 2010.* "Likely" again means, "could well happen".

163. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood, Guidance para C4 and *Richmond Adult Community College v McDougall* [2008] ICR 431, CA.

164. By the *Equality Act (Disability) Regulations 2010 Regulation 4(2)&(3)* seasonal allergic rhinitis does not amount to an impairment save where it aggravates the effect of another condition.

Discrimination

165. By *s39(2)(c)&(d) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

Direct Discrimination.

166. Direct discrimination is defined in *s13(1) EqA 2010:*
"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

167. Race, sex, religion and disability are all protected characteristics, *s4 EqA 2010.*

168. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

Victimisation

169. By *27 Eq A 2010*,
" (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 A (*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."

170. There is no requirement for comparison in the same or nor materially different circumstances in the victimization provisions of the EqA 2010.

Causation

171. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

172. If the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576.

"Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

173. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC [2003] UKHL 11.*

Harassment

174. *s26 Eq A* provides "
(1) A person (A) harasses another (B) if— (*a*) A engages in unwanted conduct related to a relevant protected characteristic, and (*b*) the conduct has the purpose or effect of— (*i*) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
…..
(4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account— (*a*) the perception of B; (*b*) the other circumstances of the case; (*c*) whether it is reasonable for the conduct to have that effect."

Burden of Proof

175. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

176. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

177. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does <u>not</u> simply shift where M proves a difference in sex/race/religion and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

Discrimination Arising from Disability

178. *s 15 EqA 2010* provides:
"(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and

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

179. Simler P in *Pnaiser v NHS England* [2016] IRLR 170*, EAT*, at [31], gave the following guidance as to the correct approach to a claim under *EqA 2010 s 15:*
'(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises..
(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
(g) There is a difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the “something” leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.
(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to “something” that caused the unfavourable treatment.''

180. The *Code of Practice on Employment*, issued by the EHRC (in force on 6 April 2011) states, at paragraph 5.6, that under EqA 2010 s 15 there is no need for a comparator at all, merely to show that the unfavourable treatment is because of something arising in consequence of the disability. It gives the following example: "In considering whether … a disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it.''

181. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

Indirect Discrimination

182. Indirect discrimination is defined in *s19 Equality Act 2010*.
“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(*a*) A applies, or would apply, it to persons with whom B does not share the characteristic,

(*b*) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(*c*) it puts, or would put, B at that disadvantage, and
(*d*) A cannot show it to be a proportionate means of achieving a legitimate aim.

183. The burden of proof is on the Respondent to show that the relevant PCP is a proportionate means of achieving the relevant legitimate aim. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking, see above, *Hardys & Hansons plc v Lax.*

184. A PCP will not be proportionate unless it is necessary for the achievement of the objective and this will not usually be the case if there are less disadvantageous means available, *Homer* [2012] ICR 704.

185. In the context of indirect religion or belief discrimination cases, the Tribunal is still required to consider the issue of group disadvantage, despite this not being required under Article 9 of the European Convention on Human Rights. Whilst there is no requirement to show that a significant number of people are affected, the "hurdle" cannot be ignored: *Trayhorn v Secretary of State for Justice* UKEAT/0304/16.

Reasonable Adjustments

186. By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.
187. *s20 EqA 2010* provides: that there is a requirement on an employer, where a provision, criterion or practice of the employer 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.

188. *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

Unfair Dismissal

189. By *s108 ERA 1996* an employee must have 2 years' service in order to be able to bring a claim for unfair dismissal.

Discussion and Decision

190. The Tribunal took into account all its findings of fact, and the relevant law, when reaching its decision. For clarity, it has stated its conclusion on individual allegations separately.

Unfair dismissal

Does the Claimant have sufficient qualifying service to bring such a claim, within the meaning of s.108(1) ERA?

191. The Claimant was employed by the Respondents from 15 October 2018 until 10 February 2020. She did not have the 2 years' qualifying service required to bring an unfair dismissal claim. Her unfair dismissal claim is dismissed.

Discrimination

Race discrimination

192. Was the Claimant treated less favourably than an actual or hypothetical comparator in materially similar circumstances in that:

She was allegedly obliged to work in patient-facing roles from July 2019 to February 2020? She relies upon the following as actual comparators: Shahla Rostami, Ben Price and Gabriella Grant.

193. This allegation referred to the Claimant being required to work at 20 & 22 Devonshire Place, rather than at Park Square West.

194. The Tribunal has found, as a fact, that the Claimant's comparators Shahla Rostami and Gabriella Grant were rostered to work at those locations just as frequently, if not more frequently, than the Claimant during the relevant period. The Tribunal accepted that the rotas produced by the Respondents showing this were accurate. The Claimant was therefore not treated less favourably than Mses Rostami and Grant in this regard.

195. The Tribunal found that Ben Price was employed in a different role to the Claimant for the vast majority of the relevant period. This role, as Senior Patient Liaison Administrator, dealt with patients who had overstayed their authorisation. The work was office based, requiring dialogue between insurers and other interested parties, mainly by telephone. The Tribunal accepted the Respondents' evidence that Mr Price, therefore, did not undertake duties at Nos. 20 and 22. It would not have been practical for him to be greeting patients face to face when, in fact, his role required him to carry out other duties on the telephone with insurers.

196. The Tribunal found that Mr Price was in materially different circumstances to the Claimant because he was employed in this different role. He was not an appropriate comparator. Further, the reason he did not work at 20 & 22 Devonshire Place was nothing to do with race. It was because of the requirements of his role.

Alleged less favourable treatment: The Claimant was not paid overtime during 2019. She relies upon Helena Dos Santos as an actual comparator.

197. The Claimant's contract para 5.7 provided, p119 – 120, that she could receive Time Off in Lieu for additional hours worked (TOIL), but provided that there was no automatic right to this. The contract stated that additional hours must be agreed

with managers in advance. It also specifically provided, “No payments will be made to you for TOIL..” .

198. Under her contract, therefore, the Claimant’s did not have an entitlement to paid overtime, or time off in lieu (“TOIL”). TOIL was permitted only at the discretion of managers and needed to be authorised in advance. The Claimant agreed, in evidence, that her managers did not agree TOIL in advance of her working her 40 hours additional work.

199. The Claimant’s comparator, Ms Dos Santos, was paid overtime on one occasion only, in the exceptional circumstances that no one else could cover a Saturday shift, and Ms Dos Santos had already worked all her contracted hours that week.

200. As the Tribunal has found, even on the Claimant’s case, regular payments for overtime were not paid to other members of staff, whether for working late, or on Saturday.

201. The Claimant was treated in accordance with policy by not being paid for overtime. Other staff were also treated in accordance with policy, save on one exceptional occasion in Ms Dos Santos’ case.

202. The Tribunal did not consider that the burden of proof shifted to the Respondents to show that race was not the reason the Claimant was not paid overtime; because she and other staff were always treated in accordance with this policy, save on one occasion. However, even if the burden of proof did shift, the Tribunal was satisfied that the reason Ms Dos Santos was paid on this one occasion was nothing to do with race – it was simply to ensure that the Saturday shift was covered when there were no other options.

Direct Religion or belief discrimination

203. Was the Claimant treated less favourably than a hypothetical comparator in materially similar circumstances in that:

She was allegedly forced to work in a back office where there was food present for the second two weeks of Ramadan during May to June 2019?

204. The Tribunal accepted the Claimant’s evidence that Mr Osbourne asked her to work in the back office, in the mornings only, for the last 2 weeks of Ramadan in 2019.

205. However, the Tribunal found, on the Claimant’s own evidence, that the Claimant had not told Mr Osbourne that she did not want to work there during Ramadan.

206. The Claimant compared herself with Shahla Rostami, who was permitted to work at Devonshire Place throughout Ramadan. As Ms Rostami was also a Muslim, however, the Claimant was not treated less favourably than an actual comparator of a different religion.

207. In any event, the Tribunal was satisfied that the reason Mr Osbourne asked the Claimant to work in Park Square West "PSW" in the mornings was because he needed her to work there, and this was nothing to do with religion. Mr Osbourne did not know that the Claimant wanted to avoid PSW - she had not told him.

208. Ms Rostami, a Muslim, had been allowed to work away from PSW, indicating that Mr Osbourne generally did allocate duties to Muslim staff during Ramadan, according to their requests, where he knew about their requests. In the circumstances, it was likely that Mr Osbourne's request that the Claimant work at PSW was, indeed, because of operational need. Mr Osbourne did not discriminate against the Claimant because of her religion in requiring her to work at Park Square West.

Alleged Less Favourable Treatment: In January 2020, her request to take annual leave to celebrate Eid al-Adha starting on 31 July 2020 for 11 days was refused?

209. The Tribunal found that the Claimant was not subjected to less favourable treatment in this regard. As she acknowledged at the time, Mr Osbourne allowed her to take the day of Eid, 31 July 2020, as annual leave. She was therefore given leave for her religious holiday. The Claimant acknowledged, at the time, that Eid was on 31 July 2020.

210. The Claimant's additional leave request was for a 2 week holiday after Eid. It was this extended leave which was declined. This was not a religious holiday.

211. There was no evidence that, as the Claimant alleged, Christians were permitted to take extended holidays after the Christmas day holiday. While many people were away on holiday after Christmas 2019, there was no evidence about who these people were, what religion they were, and how long a break each member of staff had been permitted. In any event, as the Claimant agreed, the Christmas period was a quiet time, so that is was possible for more staff to be on leave. This was not related to religion.

212. The Claimant was, in fact, treated in accordance with the Respondents' leave policy, in that her leave after Eid was declined because priority was given to Ben, who had requested the same period first. The Leave policy stated that said that "Where there are conflicting annual leave requests, priority will be given to those who submitted their requests first, subject to business needs".

213. Accordingly, the Claimant was not treated less favourably than other staff with regard to her request for a religious holiday – she was permitted to take Eid as leave. There was no evidence that Christians were permitted to take extended leave after Christmas day, when the Claimant was not permitted to take extended leave after Eid.

214. Insofar as more people were permitted to take holiday around Christmas, this was because it was an operationally quiet time, and was not related to employees' religion. If there was any difference in treatment between the Claimant and other staff, this was not related to the Claimant's religion.

Indirect Religion Discrimination

Alternatively, did the Respondent apply the following provisions, criteria or practices ("**PCPs**"):

Allowing food to be present in the back office and/or requiring employees to work in the back office where food was present?

215. On the facts, staff were allowed to eat in the back office – Park Square West. On the facts, the Claimant was asked to work in Park Square West during Ramadan when other staff were allowed to eat.

Alleged PCP: Requiring employees to work during Eid?

216. The Tribunal did not find that employees were required to work during Eid (or Ramadan). Employees were free to apply for leave. All Muslim employees were permitted to take the day of Eid as a holiday. This alleged PCP was not applied to employees.

Did allowing food to be present in the back office and/or requiring employees to work in the back office where food was present put Islamic employees at a particular disadvantage when compared with non-Islamic employees? What is that disadvantage?

217. In evidence, the Claimant agreed that other Muslim employees would not necessarily have been put at a disadvantage by this PCP. The Claimant said that it put her at a disadvantage because she was "a foodie".

218. There was no other evidence that Muslim employees were, or would be, put at a disadvantage by working in a location were other employees were permitted to eat during Ramadan. There was no evidence that Muslim employees had asked that others should not eat during Ramadan. Mr Zambon gave evidence that some Muslims, in fact, might feel pride in fasting while others are eating.

219. The Tribunal did not find that this PCP put Muslims, or a group of them, at a disadvantage.

220. Even if the PCP did put Muslim employees at a disadvantage, the Tribunal considered whether the Respondents had shown that the PCP was a proportionate means of achieving legitimate aim(s), namely: Not restricting the activities of its employees by prohibiting eating in the office and/or seeking to protect the operational needs of the business by requiring the Claimant to return to work in her usual location and her usual duties.

221. The Tribunal noted that the Claimant had been asked to work in Park Square West only for a limited period of time – on the mornings of the last 2 weeks of Ramadan. For the vast majority of the 4 week period of Ramadan, therefore, she was working away from PSW. The Tribunal accepted that Mr Osbourne needed the Claimant to work at PSW for operational reasons. The Tribunal found that

requiring the Claimant to work for limited periods at PSW was a proportionate means of fulfilling the operational needs of the business.

Sex harassment or discrimination

Did the Respondent engage in unwanted conduct in that, at the Christmas party held at the Holiday Inn in Camden in November/December 2019, the Claimant's manager, Dustin Zambon, told another manager to tell Armin Sabotic that the Claimant was dangerous and they should keep away from her?

222. The Tribunal has found, on the facts, that Mr Zambon did not say this. The allegations of sex harassment / sex discrimination therefore fail.

Disability discrimination

Was the Claimant a disabled person with the meaning of s.6 EqA at the relevant time by reason of her nasal problems? Did the Claimant have a physical impairment, namely nasal problems?

223. The Tribunal found that the Claimant suffered from a blocked and runny nose. It accepted the Claimant's evidence that she had done so since 2013. This was a physical impairment.

Did that impairment have an adverse effect on the Claimant's ability to carry out normal day to day activities? Was that effect substantial?

224. The Claimant told the Tribunal that her blocked and runny nose interfered with her ability to sleep and to rest. However, the Tribunal did not find that her blocked/runny nose had a more than minor effect on her ability to sleep. The Claimant's GP report on 11 July 2019 did not specify to what extent her nasal problems affected her ability to sleep. The 1 August OH report did not suggest that the Claimant's nasal problems were causing her any problems at all..

225. The Claimant's GP wrote a letter on her behalf dated 4 October 2019, p202, saying that the Claimant had on-going issues with blocked nose which was affecting her breathing, which was worse at night and affecting her sleep. The GP said that the Claimant had been under the care of ENT surgeons at the Whittington, St George's and Charing Cross hospitals. The GP said that, considering the NHS waiting time and in view of the severity of her symptoms, she opted to seek private treatment.

226. The Tribunal noted that, despite the contents of that GP report, there were no medical reports showing that the ENT surgeons at the Whittington, St George's or Charing Cross hospitals ever considered that an operation on the Claimant's nose was necessary. The Tribunal noted, from the Claimant's evidence, that specialists at UK hospitals had given the Claimant no treatment for her nasal problems, other than nasal sprays

227. The Tribunal also noted that blocked and runny noses are common. It noted that hay fever is specifically excluded from being a disability, unless it intersects

with another condition. It is well known that a blocked and runny nose is one of the symptoms of hay fever.

228. The Tribunal concluded, from the medical evidence, that none of the Claimant's treating surgeons considered that her symptoms were sufficiently serious to warrant an operation. It concluded that the Claimant chose to have a number of operations carried out on her nose privately and that these were not needed on medical grounds.

229. While the Claimant's GP had written a letter on 4 October 2019 saying that the Claimant's symptoms of sleep interference had been worsening, so that she required for a private operation in November 2019, this statement was at odds with the other available medical evidence. There was no medical evidence from the Turkish surgeon, who actually carried out the operation, about the nature of and necessity for the operation.

230. The Tribunal considered that the account of the Claimant's nasal problems in GP reports of 4 October 2019 and 6 October 2020 was not supported by the other medical evidence. It seemed at odds with the GP report of 11 July 2019, and the OH report of 1 August 2019 which suggested that the Claimant's sleep problems were also – indeed, primarily - caused by her stress and anxiety.

231. On all the facts, the Tribunal accepted that the Claimant's blocked and runny nose might cause some interference with her sleep. However, on its own, the Tribunal did not accept that this had a more than minor adverse effect on her ability to do normal day-to-day activities, like sleeping, resting and concentrating, as a result. Blocked and runny noses are a common problem and recur throughout most people's lives due to seasonal colds and viruses, or hay fever. The Claimant had not discharged the burden of proof to show that the effects of her particular condition were more than minor or trivial.

232. The Claimant was not disabled by reason of her nasal problems.

Direct Disability Discrimination

Was the Claimant treated less favourably than a hypothetical comparator in materially similar circumstances in that:

She was not granted sick leave and sick pay for her week's absence in November 2019, during which she had a nose operation and for which she had to take annual leave?

233. The Tribunal had decided that the Claimant was not disabled by reason of her nasal problems.

234. In any event, it found that the Respondents applied their standard policies to the Claimant in respect of this leave.

235. The Respondent's Sickness Absence Policy provides, paragraph 5.8: Elective Surgery, "Employees who elect to have surgery or treatments which are

not available on the NHS and are not necessary for medical or psychological reasons should request annual leave to cover the period of absence for the operation/treatment and convalescence. Individuals should ensure that they have sufficient annual leave to facilitate their undergoing surgery and any anticipated recovery period. Where this is not the case, consideration will be given to granting unpaid leave to cover the deficit." P133.

236. On the facts, the Claimant had arranged an operation on her nose which was not available through the NHS. The Respondents initially treated it as elective surgery, in accordance with the policy.

237. The Claimant had exhausted her annual leave entitlement, so she was given unpaid leave.

238. When the Claimant was signed off work, sick, by her GP for this surgery, the Respondents paid her sick pay. She did not receive sick pay for the whole period because she had also already exhausted her entitlement to contractual sick pay that year.

239. There was no evidence that a non-disabled employee, who sought leave for elective surgery, would have been treated any differently. The Respondents acted precisely in accordance with their policies. Their decisions changed when the medical evidence provided by the Claimant changed. Tribunal found that those policies would have been applied to other non- disabled employees in exactly the same way, in the same circumstances.

<u>The Claimant was not allowed to fully participate in or have sight of the risk assessment which was written about her in December 2019?</u>

240. The Respondents accepted that the Claimant was disabled by reason of her stress, anxiety and depression. On the facts, the Claimant did participate in the Risk Assessment. It was carried out during working hours, but the Claimant did provide answers to the questions on the assessment and Mr Osbourne noted these in the risk assessment. Recommendations were made and put in place for the Claimant as a result.

241. The Claimant was not given a copy of the Risk Assessment. However, the Tribunal accepted that this was an oversight on the part of Mr Osbourne. The fact that he put measures in place to help the Claimant as a result of the risk assessment showed that he was trying to carry out the process correctly. His failure to give her a copy of the risk assessment was not, in any way, because she was disabled.

<u>The Claimant received a final written warning because she was absent from work on 30 and 31 December 2019, having flown to Turkey to attend a follow-up meeting on 28 December 2019 with her nasal consultant following her nose operation?</u>

242. The Tribunal accepted Mr Osbourne's evidence that the Claimant had taken the leave without authorisation, in the knowledge that she had no annual leave

remaining, and was aware of the likely consequences. It accepted that he felt that this serious misconduct warranted a final written warning.

243. On the facts, Mr Osbourne had warned the Claimant that the leave was not authorised and that disciplinary action would be taken against her if she was absent without permission. He had been very clear in his warning to the Claimant. The Tribunal accepted that disciplinary action naturally followed in those circumstances.

244. The Tribunal accepted that a non-disabled person, who had been absent from work without permission, even for an alleged appointment, would also have been given a final written warning.

245. The treatment was wholly because the Claimant was absent without permission, not because she was a disabled person.

246. (The Claimant also contends that her absence was because of something related to disability - her need to attend an appointment - but the Tribunal has found that the warning was not given because of any disability itself).

<u>The Claimant was dismissed, having provided a three-month conditional fitness to work note on 17 January 2020?</u>

247. The Tribunal accepted Mr Pedro's evidence about the reasons in his mind for dismissing the Claimant. One of these was the fact that the Claimant, due to her disability, had presented a GP note saying that she could not undertake patient facing duties.

248. This was something arising in consequence of disability, rather than the disability itself (and will be considered further below).

249. The other reasons were not the Claimant's disability, either: her final written warning, her very poor relationship with her managers, the fact that the working relationship had broken down.

250. The Tribunal found that a person who was in those same circumstances, who was unable to do patient facing duties for 3 months, but who was not disabled, would also have been dismissed.

251. The Claimant was not treated less favourably because she was a disabled person.

Discrimination arising from disability

<u>Did the following "things" arise in consequence of the Claimant's alleged disabilities:</u>

<u>She was absent from work in November 2019 during which she had a nose operation?</u>

Unfavourable Treatment: Was she treated unfavourably when she was not granted sick leave and sick pay for her week's absence in November 2019, during which she had a nose operation and for which she had to take annual leave, because of that?

252. The Tribunal found that the Claimant was not a disabled person by reason of her nasal problems. The absence from work for a nose operation did not arise out of disability.

253. In any event, the Tribunal considered that there was no evidence from UK treating surgeons, or even from the Turkish surgeon, that this operation was necessary to treat the Claimant's nasal symptoms (even if they did amount to a disability). The Tribunal did not consider that the Claimant's GP reports were reliable or consistent with other medical evidence. The Tribunal concluded that the nose operation was in indeed, elective surgery. That is, that the Claimant chose to have a nose operation, rather than that it arose out of her nose problems. If there was any link between the operation and nasal problems, the Tribunal considered that it was no more than trivial.

Thing Arising in Consequence of Disability: A risk assessment was produced.
Unfavourable Treatment because of that thing:
The Claimant was not allowed to fully participate in or have sight of the risk assessment which was written about her in December 2019?

.

254. The Risk Assessment did arise out of the Claimant's stress, depression and anxiety conditions. However, the Tribunal did not find that the method Mr Osbourne used to carry out the risk assessment was because of this.

255. The Tribunal accepted that the failure to give the Claimant a copy was an oversight by Mr Osbourne. It also accepted that Mr Osbourne carried the risk assessment out while sitting with the Claimant as she was working, because he wanted to ensure that the risk assessment was carried out as soon as possible. None of these things were because of the risk assessment they were the practical circumstances in which the risk assessment was completed.

Thing Arising in Consequence of Disability: The Claimant was absent from work on 30 and 31 December 2019, in order to attend a follow-up meeting on 28 December 2019 with her nasal consultant

Unfavourable Treatment because of that thing: The Claimant received a final written warning because she was absent from work on 30 and 31 December 2019,

256. Again, the Claimant's nasal problems were not a disability.

257. On the facts, the Tribunal did not accept that the Claimant had attended an appointment with her nasal consultant in Turkey on 28 December 2019. There was no contemporaneous evidence of that appointment. There was no appointment letter from the Turkish surgeon and no medical report from the surgeon.

258. Furthermore, the Tribunal did not find that any appointment on that day arose in consequence of the Claimant's nasal problems. There was no evidence that an appointment was required that day, or in December 2019, at all. It appeared that the Claimant had chosen to go to Turkey until 9 January 2020, anyway. She might have booked a medical appointment, for her convenience, during her stay.

259. The unfavourable treatment, the written warning, was given because the Claimant had been absent on the precise dates of 30 & 31 December. Those were dates on which she had no annual leave remaining and had not been given permission to take leave. The Claimant would have been able to take leave in January 2020, when the new leave year commenced, and when other people were not away. Accordingly, the date of the leave was the effective cause of the unfavourable treatment. But the date of the leave did not arise in consequence of the Claimant's nasal problems, rather than her choice of holiday dates.

Thing Arising in Consequence of Disability: The Claimant was unable to face patients

Unfavourable Treatment because of that thing: The Claimant was dismissed

If so, can the Respondent show that such treatment were proportionate means of achieving legitimate aim(s)?
Maintaining appropriate standards of conduct and performance in the workplace and/or ensuring that the intrinsic responsibilities of the contractual role can be fulfilled.

260. The Tribunal accepted, on the basis of the Claimant's GP Fit Note dated 17 January 202 that, because of her stress, anxiety and depression, she required a "non-patient facing role/department" by way of amended duties, p316-317.

261. Her inability to face patients arose from her stress, anxiety and depression disability.

262. Mr Pedro dismissed the Claimant, at least partly because she was unable to undertake patient-facing duties. The burden of proof therefore shifted to the Respondent to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

263. Mr Pedro told the Tribunal, and the Tribunal accepted, that he believed that the vast majority of the Claimant's role was patient facing and that there were no purely secretarial roles available.

264. The Tribunal therefore accepted that, on the facts available to Mr Pedro at the time, the Claimant was unable to fulfil the intrinsic requirements of her role at the time she was dismissed. It accepted that ensuring that the intrinsic responsibilities of the contractual role can be fulfilled was a legitimate aim – and that this was a legitimate aim in Mr Pedro's mind.

265. If the Claimant's inability to fulfil the intrinsic requirements of her role had been the only reason for the Claimant's dismissal, dismissal might not have been

a proportionate means of achieving the Respondent's legitimate aim. A less discriminatory option might have been to reduce the Claimant's job role for a short period of time, until she was fit to resume her full duties.

266. However, there were very many other reasons for dismissal. On the facts, Mr Pedro also dismissed the Claimant because the working relationship had broken down, she had disobeyed management instructions regarding leave and, despite her many complaints, she had never submitted a grievance to resolve her issues with management.

267. On all the evidence, the Tribunal accepted Mr Pedro and Ms Chohan's description of the working relationship having broken down. The Claimant was in constant conflict with management and there was no real prospect of this being resolved because, despite many opportunities, the Claimant had never actually submitted a grievance.

268. The Tribunal accepted that maintaining appropriate standards of conduct and performance in the workplace was a legitimate aim and that this, too, was in Mr Pedro's mind.

269. On all the evidence, the Tribunal decided that dismissal in those circumstances was a proportionate means of achieving all the Respondents' legitimate aims. The fact that the Claimant was unable to carry out much of her role merely compounded the intractable situation of conflict between the Claimant and her managers. All the other reasons for dismissal justified dismissal on their own. Ultimately, the working relationship could not continue.

Failure to make reasonable adjustments

Did the Respondent apply the following PCP(s):
The Claimant was not paid sick pay when she was absent for a nose operation in November 2019?

If so, did the application of the PCP(s) put the Claimant at a substantial disadvantage in comparison to non-disabled employees? Was the Respondent aware the Claimant was put, or likely to be put, to such a disadvantage?

Did the Respondent take such steps as would have been reasonable to avoid the disadvantage? The Claimant says the Respondent ought to have taken the following steps

The Respondent ought to have paid her sick pay during her absence in November 2019.

270. On the facts, the Claimant was paid sick pay when she was absent. She was not paid full pay throughout because she had already exhausted her full sick pay entitlement for the year.

271. In any event, the Claimant was not disabled by her nasal problems. Even if she had been, the Tribunal found that the surgery was elective, rather than

necessitated by her nasal problems. The Claimant was not therefore at a substantial disadvantage in comparison with non-disabled employees in not being paid full sick pay during surgery which was not necessary.

PCP: The Claimant was disciplined for her absence on 30 and 31 December 2019

Reasonable Adjustment: The Respondent should have authorised her leave for her absence on 30 and 31 December 2019 and/or not disciplined her for her absence.

272. Again, the Claimant was not disabled by nasal problems. Again, the Tribunal did not accept that the Claimant attended an appointment at all, or that, if she did, an appointment on those specific days arose from her nasal problems, rather than her choice of holiday dates.

273. The Claimant was therefore not at a substantial disadvantage compared to non-disabled employees who chose to take holidays when they were not permitted to.

PCP: The Claimant was required to face patients for three weeks in January and February 2020

Reasonable Adjustment: The Claimant should have been relieved from facing patients in her duties.

274. The Claimant was required to face patients for 3 weeks in January and February 2020. The Tribunal accepted that this put her at a substantial disadvantage compared to non-disabled employees because she suffered from stress and anxiety and her duties were adding to her stress.

275. However, the Tribunal considered that the Respondent had shown that it had not failed to make a reasonable adjustment when it failed to remove her from patient facing roles.

276. The Tribunal accepted Mr Zambon's evidence that he did not understand the GP note and needed OH advice in order to do so. The Tribunal accepted that he considered that the Claimant's role was almost entirely patient-facing, yet the GP had not signed the Claimant as unfit for work. The Tribunal found that Mr Zambon was justifiably confused and could not make a decision until he had obtained clarity from OH. He tried to obtain OH advice, but, on the facts, the Claimant told OH that she did not consent to the OH report being shown to Mr Osbourne who was her manager. She therefore prevented her manager from taking the steps advised in it.

277. The Tribunal found that the OH report was the accurate and reliable assessment of adjustments which would avoid the substantial disadvantage. It described the disadvantage the Claimant was suffering at Devonshire Place and proposed measures to address this. The GP report, by contrast, was vague and confusing.

278. The Tribunal noted that, if the OH report had been disclosed to the managers, they would have seen that OH had presented a number of alternative adjustments, all of which were presented as equally suitable: " may wish to consider allocating a member of staff to work alongside Elif or cover for breaks temporarily when she is doing patient facing duties or avoid patient facing duties for at least a month whilst she is having additional support to overcome her main stressors."

279. As the Claimant accepted in evidence, Mr Osbourne had already allocated extra staff to work at 20 and 22 Devonshire Place, as a result of the stress risk assessment. The Respondents had therefore made one of the alternative adjustments advised by OH.

Victimisation

Did the Respondent dismiss the Claimant because she had done a protected act, or the Respondent believed she had done, or may do, a protected act

280. The Claimant had done a protected act when she told Donna Shanks on 6 February 2020 that she intended to bring a grievance. Ms Chohan, the HR Business Partner who advised Mr Pedro in relation to the dismissal, know about that email.

281. However, the Tribunal was entirely satisfied that the Claimant's stated intention to bring a grievance at that point was no part of the reason for her dismissal. Mr Pedro did not know about that email.

282. Indeed, one of the reasons in his mind for dismissing the Claimant was her previous failure to use the grievance procedure to resolve her workplace issues, despite many opportunities to do so. It was clear from the evidence that the Claimant had been advised by HR, over many months, about how to raise grievances. The Tribunal accepted Ms Chohan' evidence that the situation had therefore become intractable.

283. The Claimant was not dismissed because she intended to raise a grievance. On the contrary, part of the reason for her dismissal was her failure to do so.

Unauthorised deduction from wages

What sums were properly payable to the Claimant under her contract of employment? In particular:

Was she entitled to sick pay for her week's absence in November 2019?

Did she have a contractual entitlement to be paid for overtime worked? If so, how much overtime did she work? The Claimant alleges that she worked a varying amount of 30 minutes or more every time she worked in a patient facing role from 27 February to 24 December 2019.

284. The Tribunal was satisfied that the Claimant was paid what she was entitled to be paid by way of sick pay in November 2019. She had exhausted her full sick

pay entitlement and was paid SSP for some of that period, in accordance with the terms of her contract. There was no deduction from wages properly payable under her contract in November 2019

285. There was no contractual right to payment for overtime. The only contractual right was to agreed time off in lieu. The Claimant's contract stated clearly,

"Any claim for TOIL that had not been agreed with your manager beforehand may not be redeemable.

No payments will be made to you for TOIL.." .

286. The Respondents did not make any deduction from the Claimant's wages when they did not pay her for overtime.

Conclusion

287. All the Claimant's claims are dismissed. A remedy hearing will not take place.

Employment Judge Brown

Dated: …23 June 2021……

Sent to the parties on:

23/06/2021

For the Tribunal Office