# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Burchell

**Respondent:** Glebe Housing Association Ltd

**HELD AT:** Remote hearing by Cloud Video Platform **ON:** 21, 22, 23, 24 and 25 June 2021

**BEFORE:** Employment Judge Barker
Mr S Townsend
Ms B von Maydell-Koch

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Mr McDevitt, counsel

# JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant was not unfairly dismissed. He was dismissed for a fair reason, that being redundancy, and a fair procedure was followed by the respondent.

2. The claimant's claims of disability discrimination fail and are dismissed. He was not subjected to direct discrimination or harassment by the respondent on the grounds of his disability. The respondent did not fail in its duty to make reasonable adjustments for him.

# REASONS

### Preliminary Matters and Issues for the Tribunal to Decide

1. The claimant was employed by the respondent from February 2004 until his dismissal on notice on 3 June 2019, the dismissal taking effect at the expiry of his notice period on 25 August 2019. The claimant was a chef and his place of work was a nursing home operated by the respondent, Glebe Court, which

provided end of life care and care for residents with dementia. The claimant was one of two chefs employed by the respondent, the other being Mrs Sue Sculley. She was also dismissed by reason of redundancy, her dismissal taking effect the day after the claimant's.

2. The Tribunal heard evidence from the claimant and Wendy Watson, Tina Dawson and Patricia Goan for the respondent. Ms Watson is the respondent's HR manager, Ms Dawson was the former registered manager of Glebe Court Nursing Home and Ms Goan is the CEO of the respondent.

3. The evidence for the Tribunal to consider was in a bundle of 750 pages compiled by the respondent. The claimant noted that certain pages were illegible as a result of the printing and photocopying process and ensured that the Tribunal was presented with legible copies of these documents, for which we are grateful. The respondent had also prepared a chronology and a cast list which were shared with the Tribunal and the claimant. The claimant provided other documents to the Tribunal during our deliberations which we have also considered.

4. The claimant appeared in person with the assistance of his cousin, Ms Fraser. He was asked throughout the hearing to alert the Tribunal if he needed time to take a break. At times, the claimant found it difficult to cross-examine the respondent's witnesses. The Tribunal gave the claimant guidance as to what was required in questioning the respondent's witnesses and where the claimant was wholly unable to question a witness (which he acknowledged was due to nerves), the Tribunal suggested that Judge Barker should address some fact-finding questions to the witness first and that the claimant could interject with questions of his own at any time. The claimant agreed to this course of action. He was reminded in advance of cross-examination to take time to draw up a list of questions for a witness, and was offered adjournments to do so. However, the Tribunal reminded him that it was not their role to act as his legal representative and should he wish to address any particular issue to a witness, that was his responsibility to do so.

5. The evidence before the Tribunal has been considered by the panel, but not all of it was relevant to the issues for the Tribunal to decide. Therefore, where this judgment and reasons is silent on particular evidence, it is not that it has not been considered, but that it was not sufficiently relevant to be included in this judgment and reasons.

6. The respondent accepts that the claimant is a disabled person within the definition set out at section 6 of the Equality Act 2010 by reason of his stage 3 Chronic Kidney Disease (CKD) which was diagnosed on 11 February 2016 and is a life-long condition. The respondent accepts that this has a substantial adverse effect on the claimant's ability to carry out normal day to day activities, save that the respondent does not concede that the claimant's ability to bend down is impaired. This fact is relevant to one aspect of the claimant's claim of a failure to make reasonable adjustments.

7. The issues for the Tribunal to decide had been set down at a Case Management Hearing before Employment Judge Mason on 16 March 2021. Judge Mason considered both the claimant's claim form and also letters from him to the Tribunal dated 2 December 2019, 3 June 2020 (the claimant's disability impact statement and amendments to it), 8 June 2020 and the claimant's Scott Schedule. The claimant introduced further issues at the start of this hearing, which were not objected to by the respondent.

8. The issues for the Tribunal to decide are as follows:

    a. What was the principal reason for the dismissal and was it a fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (ERA)?:
        i. The claimant says that the reasons for his dismissal were
            1. Because of the respondent's decision to move from fresh food to frozen food, which was not in the best interests of the residents;
            2. Because he was offered a "bribe" to resign on 14 November 2018;
            3. Because Sue Sculley, the respondent's other cook, was re-employed by the respondent following his dismissal;
            4. Because the respondent conducted his disciplinary and grievance procedure at the same time; and
            5. Because of his experience, which was not taken into account
        ii. The respondent asserts that the reason was redundancy which is a potentially fair reason.
        iii. Was there a stopping or reduction in the requirement for employees to carry out work of the particular kind carried out by the claimant (Chef) (s139(1)(b))?
        iv. Alternatively, the respondent asserts that the reason was for some other substantial reason such as to justify the dismissal of an employee holding the position which the employee held, specifically a business reorganisation.
        v. Did the respondent think on reasonable grounds that there were sound business reasons for the redundancy or reorganisation?

    b. If the principal reason for dismissal was a fair one, was the dismissal fair or unfair having regard to:
        i. the reason shown by the respondent,
        ii. whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant, and
        iii. equity and the substantial merits of the case?

c. In particular, did the respondent in all respects act within the so-called "band of reasonable responses"'?

9. Discrimination. Did the Respondent do any of the following ("the Acts"):
   a. Submit the claimant to unfounded disciplinary action from 2012 onwards including a period of 8.5 months' suspension in October 2016, a disciplinary hearing on 13 July 2016 and a final written warning on 16 April 2019?
   b. At a disciplinary hearing on 13 July 2018, rely on CCTV footage of the claimant working in the kitchen, without his permission which the claimant says amounted to "spying" on him?
   c. Change the kitchen hours and menus without his knowledge?
   d. Fail to carry out a risk assessment since 20 December 2016?
   e. Fail to allow him to take sufficient breaks?
   f. Fail in its duty of care to the claimant by not asking him how he was or hold regular meetings regarding his medical condition?
   g. Fail to raise the ovens so that he could avoid bending down?
   h. Fail to investigate when (unknown) colleagues locked him in the toilet on 17 September 2016?
   i. Make him work harder than his colleagues?
   j. Make a complaint about cleaning on 20 April 2018 and call him to an unannounced meeting
   k. Accuse him of being "BAME" (racist) on 7 June 2018?
   l. Offer him a "bribe" on 14 November 2018 to resign?
   m. Make him redundant but then take Ms Scully back on 6 months later?

   The claimant claims that these acts amount to either direct discrimination, or harassment on the grounds of his disability, or both.

10. Discrimination – duty and failure to make reasonable adjustments.

    a. (1) Provision, Criterion or Practice: Did the respondent have the provision, criterion or practice (PCP) of not allowing sufficient breaks?
    b. If so, did this PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that he was required to take more breaks due to continence issues as a result of his medical condition?
    c. If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?
    d. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The claimant alleges that he should have been allowed to take more breaks.
    e. Would it have been reasonable for the respondent to have to take those steps at any relevant time?

f. (2) Physical features: did the respondent's premises have the following physical feature: Ovens at floor height?
g. If so, did that physical feature put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that he had difficulty bending down and lifting due to his medical condition?
h. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
i. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage. The claimant says that the respondent could have raised the height of the ovens.
j. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

11. Jurisdiction: time
    a. In respect of the Acts that arose three months before the Claimant commenced Acas early conciliation on 27 August 2019, are these allegations out of time?
    b. Do any or all of these matters form part of a course of conduct by the Respondent extending over a period of time such as to render them in time pursuant to s123(3)EqA'?
    c. If not, should time be extended on the basis the claim was presented within such further period as the tribunal thinks just and equitable? (s123(1)(a) EqA?

## Findings of Fact

12. The claimant informed the Tribunal that over the course of his employment he had been subjected to "*continuous*" disciplinary action by the respondent. He made several references to 12 disciplinary actions in recent years, and particularly since 2012. However, there was no evidence of this in the bundle or otherwise before the Tribunal other than this bare assertion from him. When asked where the figure of twelve came from, the claimant indicated that this was referred to in Ms Goan's witness statement, however Ms Goan's statement refers to twelve disciplinaries as being the number that she has conducted herself, not the number involving the claimant.

13. The evidence before the Tribunal was that, during the period to which these proceedings relate, there were three disciplinary actions against the claimant, two of which resulted in a sanction. He was issued with a verbal warning in April 2018 and a final written warning in April 2019. He went through a disciplinary process in 2016 and 2017 and was suspended but was allowed to return to work without any sanction being imposed on him.

14. He was diagnosed with Chronic Kidney Disease in February 2016, which is a lifelong condition. The respondent was aware of this diagnosis at the time and therefore any disability discrimination could only have taken place from February 2016 onwards.

15. The claimant has issued numerous grievances during his employment. The claimant's preferred method of communicating with the respondent was by letter, often sending lengthy letters to the respondent on the same issue one week after another, or sometimes several letters in the course of a week. His letters often referred back to earlier disputes with the respondent in addition to referring to the issue at hand. The claimant complained to the Tribunal that these letters went unanswered. However, we find that he had regular meetings and conversations with his managers as to the issues contained in his letters. Face-to-face discussions are, we find, the usual way of communicating in the workplace when an employee and his manager are in the same location on a daily or weekly basis and we make no criticism of the respondent for not responding to each and every one of the claimant's letters in writing.

16. In terms of whether or not the claimant's claims were in time, in order to determine whether the first of the claimant's allegations of discrimination was proven it was necessary to consider the conduct of the respondent over the whole of the period since the claimant was diagnosed with CKD. It was therefore considered to be proportionate and in the interests of justice to consider the claimant's other claims as if they were in time, as part of continuing acts of discrimination.

**The claimant's disability**

17. The claimant was absent from October 2015 due to issues with his kidney and in February 2016 was diagnosed with renal failure and "Chronic Kidney Disease" (CKD), a life-long condition. The respondent accepts that the claimant was a disabled person as of his diagnosis on 11 February 2016. The claimant has a catheter and needs to drink several litres of fluids a day to reduce his increased risk of urinary tract infections and kidney infections. The respondent accepts that the claimant required frequent breaks during his working hours to use the toilet and additional breaks to drink fluids. The respondent also accepts that the claimant has difficulty lifting. The respondent carried out a risk assessment with the claimant in relation to his return to work on 18 February 2016. The respondent does not accept that the claimant had increased difficulty bending down, however we find, having heard the claimant's evidence in these proceedings, that he did. His catheter makes it cumbersome for him to bend and therefore his normal day to day activities are adversely affected in this way.

**Events from February 2016 onwards**

18. The claimant told the Tribunal that he was made fun of due to his condition. He also told the Tribunal that he was locked in the toilet by colleagues on 16 September 2016 and that the respondent failed to identify who was responsible

or take any action against them. The respondent does not dispute that the claimant was locked in the toilet.

19. Ms Goan's evidence to the Tribunal was that, at the time she was appointed CEO of the respondent in December 2016, a "*high degree of acrimony*" was notable in the team in Glebe Court and that the kitchen was also not a harmonious workplace. One of her priorities on being appointed was to rectify that situation. She implemented workplace equalities training in relation to diversity, disability and inclusion for staff, in an attempt to improve dignity at work for staff and for the residents. The claimant was, at the time, suspended for alleged racist remarks in the workplace. Witness statements taken at the time also indicated that members of the team at Glebe Court objected to him referring to his catheter and kidney problems while at work, with staff members referring to this as "*disgusting*". Ms Goan accepted that this was an inappropriate way of speaking about the claimant's condition and also accepted that she was concerned that such attitudes would affect the way in which residents may be cared for by staff and possibly undermine residents' dignity.

20. Ms Goan decided that the claimant had been suspended on the grounds of gross misconduct without a proper investigation being carried out. She told the Tribunal that she concluded that the best way of dealing with the situation with the claimant and the rest of the team was that he should return to work without any sanction and that steps should be taken to move the team forward in a harmonious manner. The claimant was therefore not disciplined for alleged racist remarks, as Ms Goan said that she was not assured of the reliability of the statements given in that regard. None of his colleagues were disciplined for any derogatory comments made against the claimant, whether on the grounds of his disability or otherwise or for locking him in the toilet.

21. The claimant and his union representative agreed with Ms Goan, at a meeting on 11 May 2017, that a constructive way to move forward would be to abandon the disciplinary process but with more support and supervision, and that diversity awareness training should be conducted with all the staff. Ms Goan told the Tribunal that this had been carried out and evidence before us indicates that the claimant had his diversity training on 31 May 2017.

22. The Tribunal notes that the claimant did not mention in his return to work meeting that he had any issues with the matters that he now complains were the subject of a failure to make reasonable adjustments, namely not being allowed to take breaks and the respondent's ovens not being raised off the floor. He had a one-to-one supervision meeting on 1 June and another on 8 June 2017 and again, neither of these issues were raised by the claimant. In the meeting on 8 June 2017 it was confirmed that the trolley to help the claimant move heavy items had arrived. The claimant told the Tribunal that he used this as part of his work after that.

23. The claimant's relationship with his colleagues and the respondent was relatively settled for a period following his return to work, until the respondent's other cook, Sue Sculley, was appointed head of the kitchen at Glebe Court. This

was something that the claimant objected to. In particular he made a written complaint on 2 February 2018 regarding issues in the workplace, including Ms Sculley's management of the kitchens and the engagement of her husband Eddie Sculley as a kitchen assistant.

**The Installation of CCTV**

24. In February and March 2018, the respondent consulted with its staff, residents and their families concerning the installation of CCTV in the home. The claimant was asked to sign an individual document dated 9 March 2018 to say he had no objection to it, but he instead wrote on the document that he refused to sign it and did object. The CCTV was subsequently installed in the home, including in corridors and the kitchen where the claimant worked. He objects to this as part of these proceedings and asks the Tribunal to conclude that the respondent's actions in this regard are unlawful. The Tribunal notes that the claimant was told by the respondent that CCTV would be installed and that any monitoring was overt as opposed to hidden. The consultation document of February 2018 states:

    *"We are in the process of installing CCTV in all public areas in the building this will include the corridors and lounges and external areas around the outside of the building.*

    *This action is to improve safety and security of the building our residents visitors and staff.*"

25. An employer must notify its employees if CCTV is being used at their place of work, which the respondent has done. The claimant told the Tribunal that installing CCTV in the kitchen was unlawful as this was not for the purpose of preventing criminal activity. He has asked the Tribunal to consider an article from "Personnel Today" from May 2017 in which it is said that employees had a reasonable expectation of privacy in "*toilets, changing rooms, kitchens and break areas."* The claimant concludes from this that CCTV in the kitchen where he worked was unlawful. However we find that the kitchen in Glebe Court was his place of work and he was notified that there was CCTV in there. Surveillance was not simply said to be for the prevention of crime but was said to be for "*safety and security of the building, our residents, visitors and staff*". This is a broad purpose that would cover food safety in the kitchen and therefore we find that the use of CCTV by the respondent was not unlawful or unreasonable.

**April 2018 onwards**

26. The claimant was subsequently invited to an investigation meeting in relation to a grievance raised by Ms Sculley on 20 April 2018. Ms Sculley's grievance was that the working atmosphere in the kitchen was so difficult that she was resigning from her position.

27. The claimant attended a meeting regarding Ms Sculley on 25 April 2018. In advance of the meeting he re-sent a letter of 9 July 2017 to the respondent and provided a further letter of complaint dated 23 April 2018. Part of the outcome of

Ms Sculley's grievance was that the claimant was asked to sign a memo dated 21 April 2018 by Patricia Goan in which he was asked to acknowledge that there was a "zero tolerance" of bullying at work, which he did do.

28. The claimant had a supervision meeting on 10 May 2018 with Don McLeod, interim manager, at which it was put to him that there were reports of him favouring white members of staff over others in terms of who he would give food to at lunchtime. African-Caribbean members of staff had reported that if they asked him for lunch, he would say that there was no food left over, but white members of staff would subsequently be given food by him. As part of this meeting, many other issues were discussed to do with the operation of the kitchen but the claimant's disability or the need for adjustments to the workplace was not discussed.

29. The claimant wrote a letter dated 12 May 2018 to complain about being accused of discriminatory behaviour and said that he would not sign the minutes of the meeting. He raised seven points of complaint; none were related to his disability.

30. The claimant was issued with a verbal warning by letter dated 5 June 2018 in relation to the allegations of race discrimination and the respondent issued a follow-up letter of 7 June 2018, providing further explanation to the claimant in relation to the imposition of the verbal warning and responding to the other issues raised in his letter of 12 May 2018.

31. The claimant wrote a further letter of complaint dated 19 June 2018 in relation to the imposition of a verbal warning. He wrote another letter on the same issue on 4 July 2018 in which he informed the respondent that he was raising a grievance about the verbal warning. He had a supervision with Don McLeod on 5 July 2018 after which Mr McLeod noted that they had a long conversation about the verbal warning and the claimant agreed to withdraw the grievance.

32. At the supervision meeting of 5 July 2018, other matters were discussed such as the working environment in the kitchen. By this time, the respondent had engaged an outside catering company, Social Care Catering Solutions ("SCCS") to oversee the kitchen in Glebe House. There was some confusion on the claimant's part as to whether this amounted to a TUPE transfer of his employment but the evidence before the Tribunal was that it was not, and that SCCS were engaged on a trial basis at this time with a possible TUPE transfer to follow, which never took place. The immediate effect of the involvement of SCCS was that there was a kitchen manager, Gareth Thomas, brought in to manage the claimant and his colleagues in the catering function at Glebe House, with David Allen of SCCS managing remotely and providing further direction.

33. The evidence before the Tribunal was that the claimant strongly objected to the involvement of SCCS. The claimant is noted as having told Mr McLeod at the supervision meeting on 5 July 2018 that SCCS were "*going too fast in the kitchen and things are getting stressful*". Mr McLeod noted in response that "*Allan needs to follow directions of chef manager*", that is, Gareth Thomas. The claimant did not complain during this meeting that his disability was not being accommodated

in that he was not able to take breaks or that he was having difficulty bending down to reach the respondent's ovens.

34. On 10 July 2018, the claimant wrote a further letter of complaint to the respondent, about his supervision itself which he said should have been arranged on notice and that the facts around the imposition of the verbal warning had "*not been proved*". The Tribunal notes that the respondent had taken statements from members of staff involved in the complaint about the claimant and had weighed up their testimony against the claimant's and reached a conclusion that their complaints were proven. We do not consider the respondent's actions to be unreasonable. There is no evidence whatsoever that this was done on the grounds of the claimant's disability. Also in the letter the claimant complains about criticism of him that the lunch service was slow or late. He blamed this on SCCS changing the timing of lunch, which he said he should have been given two weeks' notice of, and he also complained about a lack of staff in the kitchen. However, the claimant made no reference to a lack of breaks and no reference to having difficulty bending down to take things out of the oven.

35. A file note dated 10 July 2018 from Gareth Thomas reports that the claimant was observed to have breached hygiene rules in the kitchen by placing unwashed strawberries in a bowl to serve to residents and kicking vegetable peelings under the counter instead of picking them up. It was also said that his personal appearance was scruffy and his uniform was "*grimy and dirty*".

36. Mr McLeod had a meeting with the claimant on 12 July 2018 about the concerns raised by Gareth Thomas on 10 July. This was labelled an "investigation meeting" and is recorded to have lasted for 7 minutes. The claimant wrote a letter of complaint to the respondent on 12 July 2018 about the meeting of 12 July. He complains that he did not receive a written invitation to this meeting in advance. He also complains about being "*under duress*" from SCCS in the kitchen and being short staffed on 7 July. The claimant claims in the letter that this is "*direct harassment which can lead to discrimination and bullying in the workplace*", but does not refer to his disability nor does he make any complaint that his reasonable adjustments were not being accommodated.

37. On 13 July 2018 the claimant was observed by David Allen failing to observe hygiene rules regarding the preparation of raw chicken too close to uncovered pastry, which was then used to decorate treacle tarts for dessert for the residents. The kitchen staff were subsequently instructed to destroy the tarts by David Allen as in his opinion they would have been unsafe to serve. Mr McLeod raised this with the claimant the same day and told him that, as the claimant was going on leave, they would discuss this on his return.

38. Nevertheless, the claimant wrote a letter of complaint to the respondent dated 16 July 2018. The letter raises multiple complaints about SCCS, going back to March 2018, and refers also to the events of 13 July. The letter complains about the use of CCTV and states "*you have stressed me out*" because of the changes made by SCCS. The letter also accuses SCCS of trying to remove him from his job, including at one point asking "*are you trying to get rid of me because of my*

*catheterisation?*" However no further details are provided about disability discrimination and no complaint is made about a failure to make reasonable adjustments, such as a lack of breaks or difficulties in using the ovens.

39. Mr Allen provided a statement of his observations dated 24 July 2018. In addition to the raw chicken issue, Mr Allen alleged that the claimant tried to clean out the spice cupboard but did not use any cleaning products nor remove anything from the shelves, and noted that "…*this resulted in the cupboard dirtier than before*".

40. CCTV footage was obtained by the respondent to support Mr Allen's observations. Still images of this were before the Tribunal in evidence.

41. The claimant was invited to an investigation meeting on 2 August 2018 regarding this incident with Mr McLeod, which led to an invitation to a disciplinary in a letter dated 3 August 2018.

42. However, the claimant immediately raised a grievance on 4 August 2018. In it he raised issues of short staffing at weekends, complained about the use of the CCTV images and made reference to "*discrimination*" because of his "*medical condition*", but provided no specific detail or allegations on that point other than this amounting to a lack of "*duty of care*" due to short staffing. The claimant provided further submissions and complaints by way of a "statement" dated 24 July 2018. In it is the first reference to the claimant's reasonable adjustments, as follows:

    *"My health condition, has not been considered and adds to my stress and leaves less time in the kitchen for other duties. I am prone to kidney infection which may lead to a UTI. going to the toilet before serving, Garreth tells me this is not reasonable to do so, I need to do so on a regular basis because this would compromise my health condition*"

43. The respondent dealt with the claimant's grievance and put the disciplinary process on hold until the grievance was concluded. The claimant complains that both processes were dealt with at the same time, but we find that it is clear from the documents before us and the testimony of all parties that this was not the case. The disciplinary process was put on hold while the respondent heard the claimant's grievance and grievance appeal and the disciplinary was resumed only at the conclusion of the grievance process.

44. The claimant's grievance was investigated at a meeting on 5 September 2018, at which the claimant was accompanied by his union representative Ms Olisa. The outcome of the grievance was given to him by letter dated 17 September 2018 by Mr Winter, a care consultant, who chaired the grievance meeting. Of the eight grounds of complaint considered, the eighth was a general complaint that "*your Managers had not taken account of your medical condition and the impact that it has upon your ability to undertake your role at Glebe Court.*"

45. This ground of complaint was not upheld by Mr Winter. He noted that there had been a risk assessment on the claimant's return to work after his diagnosis, and he made the following further findings:

    *"I note that for the period of 2016 - 2018 there were no performance related issues addressed with you by the Association. This would seem to indicate that you did not have any significant limitations arising from your health condition and that you were able to adequately fulfil your role in the kitchen at Glebe Court without any negative consequence. The performance related issues which you have most recently been asked to address through your management supervision sessions and which arise from alleged, observed poor performance in the kitchen, are currently subject to an ongoing disciplinary process which I have explained to you are likely to be concluded at the end of this grievance outcomes process. It is thus helpful to be reassured that the Association has considered your current health condition in advance of those processes which are yet to happen."*

46. The claimant wrote a further letter of complaint to Mr Winter dated 5 October 2018 in which he took issue with various of Mr Winter's findings in his letter of 17 September. The claimant referred back to many of the historic incidents in his employment including the allegation of racism. He repeated many of the complaints that Mr Winter's letter addressed. He repeated the allegation that his medical condition was not being considered, only on this occasion he provided the additional information that

    *"My health has not been taken in account no real adjustments has been made for me I still work the same as before. I do not get a break because there is less time to do the job at hand. I have clearly been ignored."*

47. The claimant issued a formal grievance appeal in a letter dated 7 October 2018. In relation to the medical issue, he states

    *"It is disappointing that you have come to your conclusions without either experiencing my medical condition or utilising the experience and knowledge of a medical practitioner."*

48. The claimant was invited to a grievance appeal meeting on 14 November 2018, which was chaired by Wendy Watson, the respondent's HR manager, and which the claimant attended with his union representative Ms Olisa. Ms Watson discussed each of the claimant's 8 points of grievance in turn.

49. The first issue, that of delays to the claimant's disciplinary, was noted by Ms Watson to have been caused by the claimant "*nearly always followed up by taking a grievance*" which had to be investigated first, hence delaying the disciplinary process. The claimant raises this as an issue of disability discrimination before the Tribunal but again we find that pausing a disciplinary process to allow a grievance to be heard was reasonable action by the respondent and was not unfavourable treatment to the claimant, either on the grounds of the claimant's disability or otherwise.

50. In relation to the claimant's grievance about his medical condition, Ms Watson noted that "*due process was followed*" including consultation with the claimant's GP, a risk assessment and occupational health assessment on his return to work. The claimant was off sick at the time of this appeal meeting and was due to have two urgent operations and Ms Watson noted that following this, the respondent would make further assessment of his fitness to return to work and any accommodations that needed to be made. The Tribunal notes that no reference was made during this meeting, either by the claimant or by his union representative, that the claimant had been denied breaks or other reasonable adjustments.

51. Following this meeting in November 2018, the claimant was, in conjunction with his union, offered a without prejudice settlement should he not wish to return to work. The claimant alleges before this Tribunal that this is a "bribe" and discrimination on the grounds of his disability and therefore unlawful. However, we note that the nature of the offer and the reasons for it were discussed with him by his union, as is evidenced by contemporaneous emails at the time that were before us in evidence.

52. Ms Watson wrote to the claimant and his union representative on 19 November 2018 as follows:

*"Following the full conclusion of your grievance appeal meeting on Wednesday 14 November, I would ask that Victoria again reiterates that you agreed to an without prejudice conversation, which Victoria fully explained to you what that meant before any discussion commenced, to which you agreed to. With regards to the without prejudice conversation and your consideration to what was discussed, I believe that Victoria suggested that you would both discuss this together during this week and come back to me during next week commencing 26 November which I was happy with . If you needed further time then I would be open to agreeing this.*

*Otherwise outside of this you are our employee and we look forward to you being well enough to return to work following this period of absence."*

53. The claimant's union representative wrote to Ms Watson later on 19 November 2018 and stated:

*"I have explained his options if he doesn't accept the Settlement Agreement offer, e.g. long recovery time whilst dealing with his pending kidney operation, phased return to work, workplace adjustments etc, then also the outstanding Disciplinary action that Glebe Housing will reinstate and the potential capability action against him. He is very aware of the potential outcomes of these two formal actions but is very determined to return to work and clear his name."*

54. It is therefore, we find, disingenuous that this discussion is now re-framed as a "bribe" by the claimant given that he was fully aware of the nature and purpose of it at the time and in particular that it was a response by the respondent to the

grievances and letters of complaint raised by him in relation to his work colleagues and working environment during 2018, as is recorded in the paragraphs above. The claimant has not established facts from which we could conclude, without further explanation from the respondent, that this was evidence of direct discrimination or harassment on the grounds of his disability.

55. Following the claimant's subsequent period of absence, he had a return to work interview on 13 December 2018. The claimant is recorded as having said that "*his health is going to get sorted out and he is happy and fit enough to be back.*" The claimant did not dispute the record of the meeting during the Tribunal hearing.

56. In relation to a question about the support required, the claimant is recorded as having said "*Allan agrees he doesn't need any support but I have advised Allan that he must take his allocated breaks*". In further discussions later in the meeting, the minutes note:

> "*1. Allan said that "sometimes" he needs to go on his knees when taking food out of the oven, he said twice a day;*
> *2. Allan needs to go to the toilet between 6-7 times during his shift…*
> *3. Allan needs to drink 2 litres of fluids per day so he brings a water bottle to work. I have advised him to keep the water bottle in the office in the kitchen and to have a drink in there…Allan is in agreement with this".*

57. In terms of reasonable adjustments, we therefore find that even when specifically asked about adjustments in a meeting expressly to discuss his health and any issues arising out of it, the claimant did not mention a lack of access to breaks or difficulties getting items out of the oven at floor level.

58. The claimant's disciplinary proceedings re-started in January 2019. He was present at a disciplinary meeting on 4 April 2019 with Tina Dawson, the registered manager of Glebe Court, accompanied by his union representative Ms Olisa. It is the claimant's case before this Tribunal that he has been subjected to "unfounded" disciplinary action by the respondent, which is direct disability discrimination and harassment on the grounds of his disability, including this disciplinary process in April 2019. However, we note from the minutes of the meeting that the claimant's representative acknowledges that the claimant breached the correct procedures while preparing food for residents *"and understands that there will be some kind of sanction against him*." The claimant does not dispute the record of this meeting during the Tribunal hearing.

59. The claimant was issued with a final written warning on 16 April 2019. The Tribunal notes that the sanction originally considered was gross misconduct and that dismissal was considered as set out in Ms Dawson's letter of 16 April 2019, but that she notes *"I am hopeful that these issues will not arise again as I feel that you understand the importance of keeping up safe food hygiene practices, I have decided to give you a more lenient sanction*."

60. The claimant appealed against this decision in a letter dated 23 April 2019 to Ms Goan, the CEO of the respondent. His grounds of appeal were, in essence, that the respondent did not take into account the "*pressure*" he was working under, as a result of the presence of SCCS. The appeal hearing took place on 13 May 2019. The claimant produced a statement for that meeting. He was accompanied by his union representative Ms Olisa.

61. The claimant stated that he found the sanction "*unduly harsh*" and asked for "*clemency*". His union representative said on his behalf that he considers the sanction to be "*bullying*" by the respondent and that he

    "*finds it difficult to draw a line under things and continues to have a difficult relationship with the company*" and that "*he is reactive to emails and gets caught in a cycle of frustration and emails keep going around in a loop*". This was echoed by Ms Goan who noted "*we have had different managers working with you over the years, and you keep looking back and going over old ground".* Ms Olisa also noted that she had stressed to the claimant that

    *"there must be sanction and he can't keep going back over the same points and ground…his points had been listened to, but as [he] was not receiving the answer he wanted - he thought people weren't listening."*

62. During the hearing on 13 May, the claimant agreed with Wendy Watson while reviewing the CCTV footage that he, on numerous occasions, did not follow the correct procedures when preparing food. The claimant does not dispute the respondent's account of the appeal meeting with Ms Watson.

63. The claimant received a letter dated 23 May 2019 from Ms Goan which confirmed that none of his grounds of appeal were accepted. Ms Goan states "*it is not uncommon for such an incident as this to result in dismissal*" and makes reference to the elderly and frail nature of the residents and the fact that the misconduct was poor food hygiene.

64. It is therefore, we find, not established by the claimant that this entire disciplinary process is less favourable treatment amounting to disability discrimination or harassment on the grounds of disability. We find that there are no facts from which we could conclude in the absence of an adequate explanation from the respondent, that they committed unlawful acts of discrimination against the claimant on the grounds of his disability in relation to disciplinary sanctions against him, either in July 2018 or April 2019.

**The Claimant's redundancy**

65. The claimant was notified by the respondent by way of a memo dated 10 April 2019, along with the respondent's other employees, that the respondent proposed to use an external catering provider, Apetito, with the potential risk of redundancies in the kitchen. The memo provided the areas of concern that the proposal sought to address, including limited provision of hot meals outside of main meal times and that the variety of specialised

meals available was basic and did not meet the needs of all the residents and their changing health needs.

66. One proposal was that Apetito would prepare meals off site and deliver to the respondent on site which would be reheated and served to the residents, and as a result the roles of cook would be made redundant.

67. This memo was followed on the same day by a consultation meeting of the kitchen at which the proposal was discussed.

68. The claimant was then invited to the first formal consultation meeting of the staff on 15 April 2019, along with the rest of the kitchen staff.

69. We find that both of these meetings were a genuine attempt at open consultation with the staff. The staff were given the opportunity to ask questions and make suggestions, which were responded to by the respondent.

70. The claimant had a first individual consultation meeting with Tina Dawson and Wendy Watson and his union representative Ms Olisa on 12 May 2019. Again, we find that this was genuine consultation on the part of the respondent. The claimant was able to put forward proposals and suggestions.

71. He was invited to an individual consultation meeting on 23 May 2019, which was noted to be the final meeting. He was also warned that the meeting may result in him being given notice of termination of his employment due to redundancy.

72. The claimant also handed the respondent a written document dated 17 May 2019 with his opinions as to why the proposal with Apetito would not work. At the consultation meeting on 23 May, he was presented with a written response to his points from the respondent which ran to four pages.

73. The meeting was attended by the claimant, Ms Watson, Ms Dawson and his union representative Ms Olisa. The claimant rejected each of the suggested alternatives to redundancy and before the Tribunal in evidence said that as he was a qualified chef, he was not prepared to lower himself to take work as a food service assistant responsible for managing and reheating the frozen food from Apetito, even if such a job had been available, which it was not.

74. The claimant was therefore given notice of termination of his employment by reason of redundancy in a letter dated 3 June 2019 and was notified that he was required to work his 12 week notice period. He makes no complaint before this Tribunal as to his notice pay or redundancy pay.

75. He was given the right to appeal against his redundancy dismissal, which he did by letter to Ms Goan dated 4 June 2019. His grounds of appeal were:

a. That the business case did not justify the decision to make him redundant and that his "*experience and expertise*" was still required by the respondent, despite the decision to move to reheating frozen pre-made foods;
b. That the respondent did not seriously consider his alternative proposal, which was to retain cooks;
c. That he was unfairly selected for redundancy because of his long standing disputes with managers
d. That his role could have been adapted to meet the changing needs of the home.

76. The Tribunal notes that the claimant is recorded in the minutes of the meeting stating that there was "*no discussion with the staff*" as part of the consultation process. We find that this is clearly incorrect on the balance of probabilities, on the basis of the evidence before us.

77. The claimant received the respondent's response to his redundancy appeal on 30 July 2019. It was not upheld. The respondent noted that there had been a memo outlining proposals and four subsequent consultation meetings, two group meetings and two individual meetings. The claimant had not been unfairly selected for redundancy because both cooks had been made redundant, as the new service does not require cooks, only food service assistants. No food service assistant roles were available and the claimant had said that he would not take one even if any were available.

78. The claimant complains that the other cook, Sue Sculley, was re-employed by the respondent. However, he confirmed under cross-examination that this was six months after they were both made redundant, and in a different role that was a zero-hours contract and covered laundry, cleaning and the food service assistant role. He also told the Tribunal that he had found the job during a job search and recommended that Mrs Sculley apply for it, as he did not want it.

**The Law – Unfair Dismissal**

79. For a dismissal to be a dismissal for a potentially fair reason as listed in s98 Employment Rights Act 1996 ("ERA"), an employer must show that it was for a potentially fair reason. The list of potentially fair reasons includes redundancy and "some other substantial reason" which covers business reorganisations that are not redundancy situations.

80. For a dismissal to be by reason of redundancy, a redundancy situation must exist at the claimant's place of work. The respondent says that there was a cessation or reduction in the requirement for employees to carry out work of a particular kind carried out by the claimant, i.e. chef, as per s139(1)(b) ERA.

81. A Tribunal does not have jurisdiction to consider the reasonableness of the employer's decision to create a redundancy situation nor the merits of the business case for redundancy.

82. Where a redundancy situation exists and an employee is dismissed for that reason, the dismissal must nevertheless be a reasonable one to be fair as per s98(4) ERA. This is an issue for the Tribunal to decide. The Tribunal must consider whether the employer acted reasonably or unreasonably in the circumstances in treating the redundancy situation as sufficient reason for dismissing the employee. The circumstances to consider are the size and administrative resources of the employer, along with equity and the substantial merits of the case.

83. *Williams v Compair Maxam Ltd [1982] ICR 156 EAT* provides guidelines to the Tribunal as to what a reasonable employer is to do to make dismissals by reason of redundancy. They are:

    a. Were the selection criteria objectively chosen and fairly applied;
    b. Were employees warned and consulted about the redundancy;
    c. If there was a union, was the union's view sought;
    d. Was any alternative work available?

84. Fair consultation means consultation when proposals are still at the formative stage, and providing adequate information to the employees and adequate time to respond and conscientious consideration of the response (*R v British Coal Corporation ex parte Price [1994] IRLR 72).*

85. It was said by Lord Bridge in *Polkey v AE Dayton Services Ltd 1988 ICR 142 HL*

    *"In the case of redundancy… the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation*"

**The Law - Disability discrimination**

86. Section 136(2) Equality Act 2010 states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person contravened a provision of the Equality Act, the Tribunal must hold that the contravention occurred. Section 136(3) states that this does not apply if the person shows that he or she did not contravene the relevant provision.

87. It is unlawful as per s13 Equality Act 2010 to commit acts of direct discrimination. These are defined as acts of the respondent which treated the claimant less favourably that it treated or would treat a comparator, being a differently disabled or non-disabled person in not materially different circumstances, because of the claimant's disability.

88. An employer has a duty to make reasonable adjustments for a disabled employee. In relation to whether a provision, criterion or practice causes discrimination against an employee as per s20(3) Equality Act 2010, the Tribunal must consider:

    a. Did the respondent have a provision, criterion or practice (PCP)?
    b. If so, did that PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?
    c. If so, did the respondent know or could it reasonably have been expected to know, that the claimant was likely to be placed at any such disadvantage?
    d. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage?
    e. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

89. In relation to the duty to make reasonable adjustments relating to a physical feature of the workplace (s20(4) Equality Act 2010):

    a. Did the respondent's premises have a particular physical feature?
    b. If so, did that physical feature put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?
    c. If so, did the respondent know or could it have been reasonably expected to know the claimant was likely to be placed at any such disadvantage?
    d. If so, were there steps that could have been taken by the respondent to avoid any such disadvantage?
    e. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

90. Harassment: Was any of the respondent's conduct of which the claimant complains unwanted and if so, did it relate to the claimant's disability? 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 him? When assessing whether the conduct had that effect, the Tribunal is to consider the claimant's perception and the other circumstances of the case and whether it is reasonable for the conduct to have that effect. (s26(4) Equality Act 2010).

**Application of the law to the facts found**.

**Unfair Dismissal**:

91. The claimant says that his dismissal was unfair for five reasons. The Tribunal must consider if these are in fact the respondent's reasons for his dismissal. The reasons given by the claimant are:

a. Because of the respondent's decision to move from fresh food to frozen food, which was not in the best interests of the residents;
b. Because he was offered a "bribe" to resign on 14 November 2018;
c. Because Sue Sculley, the respondent's other cook, was re-employed by the respondent following his dismissal;
d. Because the respondent conducted his disciplinary and grievance procedure at the same time; and
e. Because of his experience, which was not taken into account

92. It is the respondent's case that the reason for the claimant's dismissal was redundancy. On the balance of probabilities, we find that the claimant's dismissal was by reason of redundancy and not for the reasons alleged by him. The respondent has demonstrated on the balance of probabilities that there was a reduction in the need for employees to carry out work of a particular kind carried out by him at his place of work, that is, chef at Glebe Court.

93. The claimant alleges at (a) above that his dismissal was because of the respondent's decision to move from fresh food to frozen food. This is partly correct, but as it is part of a redundancy situation it is not an unfair reason. The claimant takes issue with the merits of the respondent's decision to move to Apetito as the catering provider, but it is not for the Tribunal to interfere with how the respondent chooses to run its business. It is for the Tribunal to decide whether there is a genuine redundancy situation at the claimant's place of work, which we find there was.

94. The Tribunal notes that there was no selection of the claimant from a pool of available candidates, as both cooks at Glebe Court were made redundant at the same time.

95. Having regard for the reason for dismissal, was the dismissal fair? Did the respondent, in the circumstances, act reasonably in treating this as sufficient reason for dismissing the claimant?

96. We find that the respondent did act reasonably. A discussion was had with the claimant, involving his union representative, about whether or not the claimant could be redeployed elsewhere within the respondent's organisation. However, the claimant was absolutely clear that he was only prepared to work as a chef. As the catering function was being wholly replaced by the outside provision of frozen meals to be reheated, this was not possible. We note that the claimant had a long period of service at the respondent and was an experienced chef. However we accept the respondent's evidence that there was simply no cooking to do going forward at Glebe Court that would justify the retention of a chef. Any food preparation would be extremely basic and could be done by Food Service Assistants. The claimant was not prepared to consider a role as a Food Service Assistant, even if one became available.

97. In terms of whether a reasonable process was followed regarding the claimant's redundancy, we find that it was. Consultation with the claimant was meaningful and took place over a reasonable period, including when the respondent's plans were still being formed. Consultation was both collective and individual and involved the claimant's trade union representative. The claimant's questions and concerns were heard and addressed. The availability of alternative work was discussed, including redeployment elsewhere at Glebe Court.

98. The claimant complains that Sue Sculley was re-employed at the respondent six months after their dismissal by reason of redundancy, however for the reasons set out above we do not consider that this took place as part of the redundancy exercise and did not impact on the fairness of the claimant's dismissal. Therefore in all the circumstances the claimant's dismissal was fair, by reason of redundancy.

**Disability discrimination.**

99. The Tribunal notes that the claimant has had to deal with the consequences of a serious and life-long health condition which has a substantial adverse effect on his ability to carry out normal day to day activities. In spite of his condition he has shown himself to be determined to continue with his career as a chef. He is to be commended for his wish to continue working.

100. The Tribunal also notes that, at the start of the period of time to which these proceedings relate, which is 2015, the respondent encountered an acrimonious working environment at Glebe Court, and had to deal with numerous allegations of bullying and harassment, both by the claimant and involving the actions of the claimant. Ms Goan and her colleagues have, we found, spent time and effort to try to change that working environment to one which is respectful. For that they are to be commended.

**The acts complained of- direct discrimination and harassment**

101. The claimant says that each of the following acts are acts which are either direct discrimination or harassment on the grounds of his disability, or both. We find no evidence that the claimant was subjected to less favourable treatment by the respondent because of his disability. To that extent and as set out in the findings of fact above, the claimant has in relation to almost all of the alleged acts of discrimination below, not established facts (the so-called primary burden of proof) from which the Tribunal could conclude that the respondent had committed unlawful discrimination as per s136(2) Equality Act 2010. Where some facts have been established from which we could have concluded there was unlawful discrimination, we indicate where this is the case and why we have accepted the respondent's explanation that their actions were in no sense whatsoever on the grounds of the claimant's disability.

102. In relation to the claimant's claims of harassment, it is clear that the claimant considers himself to have been harassed during his employment with the respondent and in addition to the thirteen complaints dealt with below, he makes numerous other references to the respondent wanting to get rid of him or wanting to force him out of his job. The claimant does not always link this harassment to his disability. There is no free-standing protection against harassment in the workplace in the Equality Act 2010. Protection from harassment is protection from harassment on the grounds of a protected characteristic (such as disability).

103. The question for the Tribunal is whether the respondent's unwanted conduct was related to the claimant's disability and whether it had the purpose or the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, or whether it was reasonable for the claimant to regard it as having had that effect. When assessing whether the conduct had that effect, the Tribunal is to consider the claimant's perception and the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

104. We find that it is clear that the claimant considered himself harassed by the respondent long before he received a diagnosis of CKD such that he was classed as a disabled person. He refers to "*repeated*" "*unfounded disciplinary action from 2012 onwards*". We have made findings of fact above that this was not established by him on the balance of probabilities. We find that he did perceive the workplace to be a hostile environment. However, we note that the claimant often objected to being managed, and raised multiple grievances in relation to a wide variety of management actions. He struggled to have good and constructive communications with the respondent and was urged to seek other ways of communicating than writing multiple letters, both by his trade union representatives and also by Ms Goan.

105. He also struggled to move on from issues that had long been dealt with, referring back to old grievances or old disciplinary actions taken many months or years earlier. His own union representative Ms Olisa said in the meeting of 13 May 2019 cited above:

> "*[he] finds it difficult to draw a line under things and continues to have a difficult relationship with the company… he is reactive to emails and gets caught in a cycle of frustration and emails keep going around in a loop*".

106. Section 26 of the Equality Act 2010 requires that Tribunals consider the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have had that effect. In making our findings below, we have taken into account the claimant's perception that the respondent was trying to get him out of the company, which we find was unfounded, particularly given that where the respondent could have dismissed him for gross misconduct (in 2019), they chose not to and where

they could have taken disciplinary action (in 2016) they chose not to. We have also taken into account the other circumstances of the case, such as the claimant's seeming lack of understanding of normal workplace practices and what is reasonable to expect in a workplace.

107. Allegation (1) Submit him to "unfounded disciplinary action from 2012 onwards including a period of 8.5 months' suspension in October 2016, a disciplinary hearing on 13 July 2018 and a final written warning on 16 April 2019". As set out above, the first acts of discrimination on the part of the respondent, if they occurred at all, can only have occurred once the claimant became a disabled person as of February 2016. Therefore only disciplinary proceedings after that date can be considered in his claim of disability discrimination.

108. We find that the claimant was subjected to disciplinary action on the following dates after his diagnosis:

a. Suspension in 2016 for alleged racist remarks, which resulted in a return to work in May 2017 with no disciplinary sanction being applied.
b. A verbal warning for alleged racist remarks on 5 June 2018;
c. A final written warning for breaches of food hygiene in January 2019.

109. It is the claimant's case that each of these actions were because of his disability and a non-disabled person would have been treated more favourably in those circumstances, and/or that they were harassment in that the respondent's conduct related to his disability and had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for him on the grounds of his disability.

110. As set out in our findings of fact above, we find that the claimant has not presented to the Tribunal facts from which we could conclude that he was subjected to any disciplinary action because of his disability, or that the disciplinary action was harassment on the grounds of his disability. The respondent has shown that the disciplinary action was taken on each occasion for reasons wholly unconnected with the claimant's disability and that therefore an employee without the claimant's disability or with a different disability would have been treated in the same way. There is also no evidence that it was reasonable for the respondent's actions to be perceived by the claimant as having had the effect of violating his dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for him on the grounds of his disability.

111. The claimant did not accept that he had made any racist remarks in 2016 or 2018. However we find that the respondent handled these incidents fairly and constructively and that their actions in relation to the claimant were not "unfounded". In relation to the disciplinary action concerning food hygiene, we note that although he contested the procedure and the sanction itself, the claimant did on several occasions accept that he did not follow correct

procedures. Given the vulnerable nature of the respondent's residents we accept that the respondent acted reasonably in taking the action that it did, and that in relation to this disciplinary process could have taken a less lenient course of action than it did at the time. It could not be said that this disciplinary action was "unfounded" either.

112. (2) "At a disciplinary hearing related to an incident on 13 July 2018, rely on CCTV footage of the claimant working in the kitchen, without his permission, which the claimant says amounted to spying on him". Firstly, we note that the CCTV was not just trained on the claimant, it was in the kitchen at all times and so would have also recorded the other cook Mrs Sculley and those others who worked in the kitchen. It was also in other areas in the home, as we have found earlier.

113. Furthermore the CCTV footage was referred to after the complaints about the claimant's food hygiene had already been made by employees of SCCS. It was used as corroboration, but was not the primary source of the complaints. There is no evidence whatsoever to suggest that a non-disabled employee in the chef's role, who made the same food hygiene errors, would have been dealt with differently and more favourably, or that corroborating CCTV evidence would not have been used against that person. There is also no evidence to suggest that the use of CCTV was done with the purpose of harassing the claimant on the grounds of his disability, or that it was reasonable for it to have had that effect on him.

114. The claimant was unhappy about the disciplinary action and about the use of CCTV, but we find that the claimant has failed to establish facts from which we could conclude that this was less favourable treatment due to his disability. The claimant complains that no action was taken against David Allen or Gareth Thomas of SCCS about observed hygiene breaches by them. However, the Tribunal has been presented with no evidence in this regard to back up this bare assertion by the claimant.

115. (3) "Change the kitchen hours and menus without his knowledge". The kitchen was being managed by SCCS for a period of time and both the claimant and Mrs Sculley, and the food service assistants, were subjected to this management and supervision. This involved actions taken to change the time of food service and the menus. Given that this was done to all kitchen staff there is no evidence whatsoever that the claimant was treated differently or less favourably because of his disability, or that these steps were taken with the purpose of harassment on the grounds of his disability, or that it was reasonable for the claimant to perceive this behaviour as having had that effect.

116. (4) "Fail to carry out a risk assessment since 20 December 2016". The claimant says that this failure is due to his disability and that a non -disabled person would have been treated more favourably and have had more regular risk assessments. There is no evidence to support this allegation. The claimant had regular meetings with the respondent, plus meetings in

relation to grievances raised by him. As set out in our findings of fact, his condition was discussed on various occasions since February 2016 and he had a return to work meeting in 2018 after his sickness absence that discussed his needs and any further adjustments that needed to be made. There is no evidence that a non-disabled or differently-disabled employee would have been treated more favourably, or that the respondent failed to carry out formal risk assessments with the intention of harassing the claimant on the grounds of his disability, or that it was reasonable for this action to be perceived as having had that effect.

117. (5) “Fail to allow him to take sufficient breaks” The evidence before the Tribunal is that the respondent, once the claimant’s diagnosis was made known to them, impressed on him the need to take sufficient breaks during the working day to manage his condition. The claimant was busy in the kitchen, but we find that anyone in his position would also have been busy and under pressure during food preparation and food service. As set out in the findings of fact above, there is almost no evidence that this was an issue that was reported by the claimant during his complaints to the respondent about other issues, given that in all the reported meetings he only raised being very busy on two occasions. We find no evidence that he was prevented from taking breaks due to his disability, or that there was the intent to harass him on the grounds of his disability by doing so, or that it was reasonable for him to perceive the respondent’s actions as having had that effect.

118. (6) “Fail in its duty of care to the claimant by not asking him how he was or hold regular meetings regarding his medical condition”. We find that this allegation is not made out on the facts, in that the respondent held regular meetings with the claimant and asked him how he was on regular occasions. Where meetings were not specifically about his medical condition, this was not done because of his disability nor with the purpose of harassing him because of his disability, nor was it reasonable for it to have had that effect. We note that when specifically asked about his disability in the workplace the claimant told the respondent that he was managing fine and did not need any more help, for example on his return to work in 2018.

119. (7) “Fail to raise the ovens so that he could avoid bending down”. We find that this was not done because of his disability nor with the purpose of harassing him because of his disability, nor was it reasonable for it to have had that effect. There is no evidence that a non-disabled or differently-disabled employee would have been treated more favourably. The Tribunal accepts that the ovens were heavy industrial ovens and that it would have been highly impractical to raise them off the floor. We also note that when asked about bending down to the ovens, the claimant told the respondent that he managed to do so by kneeling down, and that he had the food service assistants to help him should he need that.

120. (8) “Fail to investigate when unknown colleagues locked him in the toilet in 2016”. We find that this was not done because of his disability nor with

the purpose of harassing him because of his disability, nor was it reasonable for it to have had that effect. The claimant acknowledged in the Tribunal that the lack of investigation was nothing to do with his disability. Ms Goan told the Tribunal that none of the complaints of poor behaviour, discrimination or harassment that were presented to her in 2016 were followed with disciplinary action, involving the claimant or otherwise in an attempt to improve the acrimonious working environment. This was not an ad hoc decision which involved the claimant only. All members of the team were treated the same.

121. (9) "Make him work harder than his colleagues". The claimant accepted in cross-examination that this was unconnected with his disability and was because he was a qualified chef and they were not.

122. (10) "Make a complaint about cleaning on 20 April 2018 and call him to unannounced meetings in 2017 and 2018". We find that Sue Sculley's complaint about cleaning and the respondent's actions in calling him to management meetings were standard management actions that would have been applied to any other employee in his position. There is no evidence from which we could conclude that this was connected with his disability, nor done with the purpose of harassing him, nor was it reasonable for those actions to have had that effect.

123. (11) Accuse him of being racist on 7 June 2018. We find that the respondent's actions in investigating this issue and imposing a verbal warning were necessary management actions that would have been applied to any other employee in his position. There is no evidence from which we could conclude that this was in any way connected with his disability nor was it carried out on the grounds of his disability, nor done with the purpose of harassing him, nor was it reasonable for those actions to have had that effect.

124. (12) Offer him a "bribe" on 14 November 2018 to resign. The respondent's actions in this regard did not amount to a "bribe" as we have determined in our findings of fact. We find that they were not carried out on the grounds of his disability, nor done with the purpose of harassing him, nor was it reasonable for those actions to have had that effect. The matter involved the claimant's union representative and the respondent's actions and the intention behind them were explained to the claimant at the time and were in no sense whatsoever to do with his disability.

125. (13) Make him redundant but then take Mrs Sculley back on 6 months later. We have already found that there was a genuine redundancy situation at the respondent and that both the respondent's cooks were made redundant at the same time. Therefore, the act of making the claimant redundant was not done on the grounds of his disability, nor done with the purpose of harassing him, nor was it reasonable for it to have had that effect. The respondent's decision to re-employ Mrs Sculley in a different role on different terms 6 months after both she and the claimant had left the

respondent's employment is in no sense whatsoever connected with the claimant's disability and cannot be said to have been harassment of him in any way. The claimant acknowledged that he notified Mrs Sculley of the job vacancy in any event, as he did not want to apply for it.

**Failure to make reasonable adjustments – Provision, criterion or practice**

126. Did the respondent have the practice of not allowing the claimant to take sufficient breaks? We find that they did not. The claimant was urged to take his breaks by members of the respondent's management. There is no evidence whatsoever from which we could conclude that the respondent had a practice of preventing the claimant from taking breaks. It is accepted that the claimant worked under pressure in a busy kitchen but there is no evidence that the pressure was regularly such as could amount to a practice of preventing the claimant from taking breaks, nor did he raise complaints to the respondent that this was the case.

**Duty to make reasonable adjustments: Physical feature**

127. The respondent's premises have the physical feature of ovens at floor height. Did this put the claimant at a substantial disadvantage in relation to the matter of carrying out his duties as chef in comparison with persons who were not so disabled at any relevant time, in that he had difficulty bending down and lifting due to his medical condition?

128. It is accepted that the claimant had difficulty bending down and lifting due to his medical condition. It is not established on the evidence before the Tribunal that this amounted to a substantial disadvantage when carrying out his duties, although the Tribunal accepts that his will have caused him some disadvantage. The claimant told the respondent on his return to work after sickness absence in 2018 that he had to go down on his knees about twice a day to take items out of the oven. He told the Tribunal that he used a trolley to rest these items while doing so. He also told the Tribunal that he could use the Food Service Assistants to help him, although they were not always present in the kitchen at the time he needed help.

129. On balance we do not find that the claimant was put at a substantial disadvantage in this regard. However, taking his case at its highest and assuming he was, the respondent did not know and could not be expected to know that he was likely to be placed at a substantial disadvantage as they discussed this with him on several occasions and were never alerted to any substantial difficulties by the claimant.

130. Therefore in conclusion the claimant's claims for unfair dismissal and disability discrimination fail and are dismissed.

**Request for written reasons**

131. This decision and reasons were handed down to the parties at the conclusion of the hearing on 25 June 2021. At that hearing, the claimant requested that written reasons be provided.

______________________________
Employment Judge Barker

Date: 7 July 2021

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