EMPLOYMENT TRIBUNALS

Claimant: Ms J Collett

Respondent: Edge View Care Homes Limited

Heard at: Midlands West

On: 11, 12, 13, 14 and 15 October 2021

Before: Employment Judge Faulkner
Mr J Virdee
Mr P Tsouvallaris

Representation: **Claimant** - in person
Respondent - Mr A Weiss (Counsel)

JUDGMENT

1. The Respondent did not contravene section 39 of the Equality Act 2010 by failing to comply with the duty to make reasonable adjustments in relation to the requirement that on 10 October 2018 the Claimant work with a client who wanted to go shopping. The Claimant's complaint of failure to make reasonable adjustments is therefore dismissed.

2. The Respondent did not contravene section 39 of the Equality Act 2010 by treating the Claimant unfavourably because of something arising in consequence of her disability, in allocating her on 13 October 2018 to another client who it was known would wish to go shopping. The Claimant's complaint in this respect is therefore dismissed.

3. The Respondent did not contravene section 40 of the Equality Act 2010 by harassing the Claimant:

3.1. by making the comment on 4 October 2018, "We can't have you hobbling about, Julie";

3.2. by asking her on 13 October 2018, "Can't you go out into the community?";

3.3. on 13 October 2018, by allocating her to a client who it was known would wish to go shopping; or

3.4. by stating to her on 13 October 2018, "Why can't you go out [into the community with clients], it was okay for [a former employee] to be sent out with bad knees?".

4. All of the Claimant's complaints are dismissed accordingly.

REASONS

1. The Judgment in this case was sent to the parties on 19 October 2021. The Claimant requested written reasons by email of the same date.

Complaints

2. The Claimant's complaints were of discrimination arising from disability (as defined by section 15 of the Equality Act 2010 ("the Act")), failure to make reasonable adjustments as defined by sections 20 and 21 of the Act, and harassment as defined by section 26 of the Act.

Issues

3. The Respondent had conceded that the Claimant was a disabled person at all relevant times within the meaning of section 6 of the Act. She relied on right knee issues, causing her mobility difficulties. In his skeleton argument handed up just before making closing submissions, Mr Weiss cited the Claimant's characterisation of her disability as follows: "*an injury in 2007 which meant that the claimant had an operation on her right knee to insert a pin, affecting the Claimant's ability to walk and causing pain and swelling of the right knee if she walks too much (and pain to the left knee due to overuse)*". We return to this point in our analysis below.

4. The issues we were required to determine on the question of liability were agreed on day 1 of this Hearing to be as follows, essentially following the list prepared by Regional Employment Judge Findlay at a Case Management Hearing in August 2019, with some minor differences, and taking into account that one complaint of failure to make reasonable adjustments was struck out at a subsequent Open Preliminary Hearing.

Discrimination arising from disability

5. The issues to be determined in respect of this complaint were:

5.1. Did the Respondent treat the Claimant unfavourably on 13 October 2018 by allocating her to a client who it was known would wish to go shopping, when she was not originally allocated to him?

5.2. If so, was the reason for that treatment something which arose in consequence of the Claimant's disability? She says the reason she was allocated the client was her mobility issues, that is the Respondent took this decision in order to put her in a position where she could not walk. The Respondent denied that this was the case but agreed that if the Claimant established that this was the reason, it arose in consequence of her disability.

5.3. If so, was the unfavourable treatment a proportionate means of achieving a legitimate aim? In summary, the Respondent relied on the need to meet care and support obligations to clients, including where clients want that care and support to take place, so as to meet legislative and/or governance requirements.

Failure to make reasonable adjustments

6. The issues to be determined in respect of this complaint were:

6.1. It was agreed that the Respondent had a provision, criterion or practice ("PCP") of allocating the Claimant to a client who wanted to go shopping on 10 October 2018, the Claimant thus taking her to do so as the Respondent envisaged.

6.2. The next issue was whether the PCP put the Claimant at a substantial disadvantage in comparison with persons who were not disabled. The Claimant relied on pain in, and swelling to, her left knee.

6.3. If so, were there steps the Respondent could have taken to avoid that disadvantage? The Claimant says it could have allocated her to domiciliary or in-house duties, thus allocating the client to someone else.

6.4. If so, would it have been reasonable for the Respondent to take those steps?

6.5. If so, did the Respondent know or could it reasonably have been expected to know that the Claimant was a disabled person at the relevant time?

6.6. If so, did the Respondent know or could it reasonably have been expected to know that the Claimant would be put to the substantial disadvantage?

Harassment

7. The Claimant relied on the following alleged conduct:

7.1. her manager, Angie Unwin, stating to her on or about 5 October 2018, words along the lines of, "We cannot have you hobbling about";

7.2. her colleague, Carol Harris, in front of other colleagues on or about 13 October 2018, comparing her unfavourably to a former employee ("AC") who also had a knee issue, stating, "if it was good enough for AC, why can't you do it?", being a reference to taking a resident out on foot;

7.3. Carol Harris changing the Claimant's duties on 13 October 2018 so that she was allocated to take a client on a shopping trip, which involved walking; and

7.4. Carol Harris stating later on 13 October 2018, "Can't you go out walking with anyone?".

8. It was agreed that if any of the above conduct was established on the facts it was unwanted. The issues to be determined in respect of these complaints were:

8.1. Was any such conduct related to disability?

8.2. If so, did it have the purpose or effect – the Claimant said both – of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her – the Claimant said that the conduct both violated her dignity and created the requisite environment.

Time limits

9. As all of the complaints were presented out of time, the Tribunal also had to consider whether they were presented within such further period as it considered just and equitable and possibly related issues of whether any proven acts of discrimination constituted conduct extending over a period.

Hearing and evidence

10. The parties agreed a bundle of documents of around 440 pages. We made clear at the outset that it was incumbent on the parties to take us to documents they wanted us to consider in deciding the issues set out above, as it would not have been possible to conclude the Hearing in anything like the allocated time if we had to read the whole bundle. We were taken to many documents during the evidence, though by no means all of them. We did not consider those we were not taken to.

11. The Claimant handed up some additional documents twice during the Hearing, with no objection from the Respondent. These were a copy of documents she said she photocopied and took home on 13 October 2018 (see below) and copies of certain sickness absence documents. Of the latter, only two were relevant in that the others post-dated the issues identified above. They were notes made by colleagues following calls the Claimant made to say she could not attend work on 5 and 12 October 2018 respectively. We return to those documents below.

12. We read two statements from the Claimant and, for the Respondent, statements from Carol Harris (Senior Support Worker), Angie Unwin (Registered Manager), Julia Hale (Operations Manager and clinical lead), Siobhan Harmon (Support Manager) and Garry Smart (CEO and a solicitor). All witnesses were questioned by the other party and the Tribunal also asked some questions of each of them. The Claimant had concerns about giving evidence because of what she described as “brain fog”. It was agreed that she should have a pen and paper with her whilst giving evidence, to note the questions asked of her. She also wanted to have to hand copies of the Respondent’s statements annotated with her comments whilst she gave her evidence. Given the Respondent’s objection to that, it was agreed that the Claimant should see how she got on with the pen and paper only. She did not subsequently request any further adjustments, apart from breaks on occasion to find certain documents, which we were of course happy to accommodate. The Tribunal considered that she was well able to deal with questions asked of her.

13. As for the Claimant’s questions of the Respondent’s witnesses, it was agreed that Employment Judge Faulkner should help formulate her statements into questions. Part way through questioning Mr Smart, the Claimant said she was not feeling her best. It was agreed therefore that Employment Judge Faulkner should ask questions of Mr Smart, with the Claimant following up on them if needed. She expressed thanks to the Tribunal for adopting that approach.

14. We should also note the following:

14.1. At the start of the Hearing, Employment Judge Faulkner informed the parties of a passing connection to Mr Smart. They had briefly been employed by the same firm – the solicitors for the Respondent – in or around 2015. They had not worked on any substantive matters together, Employment Judge Faulkner had no previous connection whatsoever to the Respondent, and he and Mr Smart had never met outside of work, indeed they had not met at all since some point in 2015. Neither party had any objection to Employment Judge Faulkner continuing to hear the case.

14.2 We granted an amendment application made by the Respondent on day 1 of the Hearing. The application had been made in writing, copied to the Claimant, on 5 March 2021, but for some reason had not been dealt with. It concerned the Respondent's argument that the Claimant would have been dismissed shortly after the matters complained of, because she had taken home the documents referred to above at paragraph 11. Given that this was potentially very material to remedy, given also that the Claimant confirmed she was ready to deal with the point and had notice of it well before the Hearing, and as the Respondent explained that it made the application as soon as it became aware of the matter during the process of disclosure, there was little prejudice to the Claimant in allowing the amendment and potentially significant prejudice to the Respondent in denying it.

14.3. REJ Findlay had previously made an anonymisation order to the effect that no client of the Respondent was to be named in any written public record of this case. They were identified by initials only in all documents and oral evidence. We have simply referred to them as clients in these Reasons as the factual position is clear enough without even initialising them.

15. Our findings of fact were based on the above. We were not present of course when any of the events occurred. As with most factual disputes in Tribunal cases, it was rare for us to be able to say that we were satisfied beyond reasonable doubt as to what occurred. Our task was to weigh the evidence presented to us and make our findings on the balance of probabilities. Page numbers refer to the bundle, and statement references for the Respondent are based on witness initials and paragraph number, for example CH10 would refer to paragraph 10 of Carol Harris's statement.

Facts

Background

16. The Respondent provides care and support at seven different units (we were only concerned with units identified as Units A and B respectively) for clients with mental health issues, physical disabilities, or both, many of whom exhibit challenging behaviours. Unit A is a nursing unit, with three floors, several other buildings and twenty-four bedrooms. The work undertaken there is physical, because many clients have wheelchairs and some need hoisting for personal care. Unit B provides supported living and domiciliary care. Clients allocated to that Unit are more able and live either in local authority flats in the community or on the Unit B site. It is a smaller site than Unit A, though there is no lift. No manual handling of clients nor any personal care is undertaken at Unit B. It comprises nine flats, plus one used for staff, and an office.

17. The Respondent has an equal opportunities policy (page 23 onwards). We were not taken to it, and therefore did not consider it.

18. The Respondent employed the Claimant from 13 January 2004, latterly as a Senior Support Worker. She was dismissed in October 2019, but this case was not concerned with her dismissal.

19. The Claimant worked initially at Unit A, for around 3 years. In 2007 she had an accident outside work, breaking her right leg. As already noted, the Respondent accepts that at all material times (that is in October 2018) she was a disabled person. She was off work for 5 months after the accident. Upon her return, she asked to move to Unit B, the Respondent says because of a personal relationship breakdown with someone working at Unit A, the Claimant says because of knee issues. It was not necessary for us to resolve that particular difference in evidence but, in all likelihood, both were reasons for the move.

20. The Claimant therefore returned to work at Unit B, where she then worked for 11 years. She was based in the office at a desk, carrying out such work as allocating clients to staff. Each month she visited all nine domiciliary clients at their homes, travelling by car. Ms Hale did not agree that there was minimal walking in this role, as the Claimant was initially a Support Worker, though it is agreed she undertook less walking once she was promoted to Senior Support Worker, within a couple of years. It was clear to us that walking was required in that role too, including when clients wanted to go shopping or similar, though not to the same extent as at Unit A.

21. The Claimant carried out her duties largely unhindered by any knee issues. In March 2016 (page 103) she undertook a MAPA assessment (Management of Actual or Potential Aggression) which concerns measures for the restraint of clients. The assessment showed that there were some holds she could not perform, such as transitioning a client to kneeling or being face down. She agrees however that she could do all but a limited number of the restraints. A risk assessment was carried out on 4 May 2017 (page 104), signed by the Claimant and her manager, completed with them sitting together. Essentially, the assessment records the Claimant telling her manager she could do her duties except for certain aspects of MAPA, meaning that she could do some aspects of client restraint, but not all. It referred to the Claimant having pins and plates in her leg, and said that she still had some pain, discomfort and swelling. The Claimant agrees however that she did not flag to her manager any difficulties in fulfilling her duties at that point.

22. At pages 106-7 there was a similar risk assessment, again signed by both the Claimant and her manager, dated 18 January 2018. The Claimant agreed it is an accurate record of the discussion. She felt she was being taken care of at this point, and did not draw her knee to the Respondent's attention other than as set out in the risk assessments, because she had to do little walking at Unit B and so her knee did not give her much difficulty. She told colleagues most days that her knee was "a bit swollen" and it seems to have been widely known – by Ms Hale for example – that she had pins and a plate in her leg following her operation and absence, though otherwise, Ms Hale could not recall any sickness absence of note. Both risk assessments designated any risk to the Claimant as low. The Claimant could not remember telling the Respondent at any point that she was disabled. We find that there is no evidence that she had done so by the time of the relevant events in October 2018.

23. Ms Harmon, who worked at Unit B between 2015 and 2018, says (SH3) that the Claimant would sometimes talk about her knee, usually to the effect that it was aching on cold days, though Ms Harmon did not know the specific problem. She was made expressly aware of the knee issues experienced by AC, when Ms Harmon became bank senior at Unit B. The manager said to Ms Harmon that AC should be offered a day saver bus ticket if she had to do some walking, and otherwise Ms Harmon should try to change AC's allocations if needed, so that she could work in-house.

Claimant's transfer to Unit A

24. In April 2018 the Respondent identified the need for a Senior Support Worker at Unit A; this was a new role in that location. We found that the Claimant was happy to move to Unit A, Ms Hale says in part because there had been a bit of a dispute between the Claimant and someone at Unit B. She says (JH9), and we accepted, that the Claimant said to her in around March 2018 that she wanted to move to Unit A for a fresh start. Initially she was told she would have to go back as a Support Worker, but when the Senior Support Worker role was identified, Ms Hale identified the Claimant as suitable and viewed it as a positive move for her.

25. Ms Unwin was the Unit A manager. She was aware from a brief stint at Unit B that the Claimant had some pins and a plate in her leg, but says that at that time the Claimant did not appear to have any problem with it. The Claimant knew there would be more walking at Unit A, but says she did not realise the impact this would have on her until she was there. We accept that. The problems she might encounter were not at the forefront of her mind at the time of the transfer.

26. In practice, she did not sit at a desk for more than a few minutes a day whilst at Unit A. She was therefore almost constantly on her feet and moving around and says that her knees deteriorated as a result. She ended up submitting a number of fit notes, not to support any absence, but recommending slightly revised duties, which were seen by Ms Unwin:

26.1 The fit note on 19 June 2018 (page 243) identified a vitamin D deficiency, and also mentioned arthritis in the Claimant's right knee causing fatigue. It advocated lighter duties, specifically avoiding lifting and pushing. It declared her fit for work with those amendments.

26.2. The next note on 23 August 2018 (page 244) was similar, but said that it had been given to the Claimant because of knee osteoarthritis, right knee and hip pain and vitamin D deficiency. It said, "for light duties please avoid pushing/pulling", and again declared her fit to work with those amended duties.

26.3. The note on 20 September 2018 (page 245) referred to knee pain, and said that the Claimant should use the lift and avoid pushing/pulling wheelchairs (that is with clients in them of course).

27. When asked if she had sent any other medical information to the Respondent up to the relevant dates in October 2018, the Claimant's answer was, "possibly not". We concluded that she clearly did not do so.

28. The Claimant says, and we accepted, that in July 2018 she asked Ms Unwin about a risk assessment, and Ms Unwin said it was on her desk. Ms Unwin told

us that the risk assessment at page 108 was completed on 9 July 2018. The Respondent's practice is to review them periodically and the next one appears at page 109 and is dated 31 August 2018. Ms Unwin's evidence was that she was "pretty sure" she discussed both with the Claimant in the office at Unit A, typed them up but got so busy that she forgot to get the Claimant to sign them. Ms Unwin did not sign them herself, telling us she forgot to do that as well. She denied putting the assessments together only in preparation for this case. The Claimant being told by Ms Unwin that the July assessment was on her desk suggested to us that both this and the August assessments were completed, but the fact that they were not signed by either party, and Ms Unwin's uncertain evidence on the point, led us to conclude that there was no discussion about them with the Claimant, which may well have been because Ms Unwin was too busy. We would however need very convincing evidence to make the serious finding that Ms Unwin concocted these documents for the purposes of these proceedings. What the Claimant says is that the "measures to control risk" – not pushing and pulling wheelchairs – referred to in the assessments were not mentioned in her fit notes until September 2018, so that Ms Unwin could not have known about them at the time the assessments were completed. There is however reference to pushing and pulling in the note of 9 July 2018. We find that the documents were prepared as set out in this paragraph. We nevertheless make clear that whilst Ms Unwin was doubtless very busy, she should have completed the risk assessments with the Claimant present, and both she and the Claimant should have signed them. The Claimant agrees that she did not inform the Respondent of any pain or other difficulties, except as we come to below.

29. In August 2018, a client vomited over herself whilst an assessor was present at Unit A. The assessor asked the Claimant to attend to the client, but the Claimant got someone else to do it instead. As the Respondent felt that the client had been left unattended for too long, Ms Unwin investigated what had happened, and found that the Claimant had a case to answer. This eventually led to the Claimant being given a written warning. Mr Smart explained, as the person who heard the Claimant's appeal against the warning, that it was not necessary for the Claimant to move the wheelchair herself as there was only a small amount of vomit on the client. The warning was given, and the appeal denied, because the Claimant did not act quickly enough to get someone else to clean up. We were satisfied by that explanation.

30. In late September 2018 (AU10) a Support Manager reported to Ms Unwin that the Claimant was visibly limping by the end of double shifts (about 12 hours in total). The Support Manager and/or Ms Unwin passed on this information to Ms Hale, and informed her that the Claimant had submitted the fit notes referred to above. Ms Hale also became aware that the Claimant was to have an injection in her knee. She says that from her own subsequent observations (JH15) the Claimant was not so bad that she could not walk or work, but it was evident that she was in some pain.

4 October 2018

31. On 4 October 2018 the Claimant had a discussion with Ms Hale. The Respondent says Ms Unwin was also present – see below. The headlines of the discussion were as follows:

31.1. The Claimant had been to her GP for a steroid injection earlier that day and omitted to inform the Respondent precisely when she would be in work. Ms Hale

was initially only planning to talk with the Claimant about a transfer back to Unit B because of the concerns about her knee, but decided to raise this issue as well. Ms Unwin says (AU13) that she thinks the Claimant misinterpreted what Ms Unwin had said to her about the arrangements for coming into work on that day.

31.2. There was a discussion (JH18) about the amount of walking required at Unit A. The Claimant reported, Ms Hale says, that she was still able to walk at the end of shifts, but that her knee was getting painful and she was starting to struggle with mobility, especially at the end of a double shift. The Claimant told us she could not remember saying that. On balance, particularly given Ms Hale's clarity about this point, contrasted with the Claimant's uncertainty, we concluded that this was said.

31.3. There was then a discussion (JH19) about potential solutions and Ms Hale said she thought it better for the Claimant to transfer temporarily to Unit B. The Claimant essentially accepts that doing something to help her knees was discussed.

31.4. The Respondent says that there was a discussion about the duties at Unit B being lighter. Again, the Claimant told us she could not recall this discussion, then later told us it was not mentioned at all. As lighter duties were mentioned in the fit notes, and the whole point of the transfer was to ease the Claimant's duties, we found that this was also mentioned as the Respondent says.

31.5. The Claimant denies being asked for her opinion on the transfer, whilst the Respondent says she agreed to it. It was difficult for us to decide this particular evidential conflict, but our clear impression of the Claimant, both from her own evidence and that of her colleagues, was that she is very likely to have given her views on such an important issue – she was prepared to do so in relation to another issue as late as 13 October 2018 (see below) and as at 4 October 2018, apart perhaps from some awkwardness about her not reporting that she would be absent at the GP surgery – in relation to which it is agreed that her apology was accepted – she had no issues with the Respondent, including Ms Hale. We found therefore that she was able to air her views and that she did agree to the transfer.

32. The Respondent prepared a note of the discussion of 4 October (page 110). The Claimant says it was pre-prepared, then filled in and given to her to sign. Ms Hale and Ms Unwin say something similar, namely that a framework was typed up to act as a script, the rest was filled in as the discussion progressed, and it was then printed off and both Ms Hale and the Claimant signed it. The Claimant says that the points in the notes about physiotherapy and a review of the transfer to Unit B were not discussed, but it was not necessary to decide whether that was the case or not as they are relatively minor matters in context. We found that the note was dealt with as Ms Hale and Ms Unwin said. We deal separately below with the question of whether Ms Unwin was present in the first place.

33. Ms Hale's evidence (JH21) is that at the time of this meeting, whilst she knew the Claimant's mobility was impaired to the extent that she was limping and in discomfort by the end of a double shift, she was still able to perform her duties, and did not say she could not walk for any particular period, nor that she could not support clients in the community. She therefore concluded that the Claimant would be able to carry out duties at Unit B where no personal care or bending down would be required. She was aware that the Claimant could not do the full

range of MAPA restraints, but because that is the case with many staff, this did not signal anything of particular concern.

34. Ms Hale did not raise with HR any suggestion of obtaining an occupational health ("OH") report. Ms Harmon told us that the Respondent would only do so if a health issue was impacting a colleague's work, they had taken a material amount of time off, or if adjustments already made were not working. Mr Smart said that securing a report usually takes 4 to 6 weeks from the point of the request, which we accepted as not at all unusual. He also told us it is unusual to receive fit notes with clear suggested adjustments, which we also accept. The Claimant was asked several times after she went off sick in late October 2018 to consent to an OH referral and did not do so. See page 239.

35. The Claimant says that Ms Unwin was not present at the meeting between her and Ms Hale. Her case is that whilst passing Ms Unwin later that day in the hallway of the main house at Unit A – she says quite late in her double shift, such that she was limping – Ms Unwin said something about her returning to Unit B and added, in an irritated tone (in the Claimant's statement she referred to a nasty, sarcastic manner), "We can't have you hobbling about". The Claimant says she found it hurtful, disrespectful and uncalled for.

36. Both Ms Unwin and Ms Hale were adamant that both were present at the meeting, though Ms Unwin did not take an active part in it – she was working at her desk while the Claimant and Ms Hale had their conversation. Both are also adamant that the comment in question took place on that occasion and in that context. Ms Unwin says she is very confident that her account in these respects is accurate and that as a professional person she would not, as the Claimant alleges, cover for or collaborate with a colleague on such matters. Ms Hale also emphasised her professional standing as a nurse, and said would never make up something so serious, nor would she have any reason to do so. Their evidence was that Ms Hale explained to the Claimant that the transfer to Unit B was nothing to do with her performance but was designed to stop her knees being a problem and getting any worse. They say that it was at that point that Ms Unwin chipped in (she says thinking she was being helpful) and said, "We can't have you hobbling around here can we Julie? We need to keep you safe". In oral evidence, Ms Unwin and Ms Hale both said the comment was made as the Claimant was about to leave, whilst Ms Unwin stood by the telephone; their statements suggest it was made earlier in the meeting.

37. It was not entirely straightforward for us to resolve this conflict of evidence, but on balance, even accounting for the slight inconsistencies in the Respondent's evidence just mentioned, we concluded it was more likely Ms Unwin knew about the transfer because she was present at the meeting. We find the comment in question was therefore made in the context of that meeting, not later. Ms Hale says (JH23) it was made in a normal and light-hearted way. She also says (JH25) that the tone of the conversation generally was kind and light-hearted and (JH27) that the Claimant is someone who will always tell you if she has an issue with you and on this occasion, there was no reaction or appearance of upset, anger or concern. We accept that there was no such reaction.

38. Ms Unwin agreed during the later investigation of the Claimant's grievance that "hobbling" was not the best word to use. She told us that although she has used it her whole life, it is old-fashioned and may not be understood. She nevertheless emphasised that it was said in the context of a welfare meeting, and

that she wanted to reassure the Claimant that the transfer was nothing to do with her work. She says she will not use the word again. She also confirmed that Mr Smart had to speak to her in early 2018 about her manner on occasions, which she accepts could be abrupt.

39. The actual words said are essentially agreed, namely, "We can't have you hobbling about [or around] Julie [as Ms Hale and Ms Unwin say, including the Claimant's name]". On balance we concluded that the Claimant's name was used, so that the phrase was "We can't have you hobbling about, Julie". It was difficult to decide whether in the same phrase Ms Unwin also said, "we need to keep you safe", but we noted Ms Hale's statement that the discussion about keeping the Claimant safe came after the comment. Mentioning the Claimant's safety seemed to us to fit with the general tenor of the meeting, and so we found that the Claimant's safety was discussed, but in view of Ms Hale's evidence concluded that it was not part of Ms Unwin's comment about not having the Claimant "hobbling". We also concluded that the tone of the comment, given the background of Ms Unwin's conversation with Mr Smart, was somewhat abrupt and stern.

40. On 5 October 2018, the Claimant called in sick; the colleague who took the call filled in a standard form (one of the documents not included in the bundle). It said "had injury in knee; told to rest".

9 October 2018

41. The Claimant returned to work, at Unit B, on 9 October 2018. Ms Harris was a Senior Support Worker there. She and the Claimant had worked together before and Ms Harris (CH3) thought they got on well. That seems to be agreed.

42. Ms Harmon, also working at Unit B, was told by a manager (no longer in the Respondent's employment), Kate Lanfear, that the Claimant had transferred to Unit B because her knees were bad after working at Unit A and that Ms Lanfear would need to discuss with the Claimant whether her risk assessment at Unit A needed to change as a result. Ms Harmon was present at the introductory discussion on 9 October between Ms Lanfear and the Claimant. There were no notes of that meeting.

43. Ms Harmon says (SH18) that the Claimant was told by Ms Lanfear that because it had been a quick transfer, she may need to go out and support clients whilst senior shifts were phased back in. The Claimant essentially agrees, though says she questioned this point with Ms Lanfear, because the point of the transfer was to rest her knees. Ms Harmon says the Claimant seemed surprised and unhappy at hearing this information. The Claimant said she thought she was coming back as a senior; Ms Lanfear explained that the transition would be just for a few weeks.

44. Disagreeing with the Claimant's evidence, Ms Harmon was very clear that she did not recall hearing the Claimant ask on this date if she could change any client allocation, and equally clear that she herself did not make a comment or request about the Claimant's allocation being changed. We are wholly persuaded of her evidence in this respect, not least because, as she says, it would not have been her place to make any such comment.

45. The Claimant asked about her risk assessment being revised. She says Ms Lanfear told her that it would remain the same as before – no pushing or pulling wheelchairs, though there are no wheelchair users at Unit B as we have noted. Ms Harmon's evidence was not dissimilar. She says Ms Lanfear referred to the comment in the fit note about no pushing or pulling wheelchairs and that the Claimant should use the lift when possible. As already noted, there is no lift at Unit B. It seemed to us to follow therefore that, as Ms Harmon says, Ms Lanfear asked if the Claimant had any difficulty with using stairs, in the context of delivering medication to clients, and the Claimant replied she had good days and bad, and would speak to the person in charge if she was struggling. The Claimant denies Ms Harmon's account, saying she only recalls asking about a new risk assessment. Again, we had little to go on, but given the clarity and specificity of Ms Harmon's evidence, including how the use of the stairs came up, we accepted her account.

46. Ms Harmon also told us (SH21) that the Claimant asked what would happen if she was allocated to go into the local town or on a long walking trip with a client. She says Ms Lanfear asked if the Claimant had any problems walking for any specific time and the Claimant replied she would be okay on single shifts, it was double shifts that could be a problem, both Ms Lanfear and Ms Harmon informing her that she could use a day saver bus ticket or her car and Ms Lanfear adding that if the Claimant was struggling, she should say so and her work would be adjusted. The Claimant denies this account as well, though she told us she "vaguely remembers" a day saver ticket being mentioned, even though that would not alleviate all of the walking that could be required at a large shopping centre.

47. The Claimant says she asked if she could stay in-house, but this is not mentioned in either of her statements. On balance, we find that whilst this is what the Claimant may have thought, it was not said – if it had been, given the Claimant's comprehensive coverage of all of the key incidents in her lengthy witness evidence, it would have been included in one of her statements. As for the discussion about going out with clients, given the Claimant effectively conceded that the bus ticket was mentioned, on balance we preferred Ms Harmon's account on that front also. The Claimant says she told Ms Lanfear that going out with clients was not ideal and that she would struggle, but was told she would have to go out anyway. There is certainly no clear reference to this in her statements either and Ms Harmon was very clear that she did not hear any such comments. She was in the office all day. On balance, we again preferred Ms Harmon's evidence.

48. Ms Harris for her part (CH13) recalls Ms Harmon and Ms Lanfear informing her that the Claimant's knee was "playing up", but that if she was struggling, she would let them know. Ms Harris knew the Claimant had injured her knee outside of work but says (CH4) that prior to October 2018 the Claimant did not present as experiencing any difficulties at work. She was able to walk upstairs, go on client visits and none of her duties were an issue. She knew of nothing that would prevent the Claimant going into the community with a client.

10 October 2018

49. On 10 October 2018, the Claimant was sent out with a female client, and says she ended up walking for three hours in a large nearby shopping centre. She was given a day saver bus ticket (she says it was not practical to use her car

in this situation) but it was only a short ride. She says she was in agony on her return and sustained an injury to her left knee as a result. She says that getting on and off the bus did not help. Her case is that the staff diary would have shown in advance that the client would want to go shopping.

50. Ms Harmon has supported this client many times and when promoted saw her monthly support notes. She stood by her explanation in her witness statement of what the session is likely to have entailed. As Ms Harris also said (CH14), the client in question is less demanding than many, but like most or all of the clients, the Respondent is unable to predict what she would want to do. A support session with her may involve going out, but it may also involve going to her flat; if the former, she is a large person and spends most of the time sat in a café. It would not have been known therefore what she wanted to do until she arrived at Unit B.

51. It is clear there was no mention of a 3-hour shopping trip when the allocation to the Claimant was made. An allocation sheet is a living document developed during the working day and on the sheet in question (page 265) Ms Harris wrote, "Coming to Unit B". The rest of the entry for this client on that day was not in her handwriting. Ms Harris says the other writing would have been someone else recording what actually happened, which is certainly suggested by the use of the phrase "went" shopping, other entries for other clients also being completed in the past tense. It seemed clear to us that the Respondent could not be certain that the Claimant would have to have gone walking with the client before the latter's arrival at the Unit. This is inherent in the profile of the client base.

52. Ms Harris in her evidence (CH21) emphasised the waiting time at the bus stop (where she says the Claimant could have sat down), the likelihood of a substantial period sitting in a café, the fact that any charity shops the client visited are in the local town and close together, and that the client typically spent lots of time looking at items rather than doing lots of walking. Ms Harmon says (SH32) that the client cannot move quickly at all. It is agreed however, on the basis of the record of the day, that the client ordered a washing machine from a store at the other end of the large shopping centre to where the bus stops are located, looked at some clothing, and later looked around charity shops in the town. It is also clear she spent some time in a restaurant.

53. The Claimant says the difficulties on that day were more with her left knee than her right. At one point in her evidence, as Mr Weiss agreed in his submissions, she tentatively indicated she was compensating on her left knee because of the problems with her right, but did say it was the extra walking on this day that caused the left knee problems – the injection had been just a few days before. The left knee became swollen and very painful. As the Claimant put it, the extent of the walking put pressure on the left knee.

54. Ms Lanfear agreed in the subsequent grievance investigation (see below) that she should have sent out a senior who had no mobility issues. Although its evidence on the point was limited, the Respondent seems to suggest it could not have sent Ms Harris out with the client as Ms Lanfear had raised concerns about the Claimant making medication errors (page 113 – the Claimant did not see this email until she received the results of a subject access request or disclosure) and so the Claimant could not be left to run Unit B as the most senior staff member. She had however been the most senior person there many times in the past.

55. The Claimant called the Respondent on 11 October 2018 (a non-working day for her) to say she would be absent the next day – this is the other form not included in the bundle. It was completed by a colleague, and noted the Claimant would not be at work on 12 October "due to her knee".

13 October 2018

56. On 13 October 2018, the Claimant returned to work. The allocation of clients had, as usual, been done the night before. It was Ms Harris' job to review the allocations first thing the next day, that is on the morning of 13 October, to see if any changes were required. The Claimant had originally been allocated to two domiciliary clients, but as pretty much her first task of the day, Ms Harris switched the Claimant to work with a male client from 10.00 am. Ms Harris' evidence was that the change was required because of a sickness absence, and because one member of staff had needed to intervene with the client the previous day so that it was not appropriate to allocate the client to her – although the Claimant took a different view about the benefit of that, we accepted Ms Harris' evidence that sometimes a break is good where this has happened, not least to give a client the opportunity to air any concerns. Ms Harris (CH36) did not know in advance what the client would wish to do. In her later grievance investigation interview with Mr Smart, she said, "[the Claimant] was in, I allocated her to go to town with a client". She says that was a poor choice of words, as if it had been the case that it was clear the client would go into town, it would have been noted on the allocation sheet. Given what we have already said about the nature of the client base and indeed how the allocation sheets are completed, we readily accepted this evidence. This particular client has very little money and often spent a part of his time in a local café.

57. At some point on this day, the Claimant had a return-to-work interview with Ms Harris – see the record at pages 111-112, signed by the Claimant. It seemed to us almost certain that this occurred after the Claimant returned from her first visit to a domiciliary client, but before the exchanges with Ms Harris described below. According to Ms Harris (CH31) the Claimant showed her an amended duties certificate from her GP (page 245) which referred to no pushing and pulling wheelchairs and that she should use lifts. Again, there was no mention of her not being able to go out or walk. As already indicated, Ms Harris had not seen the Claimant struggling walking and knew of no problems she had with going into the community with clients. She says the Claimant had not complained about the work she had carried out on 10 October. As the Claimant herself did not say that she did so, we accepted Ms Harris' evidence. Her understanding was that the Claimant would be fine as long as she did not have to do prolonged walking (like at Unit A) or heavy manual handling, and that the Claimant would flag up any concerns.

58. The record of the discussion notes, "Do you have any work-related concerns which may have contributed to your absence?". The Claimant replied, "no". Ms Harris says (CH33) that she asked if there was anything the Respondent could do to support the Claimant and again the answer was, "no". The Claimant says this was not a good conversation. She had concluded the Respondent was not going to do anything for her, so just answered no to both questions. She also says she was intimidated by the allocation change Ms Harris had made. She agrees this discussion was in the earlier part of the morning. For reasons we will come to, we find that she was not aware of the allocation change by then, and so we did not accept she could have been intimidated by that change during this

meeting. Moreover, given that we rejected parts of her account of her meeting with Ms Lanfear, such that there had been very little by this point adverse to the Claimant in her dealings with her colleagues since returning to Unit B, on balance we did not accept her evidence that she was in a state of mind, or that the meeting was otherwise such, that she was not properly able to consider signing the document and raise any objections to doing so should she wish.

59. The Claimant says that when at some point that morning, she found she was allocated to a client who she believed would want to go into town, she raised the matter with Ms Harris who replied, "why can't you go, it was okay for [AC] to be sent out with bad knees". The Claimant had helped manage AC when previously at Unit B and was, some of the Respondent's witnesses say, to some degree unsympathetic to AC's needs. The Claimant says that a colleague called Margaret Marson witnessed this exchange. During her grievance investigation interview (page 186) Ms Marson said she could not say it did not happen, but "I don't remember anything in particular". Ms Harris for her part (CH42) told us it did not happen as the Claimant describes. She told us AC was irrelevant to her working life at that point as she had left the Respondent's employment. Both she and Ms Harmon refer to AC in their statements, which the Claimant says is evidence that Ms Harris did make the comment about AC. On the basis of what their statements say however, we accept that the references to AC were made in the context of Mr Smart, who appears to have taken proofs of evidence or at least had discussions with them about this case, asking how AC got on accessing community work and what adjustments were made for her. We do not think therefore that the mention of AC in these statements is an indication that Ms Harris made a comment about AC as alleged.

60. The Claimant has the burden of proving the primary facts on which her case is based. We have very little evidence indeed in this respect. There is her assertion that this comment was made; Ms Marson's comment that she was not sure but did not remember anything; Ms Marson's further comment on Ms Harris' demeanour in the subsequent discussion that we will come to below, in which she describes Ms Harris as being "pretty laid back"; and Ms Harris' own insistence that nothing was said to this effect. As just noted, we accepted the explanation of why the Respondent's witnesses referred to AC in their statements, effectively as a comparator for how the Claimant was treated, and so do not any draw any conclusion about whether the comment was made on that basis. On balance, with the addition of the fact that the Claimant did not raise any comment about the matter at the time (we accept it is not always easy to do so, but even on this day the Claimant was plainly prepared to raise issues she was unhappy with), the Claimant has made the assertion that this is what was said, but has not established on the balance of the evidence that the comment was made. We concluded that it was not.

61. At some point after the meeting we have just described, the Claimant saw that Ms Harris had changed her allocation to the male client. She then went to raise it with Ms Harris in another client's kitchen. That is what Ms Marson says at page 186. We found on balance therefore that she did not raise the question of this allocation with anyone until after the client arrived and informed her that he would like to go out. That confirms our finding that the AC comment was not made at all. The Claimant gave the client his medication on his arrival at the Unit at 10.05 am. It seems clear that she then found out he wanted to go out into the town.

62. Ms Harris says that the Claimant "stormed" into the other client's kitchen and raised her allocation to the male client. There was some discussion. What is agreed is that the allocation was changed and that the Claimant did not go out with the client, staying in-house.

63. The Claimant says that Ms Harris acted vindictively in making the reallocation, taking revenge for how AC had been treated, and that she had an angry demeanour from when the Claimant returned to Unit B. Ms Harris denies all of this. She says the reasons for the reallocation were the needs of the shift, the issue of sickness absence and the issue of one colleague having had to confront the client the day before. She told us it would be wholly unfair to clients, as well as to employees, if she allocated someone to a client knowing, still less intending, that doing so would make the session with the client difficult for the employee.

64. The Claimant says Ms Harris also remarked, "Can't you support anyone in the community who wants to go out walking?" causing her to feel bullied. Ms Harris says (CH43) that she asked a question to seek an answer and that the actual question was, "Can you go out with anyone?". She says she needed to ask about what the Claimant could and could not do so as not to make the situation worse and needed to make sure she allocated workers appropriately. She denies having an angry demeanour towards the Claimant following the latter's return to Unit B, saying they had worked together before, and never fallen out. Ms Marson (page 186) later told Mr Smart that Ms Harris was trying to accommodate the Claimant as best she could, and that it was the Claimant who was a little bit stern; she makes no reference to the question Ms Harris put to the Claimant about going into town, though she says Ms Harris asked the Claimant if she minded taking the client out. The Claimant describes Ms Marson as a very truthful person, but says that on this occasion she was "smoothing over" what really happened. Ms Harris also denies having a generally negative view of the Claimant. She does say in her statement that the Claimant did little work on 13 October. She stood by that in oral evidence, saying that the support for a client at 11.00 am was brief, and that two hours later the Claimant did some daily living skills with another client. She told us that saying the Claimant did not work "all day" was not right, but not a lot of the shift was spent with clients.

65. The Claimant agrees that she is not a "shrinking violet", though says at times she is a shadow of what she was. She says that if it is a normal day, she will speak up for herself. Ms Unwin described the Claimant as quite open, and says she regularly knocked on her door to ask questions. Mr Smart, as CEO, said something similar.

66. Our factual conclusions about the comment Ms Harris made regarding whether the Claimant could or could not go into town are these. The Claimant did not complain about this comment either, but it is accepted something like it was said. Ms Harris was clearly confronted with the issue on the spot and so it may well have become a slightly tense conversation with some frustrations on both sides. The material difference in terms of the words said is between "Can you go out?" as Ms Harris says, and "Can't you go out?" as the Claimant says. References to going into town did not seem to us to change the nature of the statement. We will come back to the words spoken in our conclusions. As to the tone of the question, we conclude, given the context of the discussion, the need to make the best client arrangements possible, and Ms Marson's evidence we

have referred to, that Ms Harris made the comment in a tone of what we would describe as surprised enquiry.

67. The Claimant says that she took a copy of the allocation sheet in question (page 273) as proof of what Ms Harris had done and says she made Ms Harris aware that she had done so. Ms Harris says that did not happen as she would have reported it if she had known about it. On balance, we accept Ms Harris' evidence that she was not told, for the reason she gives, and for the additional reason that it is unlikely on balance the Claimant would have raised it with her of all people, given the awkwardness of the conversation in the client kitchen.

68. Given the way the document looked to us, we accepted what the Claimant says, namely that she photocopied it, then later photographed it at home and emailed it to the Respondent as part of her grievance, even though she cannot remember sending any other documents to the Respondent in a similar way. The Claimant's original copy of page 273 is clearly not a copy of page 279, as it is of much better quality; it does look like a photocopy.

69. The Claimant agrees the copy document included client names. At page 397 and following is the Respondent's confidentiality policy. The Claimant could not say whether she had seen it, saying it had changed several times, but it seemed clear to us that the general principles were well-known. At page 400, paragraph 9.1 says that documents with client names should only be copied and retained for legitimate work purposes. Paragraph 9.2 says it is unacceptable to copy documents for personal use regardless of whether there is a dispute between the employee and the Respondent. Paragraph 9.3 says certain staff, including seniors, can copy documents, though we took that clearly to mean only within the bounds of paragraph 9.1. No document, according to paragraph 9.4, is to be copied or removed without permission. The Claimant says she considered herself to be bullied and knew if she did not copy the document, it would be changed. She did not think about the warning of gross misconduct dismissal set out at page 401 in the event of the policy being breached.

70. The Claimant accepts (in line with the policy at page 402 and following) that no-one used mobile phones at work. She knew other staff had been dismissed at another unit, she thinks for using social media at work. Again, she did not think about this at the time.

71. The Claimant worked until 23 October 2018, and was then off on sick leave. There is no need for us to say much more about events after that, though we will say a few words about the Claimant's grievance.

72. Her first grievance letter was dated 14 November 2018 (page 119) and was sent to Mr Smart and a colleague in HR. Mr Smart says he did not sign for the letter, even though his name is on the receipt. We saw no reason not to accept that evidence. Mr Smart was of course very conscious of his duties to the Tribunal, particularly as a solicitor, and moreover he was open about the delay in dealing with the grievance, so there would have been little sense in him seeking to mislead us regarding its receipt. We would though point out the potential risks with someone else giving his name when signing for receipt of a letter, which is something the Respondent may wish to address.

73. If Mr Smart receives a grievance, he reads enough to get the gist of it, to assess whether he needs to be involved, and then forwards it to HR. On this

occasion his HR colleague informed him she was dealing with it, though we accept that page 134 suggests the HR colleague had not read the grievance a week following its receipt.

74. On 30 November 2018 the Claimant was sent a first invitation to a grievance meeting, scheduled for 4 December 2018 (pages 142-3). On 3 December 2018, she said she was not well. Mr Smart says (GS23) that his HR colleague then wanted to give some time for OH forms to be returned, as the Claimant was on sick leave, before rescheduling the meeting. She was then on leave over Christmas and New Year. Another invitation (page 158) was sent on 15 January 2019. The Claimant again said she was too unwell and wanted a response in writing (page 164).

75. Mr Smart accepts (GS31) that the delay in responding substantively was not ideal. We agree. On 19 January 2019, the Claimant presented an updated grievance (pages 168-173) in which she referred to the Act and disability – the first time, it seems, she used that term. She had adopted some wording she found online. Mr Smart's HR colleague was then seriously ill and another colleague was also off sick for a month, whilst Mr Smart himself was extremely busy. He told us (GS43) that only he could address the grievance, given he could not ask those named by the Claimant to do so, and another manager was otherwise occupied. That evidence was essentially unchallenged. He also told us the Respondent was trying to deal with welfare issues associated with the Claimant's absence – see below.

76. Mr Smart was aware of the content of the grievance by 21 January 2019. His outcome letter was sent to the Claimant on 12 March 2019. Mr Smart also sent the Claimant a new risk assessment – pages 191-2 – produced by him. The principal difference between that and previous assessments was a reference to the Claimant's walking.

77. The Respondent also engaged in welfare (return-to-work) discussions with the Claimant during this period. The Claimant focused much during the Hearing on the production of minutes from a welfare meeting. Two points were missing from the original notes sent to her on 11 December 2018 by someone in HR who conducted the meeting. The Claimant raised these omissions with Mr Smart, who enquired of those who had been present. They agreed the comments were made and so he then arranged to have the Claimant's additional comments stored with the minutes, and later put into the notes directly. This account appeared to us to be supported by the emails at pages 154-5 and 167. The originally omitted comments concerned Ms Lanfear saying in her grievance interview with Mr Smart that she should have sent someone else out with the client on 10 October 2018, and an HR colleague saying at the welfare meeting that a new risk assessment should have been carried out on the Claimant's return to Unit B.

78. Mr Smart's view on the latter is that the risk assessment was done without being written down – he partially upheld the Claimant's grievance on this point, acknowledging it should have been put in writing. His view on the former is that Ms Lanfear was commenting with the benefit of hindsight. He firmly denied, as an officer of the court as he put it, arranging for these comments to be taken out of the original version, saying that he would not risk his career and reputation for that. We accepted his evidence. After all, by putting the comments back in – which is what the Claimant says happened – he would have directly exposed any

cover up, when his simpler route to any such end would have been to ignore what his colleagues told him and ensure that they understood they should not agree the comments were made. Regrettably, that is the characterisation of Mr Smart that the Claimant would have had us accept. We did not. We found that there was no cover up as she alleges. We should also make clear that by putting the comments into the minutes, the Respondent was not saying it agreed with the Claimant's case in relation to either point; it was simply accepting that the comments were made.

79. The Claimant contacted ACAS on 26 February 2019 regarding Early Conciliation. She said the idea of a claim to the Tribunal was "just floating around in her mind". She had heard of employment tribunals, but not of time limits.

80. The Claim Form was presented on 11 March 2019. The Claimant says it was late because of the time taken to respond to the grievance. As a long-standing, dedicated employee, she thought she would wait for the grievance outcome before taking the matter further. After numerous chasing emails, she felt she had no choice but to complain to the tribunal. She says the Respondent was in breach of the ACAS Code on Disciplinary and Grievance Procedures because of the time it took to deal with the grievance.

81. The Respondent says (GS56) that the Claimant would very likely have been dismissed within two weeks if the Respondent had known on 13 October 2018 that she had breached its confidentiality and social media policies. As to the latter, Mr Smart told us it is vital to have an absolute ban because of client care and to ensure the care being provided is dignified. The previous incident with former employees has increased the seriousness of the issue. As to the former, he says even a client name is highly confidential given their vulnerability. He also identified data protection and Care Quality Commission issues that play into these requirements. He added that this would have been a far easier matter to investigate than the Claimant's grievance and so was clear that it would not have taken so long to deal with.

82. Mr Smart was involved in the Respondent's decision to concede that the Claimant was a disabled person, following receipt of full medical information in the course of these proceedings. He said to us that this information told the Respondent more about the impact of the impairment on the Claimant's ability to carry out normal day to day activities.

Law

Burden of proof

83. Section 136 of the Act provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment tribunals] *could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

84. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] ICR 931**, updating and modifying the guidance that had been given by the Employment Appeal Tribunal in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205**. The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage".

85. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

86. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

87. In a harassment case, the first stage of the burden of proof is particularly relevant to establishing that the unwanted conduct was related to the protected characteristic.

88. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

89. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases, it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination.

Harassment

90. Section 40 of the Act renders harassment of an employee unlawful. Section 26 defines harassment as follows:

"*(1) A person (A) harasses another (B) if - //(a) A engages in unwanted conduct related to a relevant protected characteristic [here, disability], 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".

91. The Tribunal is thus required to reach conclusions on whether the conduct complained of was unwanted, if so whether it had the requisite purpose or effect and, if it did, whether it was related to disability.

92. The Respondent agrees that if the Claimant proves on the facts any of the conduct on which she relies, it was unwanted. There is no need to say anything further about that.

93. It is clear that the requirement for the conduct to be "related to" disability entails a broader enquiry than whether conduct is because of disability as in direct discrimination. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to disability, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it. In this case, the words used and the overall context fall to be considered.

94. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – requires consideration of each alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before us. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the Claimant's perception of the impact on her (she must actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the remark, and all the surrounding context. That much is clear from section 26 and was confirmed by the Employment Appeal Tribunal in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724.** The words of section 26(1)(b) must be carefully considered; conduct which is trivial or transitory is unlikely to be sufficient. Mr. Justice Underhill, as he then was, said in that case:

> *"A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard … whether it was reasonable for a claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have*

been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …

"…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"

95. It is for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If she does, then it is plain that the Respondent can have harassed her even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c). Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be recognised that is not always easy to do so. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met.

Discrimination arising from disability

96. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others.

97. What caused the unfavourable treatment requires consideration of the mind(s) of alleged discriminator(s) and thus that the reason which is said to arise from disability be more than just the context for the unfavourable treatment. There need only be a loose connection between the unfavourable treatment and the alleged reason for it, and it need not be the sole or main cause of the treatment, though the reason must operate on the alleged discriminators' conscious or unconscious thought processes to a significant extent (**Charlesworth v Dronsfield Engineering UKEAT/0197/16**). By analogy with **Igen**, "significant" in this context must mean more than trivial. Whether the reason for the treatment was "something arising in consequence of the Claimant's disability" could describe a range of causal links and is an objective question, not requiring an examination of the alleged discriminator's thought processes.

98. The approach to complaints of discrimination arising from disability was considered in detail by the Employment Appeal Tribunal in **Pnaiser v NHS England [2016] IRLR 170**:

> "*(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 … 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.*
>
> *…*
>
> *(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*
>
> *…*
>
> *(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."

99. A complaint of discrimination arising from disability will be defeated if the Respondent can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim – "justification" for convenient shorthand. We draw the following principles from the relevant case law, some of which concerned justification of indirect discrimination though we see no reason for a difference in approach in the context of section 15:

99.1. The burden of establishing this defence is on the Respondent.

99.2. The Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

99.3. What the Respondent does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ in **R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

99.4. In **Hardy & Hansons plc v Lax [2005] ICR 1565** it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the treatment justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

99.5. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Naeem v Secretary of State for Justice [2017] ICR 640**.

99.6. In summary, the Respondent's aims must reflect a real business need; the Respondent's actions must contribute to achieving it; and this must be assessed objectively, regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative course of action, but whether what it did was reasonably necessary to achieving the aim.

Knowledge

100. A complaint of discrimination arising from disability will also be defeated if the Respondent can show that at the time of the unfavourable treatment, it did not know and could not reasonably be expected to know that the Claimant was a disabled person. We return to this below in summarising the law on reasonable adjustments.

Reasonable adjustments

101. Section 20 of the Act provides as far as relevant:

"*(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A 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".

102. Section 21 provides:

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

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

103. "Substantial" in this context means "more than minor or trivial" – section 212(1) of the Act. The Tribunal's task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, it must consider what it is about the PCP that puts the Claimant at the alleged disadvantage. As can be seen from section 20(3), a comparative exercise is required, namely consideration of whether the PCP disadvantaged the Claimant more than trivially in comparison with others. As indicated in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216** the comparator is merely someone who was not disabled. They need not be in a like for like situation, but should be identified by reference to the PCP, so as to test whether the PCP puts the Claimant at the substantial disadvantage. The disadvantage must relate to the Claimant's disability.

104. The next question is whether there were any reasonable steps which the Respondent could have taken to avoid the disadvantage which were not taken. It is well known that assessing whether a particular step would have been reasonable entails considering whether there was a chance it would have helped overcome the substantial disadvantage, whether it was practicable to take it, the cost of taking it, the employer's resources and the resources and support available to it. The question is how might the adjustment have had the effect of preventing the PCP putting the Claimant at a substantial disadvantage compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the Respondent.

105. A summary of the above can be found in **Environment Agency v Rowan [2008] IRLR 20,** in which the EAT restated guidance on how an employment tribunal should approach such a complaint, saying that tribunals must identify:

> *"(a) the provision, criterion or practice applied by or on behalf of an employer, or;*
> *(b) the physical feature of premises occupied by the employer;*

(c) the identity of non-disabled comparators (where appropriate); and
(d) the nature and extent of the substantial disadvantage suffered by the claimant."

106. In **Bank of Scotland v Ashton [2011] ICR 632**, Langstaff J emphasised the importance in all cases of the tribunal focusing on the words of the statute and considering the matter objectively:

> "*The Act demands an intense focus by an Employment Tribunal on the words of the statute. The focus is on what those words require. What must be avoided by a tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save except in certain specific circumstances) as to the thought processes which that employer has gone through*."

Knowledge

107. Paragraph 20 of Schedule 8 to the Act provides, in wording akin to section 15(2):

"*(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

108. The burden is on the Respondent to show that it did not have the knowledge in question – certainly that is clear enough in relation to section 15 given the express wording of section 15(2). The EAT held in **Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10** that what this provision requires is that the employer know (or could reasonably be expected to know) that an employee was suffering from an impairment, the adverse effects of which on their ability to carry out day-to-day activities were substantial and long-term, that is the various constituent elements of the definition of disability in section 6 of the Act – though as made clear in **Gallop v Newport CC 2013 EWCA Civ 1583** it is knowledge of the facts of the Claimant's disability that is required, not an understanding by the Respondent that those facts meet the statutory definition.

109. If the employer did not know and could not reasonably be expected to know the Claimant was disabled, knowledge of disadvantage does not arise.

110. What is reasonable for the Respondent to have known is for the Tribunal to determine and will depend on all the circumstances of the case. The question is what the Respondent would have found out if it had made reasonable enquiries – in other words there should be an assessment of what the Respondent should reasonably have done, but also of what it would reasonably have found out as a result (**A Ltd v Z EAT 0273/18** reflecting paragraph 5.15 of the EHRC Code on Employment (2011)).

Time limits

111. Section 123(1) of the Act provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting

with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Section 123(3) says that for the purposes of this section conduct extending over a period is to be treated as done at the end of the period, and failure to do something is to be treated as occurring when the person in question decided on it. Section 123(4) says that in the absence of evidence to the contrary a person is to be taken to decide on failure to do something, (a) when they do an act inconsistent with doing it or otherwise (b) "*on the expiry of the period in which [they] might reasonably have been expected to do it*".

112. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in unfair dismissal cases. Nevertheless, there is no presumption that it will be – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**, though extending time does not require exceptional circumstances. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of the tribunal granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

113. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** Leggatt LJ in the Court of Appeal said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. Notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a Respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. At paragraph 25 he said that there is no reason to read into the statutory language any requirement that the Tribunal must be satisfied that there are good reasons for the delay, let alone that time cannot be extended in the absence of an explanation of delay from the Claimant. At most, he said, whether any explanation or reason is offered and the nature of them are relevant matters to which the Tribunal should have regard. Where the alleged breach of the legislation is a failure to act, time runs from end of period in which the Respondent might reasonably have been expected to comply with its duty; that period should be assessed from the Claimant's point of view.

114. **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23** approved **Morgan**. In that case, a race discrimination complaint was dismissed when three days out of time. Two key factors in the Court of Appeal upholding the decision were that the events in question occurred a long time beforehand, and that the claimant in that case was a very educated man who had taken legal advice.

115. The Claimant asked us to consider **Olenoa v North West London Hospitals NHS Trust [2012] UKEAT 0599.** The crux of that case was that findings of fact about the nature of reasonable adjustments required and whether

they would have overcome the disadvantage to the employee were necessary to determine whether such a complaint was in time or not. The EAT made clear that this was something which required all the evidence to be heard, and would usually therefore be dealt with at a final hearing.

Analysis

116. Having found the relevant facts and summarised the law, we took a chronological approach to the complaints the Claimant pursued, before coming separately to the question of time limits.

Reasonable adjustments

PCP

117. As noted above in the list of issues, it was agreed on day 1 of this Hearing that the Respondent had a PCP of allocating the Claimant on 10 October 2018 to a client who wanted to go shopping, the Claimant thus taking her to do so as the Respondent envisaged. It was not contested by the Respondent that this was a PCP in fact or in law. There was therefore nothing further to say about it.

Substantial disadvantage

118. The second question was whether the PCP put the Claimant at a substantial disadvantage compared to persons who are not disabled. This required the Tribunal to determine what actually happened, assessing it objectively. At this stage, we were not concerned with what could reasonably have been expected to happen; that was a matter to come to when assessing the question of whether it was known, or should reasonably have been known, that the Claimant would be put at a substantial disadvantage if there was one.

119. What happened on 10 October, largely as already set out in our findings of fact, is as follows:

119.1. Shortly after 10.00 am when the client contact began, the Claimant took the bus to the shopping centre, with the client. This included waiting for the bus, which we are prepared to accept included some standing up, and of course she had to get on and off the bus as well.

119.2. Either immediately on arrival or at some point later, the Claimant and the client walked from one end of the shopping centre to the other – this would have been a slow walk, given that the client was a slow walker, but it still involved walking across the whole of a large shopping centre.

119.3. At some point, the client had something to eat and drink, quite probably for up to an hour. The Claimant would have been sitting down during this time.

119.4. The client, and therefore the Claimant, did a little more shopping at the shopping centre and then, doubtless after another bus journey, in the local town.

119.5. By the time the Claimant got back to Unit B at some time after 1.00 pm, her left knee was painful and swollen.

120. In summary, describing this as a three-hour shopping trip, as the Claimant did, was not an entirely accurate characterisation of what took place, but neither was the entirety or even the majority of the time spent sitting down. There was a not negligible amount of walking, albeit at a slow pace and there is no disputing that the Claimant suffered knee pain and swelling, which in fact led to her taking the next day off work. On the face of it, that was very plainly more than a minor or trivial disadvantage.

121. We also considered whether she was disadvantaged more than trivially in comparison with those who are not disabled, noting that the disadvantage must flow from the disability. Mr Weiss submitted that she was not disadvantaged when compared with those who were not disabled, focusing on the fact that the problem the Claimant encountered on this day was with her left knee. Our understanding of his submission was that this is because someone who did not have a right knee disability would also have suffered the left knee problems the Claimant encountered. In rejecting that submission, we noted the following:

121.1. As Mr Weiss set out in his skeleton argument, at paragraph 3, with reference to pages 33 onwards, the Case Management Summary of REJ Findlay after a hearing in August 2019, recorded the Claimant's characterisation of her disability as follows – "*an injury in 2007 which meant that [she] had an operation on her right knee to insert a pin, affecting [her] ability to walk and causing pain and swelling of the right knee if she walks too much (and pain to the left knee due to overuse)*".

121.2. The Respondent was careful to draw our attention to its concession recorded in a later Case Management Summary at page 46. We noted however that this recorded only the Respondent's position as to the Claimant's physical impairment; it did not depart from the characterisation of the disability set out by REJ Findlay. Mr Weiss's skeleton argument, including the reference to the Claimant's case that one of the consequences of the agreed impairment was pain to the left knee due to overuse, is consistent with that. On that basis, it seemed clear to us that the Claimant's left knee issues, resulting from her right knee impairment, were part of the disability she relied upon.

121.3. In any event, it was agreed that the Claimant referred in oral evidence to compensating on her left knee because of the right knee impairment. We do not of course lay claim to medical expertise, but that seems to us to be very likely; it is common knowledge and experience that this sort of compensating occurs in such cases.

121.4. We did not have any details of or evidence regarding an actual comparator, but it is clear that a person who had no right knee impairment, assuming as we must that they were not disabled because of a left knee impairment, would be very unlikely indeed to have experienced pain and swelling in their left knee as a result of doing the walking the Claimant did on 10 October 2018.

121.5. In fact, the assessment to be made is only whether the disabled person was disadvantaged in a more than minor or trivial way compared with those who are not disabled. For the reasons we have given, we were satisfied the Claimant had established that she was.

Reasonable steps to avoid the disadvantage

122. We then turned to consider whether there were steps the Respondent could have taken to avoid that disadvantage and whether it would have been reasonable for it to have taken them. In answering this question, we noted the following:

122.1. We heard very little evidence from either party on this issue.

122.2. What the Claimant argued is that the Respondent could have allocated her other duties, either in-house or with domiciliary clients, the flip side of which, as agreed on day 1, would have been giving the outside duties to someone else.

122.3. Ms Harmon told us that reallocations are frequent and common.

122.4. The Respondent's argument on this point focused on the Claimant having made mistakes, including with medication, following her return to Unit B, so that it could not leave her in charge of the Unit. It relied in that regard only on page 113, a complaint from Ms Lanfear to the Respondent's owner about a number of aspects of the Claimant's work, including medication issues. We accept the Claimant's evidence that she did not see this at the time, only seeing it much later as a result of either disclosure or a subject access request. We also accept her evidence that she had been the most senior person in Unit B many times in the past.

122.5. The Respondent says that it could not have sent a senior out with the client for these reasons, but even if we were to accept its limited case in that regard, it is clear to us a senior would not have been required. The Respondent was at pains to say that the client in question is not demanding, and we heard no evidence that there was no other support worker available.

122.6. As stated above, we had little evidence to go on in this respect, but weighing up the matters just referred to, we concluded that it would have been perfectly possible for the Respondent to allocate other duties to the Claimant on 10 October 2018 and to allocate the client to someone else – much as it did on 13 October 2018 – and we found that this would have been a reasonable step (or steps) for it to take. We heard no cogent evidence of any negative impact of doing so on clients, any other employee or the running of the Unit and obviously there would have been no additional cost.

122.7. Equally obviously it would have helped address the disadvantage to the Claimant.

123. There was therefore a PCP which put the Claimant at a more than minor or trivial disadvantage compared to persons who were not disabled, and it would have been reasonable for the Respondent to avoid the disadvantage by taking the steps the Claimant suggested. That did not mean the Claimant's complaint succeeded of course, because we then needed to address the crucial question of knowledge of disability and of the disadvantage.

Knowledge of disability

124. Our approach to the issue of knowledge was first to summarise the evidence relevant to both questions, that is knowledge of disability and of

disadvantage, dealing with what the Respondent actually knew and then with what it should have known, then addressing the two questions separately in the light of what that evidence showed. We noted again that the burden was on the Respondent in this respect. We have summarised the law above but, in short, the questions we had to address were what the Respondent actually knew and what it should reasonably have known based on having made reasonable enquiries. In respect of knowledge of disability, what we had to consider is whether the Respondent knew or should reasonably have known that the Claimant was a person who satisfied the constituent parts of the statutory definition of disability, namely that she had a physical impairment, which had a more than minor or trivial impact on her ability to carry out day to day activities and that this impact was long term. It was not necessary for these purposes to ask whether the Respondent knew or should reasonably have known that the Claimant met the statutory definition as such. Our assessment was also of the collective (that is corporate) knowledge or constructive knowledge the Respondent had, through what was known or should reasonably have been known to its individual employees. Of course, the question of knowledge of disability was relevant to the section 15 complaint as well.

125. The Claimant did not assert that she was a disabled person until her grievance in January 2019. We therefore began by considering what the Respondent's employees actually knew by 10 October 2018. Summarising the relevant parts of our findings of fact, the Respondent's collective knowledge by this point was as follows:

125.1. It knew that the Claimant had an accident outside of work in 2007.

125.2. It also knew that following a resulting operation she had a pin and plate in her leg, though it plainly did not know one way or the other whether the pin and plate were giving continuing support and assistance to the functioning of the Claimant's leg eleven years later. It cannot be said it was obvious they would have been, without medical advice on the point. We will come back to that below.

125.3. What seems abundantly clear therefore is that the Respondent knew the Claimant had a physical impairment.

125.4. The Respondent knew before October 2018 that there were limited aspects of the MAPA restraints which the Claimant could not perform, though as Ms Hale said, few employees can do all of the potential manoeuvres.

125.5. By May 2017 (page 104), the Respondent knew the Claimant had some pain, discomfort and swelling, though it was agreed that any risk to her in work was low. It was also clear that she should avoid the more extreme MAPA measures, but otherwise she could fulfil the duties of her role – this was at Unit B.

125.6. On 18 January 2018, that knowledge was confirmed as the further risk assessment at page 106-7 said exactly the same things. We were clear that an inability to do the complete range of MAPA measures, those the Claimant needed to avoid being the most severe, did not indicate that the Claimant's impairment had a substantial adverse effect on normal day to day activities, as those more severe measures can in no way be said to be normal day to day activities, even in the Claimant's and similar workplaces.

125.7. In April 2018, the Claimant agreed to a transfer to Unit A, knowing (from her previous work there) what it was like and the work required, though we accepted that she could not foresee precisely how things would work out because it was to be her first time working at Unit A since her accident.

125.8. Whilst the risk assessments in July and August 2018 were not seen by the Claimant, they can be said to have been part of the Respondent's knowledge. They did not change the picture.

125.9. The fit notes from June to September 2018 told the Respondent that the Claimant had knee pain, made reference to arthritis, said that she should avoid pushing and pulling but that with that amendment to her duties, she was fit to carry them out. We did not think that the advice to avoid pushing and pulling an adult in a wheelchair would indicate a substantial adverse effect on the Claimant's ability to carry out normal day to day activities, not least because again that did not seem to us to fall within the definition of such activities.

125.10. In late September/early October 2018, several of the Respondent's employees at Unit A knew that the Claimant was limping and in some pain at the end of double shifts. She was otherwise still able to do her duties at Unit A, apart from the more serious MAPA measures and pushing/pulling of wheelchairs when occupied by clients.

125.11. From 4 October 2018, the Respondent knew that the Claimant needed a transfer to Unit B to help her knees. It is important to note carefully what the Respondent knew in that context and at that point. It knew that the Claimant struggled after being on her feet (her evidence is that at Unit A she barely got 5 minutes' rest) for 12 or 13 hours. That cannot in our view reasonably have suggested to the Respondent that the Claimant's impairment was having a substantial adverse effect on her ability to carry out normal day to day activities because whilst this extent of standing and walking was normal at Unit A, it was not normal at Unit B. Indeed, whilst common workplace activities can form part of normal day to day activities, so that one does not ignore workplace activities altogether in making this assessment, what the Claimant was doing at Unit A cannot properly be considered a normal day to day activity. It is unique to a certain, very specific and limited, type of workplace.

125.12. The Claimant would have known what work would be required of her at Unit B, including working in the community from time to time. The Respondent knew that she had agreed to transfer to that Unit.

125.13. Until after these legal proceedings commenced, the Respondent had no other medical information apart from knowing the Claimant had a steroid injection in her left knee on 4 October 2018.

125.14. There was nothing in the Claimant's fit notes that referred to restrictions on walking, though unusually they made clear reference to the other restrictions we have referred to.

125.15. On 4 October 2018, the Claimant told the Respondent she had also had or was having some physiotherapy.

125.16. She called in to report sickness absence on 5 October 2018, citing a knee problem, but came back to work very quickly.

125.17. That takes us up to 10 October 2018. The Claimant went off again on 12 October 2018 and gave basically the same report when phoning in, but again came back to work very quickly.

125.18. She had very little sickness absence generally after she returned to work from her accident and operation.

125.19. There was never any visible problem at work apart from what we have already set out about how the Claimant appeared at the end of long shifts at Unit A.

125.20. It was not until 13 October 2018 that she raised any concern about being unable to walk in the community with clients. She had asked about whether she would be doing so, but had not raised any concern about carrying it out.

125.21. She did not ask to be reallocated on 10 October itself, though on her own case she knew that walking with the client would be involved.

125.22. In discussion with Kate Lanfear and Siobhan Harmon on 9 October, she did not say she would struggle walking and said she would ask for support if needed. She did not ask to stay in house or raise any other actual or potential difficulties with her duties.

126. In summary, the Respondent knew the Claimant had a knee impairment and that she experienced some pain. It also knew that there were certain minor aspects (overall) of her duties that she could not do – certain restraints and pushing/pulling of adult clients in wheelchairs – and one she could only do with difficulty – standing/walking for a double shift. None of these can properly be considered normal day to day activities. Walking is clearly a normal day-to-day activity of itself, but the Respondent had no information that reasonably indicated that the Claimant could not walk within reasonable, everyday boundaries. The Code on matters to take into account in determining disability, gives as an example of something which would indicate a substantial adverse impact on the ability to carry out normal daily activities the total inability to walk or ability to walk only a short distance without difficulty. On the other hand, it says that minor discomfort as a result of walking unaided for about a mile would not indicate a substantial adverse impact on ability to carry out normal day to day activities.

127. In our judgment, the Respondent could reasonably conclude that the Claimant, as she presented to its employees, and based on the medical information it had, was much nearer the second example in the Code, if not markedly beyond it. She had recently been carrying out extensive walking at Unit A, when only after a 13-hour shift had she started to limp. The medical information from June 2018 indicated that she had pain and arthritis, but of itself that was not sufficient to indicate a substantial adverse effect on normal day to day activities given what the Claimant was doing at Unit A and given that she remained – at that Unit and according to her GP with whom she had plainly discussed her work – fit to keep walking and carrying out the rest of her duties, as long as the heavy lifting, pushing and pulling was avoided. The Respondent did know she was undergoing physiotherapy and had been given a steroid injection, but of themselves, without further medical input (which we come back to below) this did not take the Respondent much further forward in its store of actual knowledge or indeed what it should have known.

128. Combine the above with the Claimant's very limited absence prior to 10 October 2018 – just one day after her transfer to Unit B and apparently none whilst at Unit A; the Respondent's actual daily observations of the Claimant; and the absence of any comment by the Claimant about any negative impact on her walking, other than feeling pain at the end of the long shifts at Unit A, and based on the information it actually had, we concluded that the Respondent had established that it did not know and could not reasonably have been expected to know she was disabled. This is confirmed by the fact that the Claimant did not ask to be reallocated on 10 October 2018, though on her own case knowing her duties would entail some walking, unlike on 13 October 2018 when she did make such a request.

129. We considered whether by reasonable enquiries, there was anything else the Respondent should have known.

130. One issue canvassed at length in the Hearing was whether the Respondent could or should have engaged the services of OH. We noted the following:

130.1. The GP notes were full, including measures that the GP, and thus the Claimant, wanted to see put in place.

130.2. Even if the Respondent had sought OH input at the end of September when the Claimant visibly started to struggle at the end of a long shift, a report would not have been available by 10 October or even by 13 October.

130.3. There was nothing to indicate that an OH referral should have been made earlier, or put another way it was reasonable for the Respondent not to do so.

130.4. Further, in light of her later conduct when the Respondent sought an OH referral, it is not clear that the Claimant would have agreed to it, confirming that no report would have been forthcoming by the relevant dates, if at all.

130.5. It is clear that a further medical opinion (or the disclosure of further medical records) to determine whether the plate and pin in the Claimant's leg should have been disregarded by the Respondent in making its assessment of her condition could only properly have followed the engagement of OH.

131. It is equally plain that even if the Claimant had been present at the July and August risk assessments, it would have made no difference to the Respondent's store of knowledge, given what came later on 9 October.

132. Finally, the Claimant raising the fact of not doing senior shifts on her return to Unit B and looking unhappy about this in the initial meeting there with Kate Lanfear and Ms Harmon did not flag anything to the Respondent of relevance to our assessment, not least given her previous preference for limited work outside of the Unit in any event.

133. We concluded in the light of all of the above that the Respondent did not know and could not reasonably have been expected to know that the Claimant was a disabled person by 10 October 2018. We further concluded that what it found out by the early morning of 13 October 2018 added little to its collective knowledge, though for reasons that will become clear we do not need to go on to consider that in detail. As noted, the question of what changed the Respondent's perspective once it got more detailed records in the course of these proceedings

was briefly canvassed during this Hearing, and we have noted Mr Smart's evidence in that regard. The Claimant was satisfied with all of the questions we put to Mr Smart on her behalf in the circumstances described at paragraph 13 above and thanked us for doing so. Whilst acknowledging that she was not legally represented, we noted that we were not taken to any of the additional medical evidence as part of any case that might have been put that they disclosed little that the Respondent did not know before. Naturally we had to be careful to adjudicate only the case presented to us, and not to pursue a detailed line of enquiry on a party's behalf. To do so would have taken us beyond the substantial assistance we already provided to the Claimant and into the realms of advocating for her. We make clear therefore that on this basis we did not consider that additional medical evidence as part of our assessment of this issue.

Knowledge of disadvantage

134. Even if the Respondent had possessed actual or constructive knowledge of the Claimant's disability on 10 October 2018, we concluded that it did not have knowledge of the substantial disadvantage which the PCP created for the Claimant, nor should it reasonably have known that it was likely to arise. This was essentially for similar reasons, though it was of course a separate consideration. The Respondent could reasonably foresee that the client may well want to go to the shopping centre, but given in particular:

134.1. what it knew of the Claimant's very recent work at Unit A;

134.2. the fact that she had only started to struggle at the end of a double shift;

134.3. the fact that the walking in the community would not entail anything like that level of exertion;

134.4. the fact that the Claimant did not ask for any restriction on walking and neither did her GP; and

134.5. the fact that she did not say on 10 October itself that she could not go out with the client,

we concluded that the Respondent did not know and could not reasonably have been expected to know that what in fact happened (the pain and swelling in the Claimant's knee) was likely to happen, or even that the Claimant would be placed at any substantial (more than minor or trivial) disadvantage. Kate Lanfear commented much later (as Mr Smart says, with the benefit of hindsight) that she would have been better to put someone else on that session, but that was by no means sufficient to overturn our conclusions that the Respondent had made out the statutory defence.

135. The complaint of failure to make reasonable adjustments therefore failed.

Discrimination arising from disability

136. This complaint was of course concerned with the events of 13 October 2018. We have dealt with the question of the Respondent's knowledge of disability to that point and the complaint failed on that basis, but we briefly considered the remaining issues relevant to it.

137. The alleged unfavourable treatment was Ms Harris changing the Claimant's work allocation. It is a low bar to establish unfavourable treatment as we have noted, and whilst it would not encompass an unjustified sense of grievance, on balance we found that there could be a legitimate sense of grievance in this regard, given the Claimant's absence because of knee pain the previous day.

138. We readily concluded however that the reason for the unfavourable treatment was that given by Ms Harris: the need to rejig the staffing arrangements and client allocation because of staff absence, together with the issue another member of staff had experienced with the client on the previous day and the benefit of space between that worker and the client. We were entirely satisfied and were struck by Ms Harris' evidence that she would not have put a colleague or a client at risk in the way alleged by the Claimant. As she said, deliberately setting up client arrangements to make life difficult for the Claimant would not be fair to her or to the client, given the risk Ms Harris would have been aware of (if that were in her thinking) of the session breaking down. That in turn could have put Ms Harris herself at risk of some punitive action by the Respondent. We also note that Ms Harris readily concurred to changes being made once the Claimant raised her concern. Beyond the assertion of her case in this regard therefore, the Claimant did not in our judgment establish that it was any part of Ms Harris' thinking that she should be sent out because of her reduced mobility. There are not facts from which we could reasonably conclude that the Respondent discriminated against the Claimant in this way.

139. Further, the reason for the unfavourable treatment as we have just articulated it was plainly not related to disability, in any sense. Rather, it was related solely to the proper operation of the Respondent's business.

140. It was not necessary for us to say anything about the justification defence. It would only have arisen if the Respondent had treated the Claimant unfavourably because of something arising in consequence of her disability, i.e., if on the Claimant's case Ms Harris had allocated her to the client because of her reduced mobility. That would be very hard to justify on the face of it, but analysing that question would have been an entirely artificial exercise in this case.

141. The complaint of discrimination arising from disability failed.

Harassment

142. It will be plain from our findings of fact that only two instances of alleged harassment remain to be considered. We had determined that the comment with reference to AC was not made. As just indicated, we also found that the allocation by Ms Harris on 13 October was not in any sense related to disability, and so that complaint of harassment must fail at that hurdle.

143. We considered the remaining two complaints of harassment in reverse order.

144. The first was Ms Harris' comment to the effect of, "Can't you go out into the community?". We were prepared to give the Claimant the benefit of any doubt that these were the words that were said. It was agreed that the conduct was unwanted and so the first question was whether it was related to disability.

145. The comment did not contain any reference to disability and Ms Harris certainly did not understand the Claimant to be a disabled person at that point. It was connected to disability in the sense that the reason the Claimant was saying she could not go out was her disability, but that is an insufficient connection to disability in our judgment once one considers the context and tone of the question as well as the words spoken. The context was a fairly assertive comment from the Claimant herself and as we have said the question was about an operational issue, which as we have also said was asked in a tone of surprised enquiry.

146. Even if was related to disability, whilst we noted in our findings of fact some criticism of the Claimant by Ms Harris, related to her performance, Ms Harris was not alone in that regard, so that there is nothing to suggest that she had any particular history or reason to offend the Claimant. The Claimant did not establish facts from which we could sensibly conclude that Ms Harris had the purpose of violating her dignity or creating the requisite environment. Ms Harris' sole purpose was in fact to get client arrangements properly made and to deal with the operational issues presented to her.

147. We then considered whether the comment had either of those effects. Subjectively, the Claimant complained about it later, in her grievance, but she is a notably resilient and forthright individual, as indeed she was in that exchange, and there is no evidence of any complaint, even of an informal nature, having been made at that time. Objectively, the circumstances as we have found them to be – a private, brief exchange, on operational issues, the tone of the enquiry, its content having only a very indirect link to the Claimant's disability and the fact that the allocation was changed when challenged by the Claimant so that Ms Harris did not insist on the Claimant working with the client in question, all led us to conclude that it was not reasonable for the conduct to have had the required effect. "Violation" is a strong word, and we could not find that these words, in that context, with that tone, could be classified in that way. Neither did we think that of itself, the comment could be said to create the requisite environment for the reasons we have given. This complaint of harassment therefore failed.

148. That left the complaint relating to Ms Unwin's comment which included the word "hobbling".

149. Returning to our findings of fact, the words spoken were, "We can't have you hobbling about Julie". They were spoken in the meeting between the Claimant and Ms Hale, and in a somewhat abrupt and stern tone.

150. We were satisfied that the word "hobbling" was related to the Claimant's disability. The Claimant did not establish however that the comment was intended to violate her dignity or create the requisite environment. The burden was on her in that respect. It was a phrase Ms Unwin had used regularly to describe limping, and she used it as an interjection into a meeting taking place between the Claimant and someone else. It was thus, at worst, a careless rather than a calculated comment, and cannot be said to have been purposefully made to cause upset in any way. Ms Unwin certainly did not perceive the Claimant as a disabled person.

151. As to whether it had the requisite effect, even if we were to give the Claimant the benefit of the doubt and conclude that she did perceive it as violating her dignity or creating the requisite environment – and we can accept

that it was a more difficult comment for her to hear than that made by Ms Harris, perhaps somewhat exacerbated by Ms Unwin's somewhat abrupt manner – this was very clearly a one-off comment, made innocently and in a private meeting, and specifically in the context of a discussion with the Claimant about a transfer to Unit B to assist her with her condition. Ms Hale, who is a very senior person in the business, found nothing untoward in the exchange and it was followed by a discussion about the Claimant's health and safety. The Claimant invited us to draw an inference in her favour because Ms Unwin had found she had a case to answer which led to a disciplinary warning. We were satisfied by the Respondent's explanation of that matter and we also noted that Ms Unwin can be said to have been supportive in saying that the Claimant may not have understood what was required of her in reporting her absence when she failed to do so on 4 October. Accordingly, we did not draw any adverse inference from historic events.

152. Again therefore, any effect on the Claimant would reasonably have been transitory; we were not satisfied the comment would reasonably have had the effect required by the statute.

153. That was our conclusion even when both matters were taken together. We have to heed the warning in the case law not to encourage a workplace culture where operational matters cannot be openly discussed or where an unfortunate phrase leads to legal liability. This complaint also failed.

Other matters

154. The question of time limits was not relevant in view of the fact that all of the complaints failed, but briefly we would have found that it was just and equitable to extend time so as to permit the Claimant to proceed with all of them. The delay in presenting them was relatively short, her explanation that she was awaiting the outcome of her grievance was not without merit, as the case law shows even the complete absence of a reason is not determinative of this question, the Claimant was unaware of the time limits (there was no challenge to that part of her evidence), the Respondent could not identify any prejudice in its conduct of the case arising from the delay, whilst of course the prejudice for the Claimant was significant.

155. We did not need to consider whether the Respondent's conduct of the Claimant's grievance was in breach of the ACAS Code or whether the Claimant would have been dismissed in any event, how likely that was, and when it would have taken place.

156. Finally, we record that we found all of the Respondent's witnesses to be courteous in their approach to the case and it was clear that all of them took the Hearing very seriously. Mr Weiss presented the Respondent's case very carefully, kindly and ably. And the Claimant herself was also courteous in her exchanges with the Tribunal at all times. Whilst her complaints failed, she had clearly worked very hard in preparing her case and presented it both consistently and with great determination.

Employment Judge Faulkner

15 November 2021

Note

All judgments and written reasons for the judgments (if provided) are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.