Case Numbers: 3201323/2018, 3201324/2018, 3201353/2018
3201387/2018, 3201933/2018, 3201400/2018

EMPLOYMENT TRIBUNALS

Claimant:	**Ms L. Morris**
Respondent:	**London Borough of Hackney**
Heard at:	**East London Hearing Centre**
On:	**21-24 September 2021,** **23-25 November 2021; and** **26 and 29 November 2021 (in chambers)**
Before:	**Employment Judge Massarella**
Members:	**Mrs B. Saund** **Mr J. Webb**

Representation

Claimant:	In person
Respondent:	Ms C. MacLaren (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **by consent, and pursuant to Rule 34, the London Borough of Hackney is substituted as the sole Respondent in all six cases; the individual named Respondents are removed from the proceedings, the London Borough of Hackney having accepted vicarious liability in respect of any unlawful acts by them;**

2. **the Claimant was at all material times a disabled person within the meaning of s.6 Equality Act 2010 ('EqA');**

3. **the following claims were presented out of time and it is not just and equitable to extend time; accordingly, the Tribunal lacks jurisdiction in respect of them and they are dismissed:**

    3.1. **Issues B1-3 (failure to make reasonable adjustments, s.20 EqA);**

    3.2. **Issues C1, C2, C3, C4, C5 (harassment related to disability, s.26 EqA);**

    3.3. **Issues D1 and D2 (direct disability discrimination, s.13 EqA);**

3.4. Issues E1, E2, E3, E4, E5 and E6 (discrimination arising from disability, s.15 EqA);

3.5. Issues F4, F5, F6, F7 and F8 (victimisation, s.27 EqA);

4. the Claimant's remaining claims of harassment related to disability, discrimination because of something arising in consequence of disability, direct disability discrimination and victimisation are not well-founded and are dismissed;

5. the Claimant's claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Procedural history

1. The Respondent dismissed the Claimant, with pay in lieu of notice, on 21 May 2018, giving capability (ill-health) as the reason for dismissal. Between 27 June 2018 and 2 July 2018, the Claimant lodged five ET1s against Hackney Learning Trust and individual managers. The Claimant lodged a sixth ET1 on 31 August 2018. She went through three separate ACAS conciliation periods: two between 3 and 14 June 2018, in which Ms Fayemi and Ms Weeks were named as the Respondents; the third between 10 May and 10 June 2018, in which the Respondent was named as Comberton Children's Centre.

2. Because of the multiplicity of claims, at a preliminary hearing (PH) on 1 October 2018, EJ Prichard listed the case for a two-day PH to consider striking out, or making deposit orders in respect of, some of the claims.

3. At the PH on 14 and 15 February 2019, EJ Barrowclough struck out some of the Claimant's claims because they had no reasonable prospects of success. He gave directions for a trial commencing on 11 June 2019.

4. The disability relied on is neuralgia/nervous hypersensitivity. Disability was not conceded. At a PH on 29 April 2019 EJ Gilbert permitted the Respondent to instruct an expert on the issue of disability and set a timetable for the preparation of a report. In the event, the Respondent did not instruct an expert.

5. The final hearing on 11 June 2019 did not proceed because EJ Burgher considered that the issues had not been properly clarified and a fair trial could not take place. The final hearing was relisted for April 2020. The Judge also listed a PH on 9 August 2019 to consider the Respondent's further strike-out/deposit order applications. At that hearing, EJ Hallen declined to make such orders; he ordered that time points should be determined at the final hearing.

6. At a PH on 26 November 2019, EJ Burgher stayed a seventh ET1 presented by the Claimant, under Case No. 3202068/2019 (which had been presented on 15 August 2019), until after the promulgation of the judgment in these cases.

7. The April 2020 final hearing was postponed because of the Covid-19 pandemic. EJ Russell further clarified the issues at a telephone PH on 7 April 2020, which would have been the first day of the trial. She relisted the case for seven days, starting on 15 September 2021.

The full merits hearing

8. At the beginning of the final hearing both parties confirmed that it had previously been agreed that the named Respondents should be removed as parties to the proceedings (the Respondent having accepted that it would be liable for any acts of unlawful discrimination found to have been done by them). However, that decision appeared not been the subject of a formal order. Accordingly, and by consent, the London Borough of Hackney is substituted as the sole Respondent in this judgment.

9. Owing to a lack of judicial resources, this hearing, which was originally listed for seven days, was reduced to four. The Tribunal informed parties on the first day that its focus would be on completing evidence and submissions in that time, which seemed feasible, although it was acknowledged that there was a risk the hearing might go part-heard. The Tribunal took the view that this was preferable to adjourning the case altogether which would probably have led to a further delay of over a year.

10. The Tribunal checked through the list of issues with the parties and produced a final consolidated version, incorporating into EJ Burgher's list the clarifications made by EJ Russell. The Tribunal distributed copies to the parties and the list was used by both parties as a reference point during cross-examination.

11. We had a bundle of 1,250 pages in four volumes. At the beginning of the hearing the Claimant referred to an order of EJ Wilkinson, stating that any 'issues of admissibility' would be dealt with at the beginning of the hearing. The Tribunal asked if the Claimant had documents which she wished to add to the bundle; she said that she did. As there were only around 50 pages, the Tribunal arranged for them to be copied and added to the bundle, on the understanding that questions of relevance would be assessed when we were taken to them. The Claimant did not mention an amendment application.

12. At the end of the third day, the Claimant drew to the Tribunal's attention to four documents, which she had sent to the Tribunal between July and August 2021:

    12.1. an amendment application, running to 46 pages, and dated 10 July 2021;

    12.2. a schedule of loss, running to 27 pages, dated 2 September 2021, purporting to add additional claims, including age discrimination;

    12.3. a 2-page letter of 6 September 2021 'in support of the amendment application'; and

    12.4. a 3-page letter of 16 September 2021, referring to alleged GDPR breaches.

13. None of these applications had been dealt with in writing at the time, nor had an order been made that they should be dealt with at a hearing (in accordance with

Rule 30). Neither party had told the Tribunal at the beginning of the hearing that there were outstanding amendment applications, although they were both aware of these documents, which had been included in the bundle. The Claimant explained that this was what she meant when she spoke of 'admissibility'. Ms MacLaren (Counsel for the Respondent) explained that it was not clear to the Respondent that the Claimant was pursuing an application to amend.

14. The Tribunal took the view that the applications must be dealt with before the case proceeded any further. We heard submissions on the fourth day of the hearing and reserved our decision, which was sent to the parties on 29 September 2021. For the reasons given in that order, the application was refused.

15. By the end of the initial four-day listing, we had heard evidence from the Claimant and from only one of the Respondent's witnesses. Ms MacLaren's cross-examination of the Claimant took longer than she had anticipated (just over a day and a half), in part because the Claimant frequently gave long answers, which did not always address the question.

16. We listed a further five days in November, three for evidence and submissions and two for deliberation. The Claimant returned to the resumed hearing well-prepared, with written questions for all witnesses, linked to the issues in the agreed list. She cross-examined the Respondent's witnesses for just over two and a half days in total.

17. We heard evidence from:

    17.1. the Claimant;

    17.2. Ms Janet Fayemi, Head of Centre, Comberton Children's Centre ('the Centre');

    17.3. Ms Jean Kelly, Extended Services Manager/Deputy Head and Designated Safeguarding Lead;

    17.4. Ms Nicola Weeks, Nursery Education Officer Room Leader;

    17.5. Ms Marian Lavelle, Head of Section with responsibility for school admissions, pupil benefits and the planning of school places;

    17.6. Mr Timothy Wooldridge, Early Years Strategy Manager; and

    17.7. Ms Donna Thomas, Acting Head of Early Years and Early Help.

18. We also read two statements from witnesses who did not attend the hearing by reason of ill-health:

    18.1. Ms Jeannie Terry, Head of Linden Children's Centre; and

    18.2. Ms Yvonne Turner, HR Business Partner.

19. Both the Claimant and Ms MacLaren provided the Tribunal with written closing submissions. By agreement, each took a further 30 minutes to make oral submissions. We do not summarise those submissions in what is already a long judgment; reference is made to them, where relevant, below.

Findings of fact

Policies

20. The Respondent's Managing Sickness Absence policy contains a procedure for dealing with long-term absence.

21. Long-term absence is defined as: absence for a period exceeding four weeks and where there is no expected return to work; where the actual and anticipated future health of the employee makes a return to their current role very unlikely; and recurrent long-term absence with an underlying medical condition.

22. There is an informal stage, at which the line manager explores the reason for the absence with the employee. Following those discussions, the manager may decide that the level of absence gives cause for concern, in which case the issue is addressed formally. This consists of three stages.

23. Stage 1 is a review, which is usually conducted by the line manager, to establish why absence levels are giving cause for concern, to identify underlying reasons for the absence, and for the employee to present evidence as to why their absence is so high. There are two possible outcomes: the manager is satisfied with the employee's response and no further action is necessary; or the employee is warned that the absence level is unacceptable and, unless improvements are achieved, the next stage of the process will be engaged.

24. Stage 2 is a formal attendance review, which takes place when concerns persist and a satisfactory level of attendance has not been achieved. This is a comprehensive review of the employee's attendance record. There are three possible outcomes: no further action; a warning that attendance must improve by a specific date; and dismissal. The employee has a right of appeal (stage 3).

The Claimant's employment

25. The Claimant commenced employment as a nursery education officer (NEO) in October 2005. NEOs provide care and support for children. She moved to the Centre in 2007. Initially, her line manager was Ms Ann Hercules.

26. Staff worked on a rotational shift. The shifts were: 07.30 to 15.30, 08.00-16.00, 08.30-16.30, 09.00-17.00, 09.30-17.30 and 10.00-18.00.

27. There were three rooms in the Centre: the preschool room, the toddler room and the baby room. The children in the baby room were up to two years old; in the toddler room up to four years old; in the preschool room the children were toilet-trained and not in nappies, consequently there was less manual handling involved. The toddler and baby rooms were around the same size. All three rooms had access to the garden. The children in the preschool room tended to be outdoors more than the children in the other rooms. Both the toddler and the baby rooms had changing stations with retractable steps, so that children who were mobile could climb onto the table without help from staff. Each room had its own room leader, who line managed the other NEOs, who were sometimes a combination of permanent employees and agency workers.

28. On 21 December 2015, the Claimant began a period of long-term sickness absence after contracting chickenpox. She believes that she caught chickenpox

at the Centre. The Respondent acknowledges that there was an outbreak of chickenpox around this time but does not accept that the link is proven. The Claimant was referred to OH but did not consent to the release of the report. The letter to Ms Fayemi confirming this makes brief reference to 'some more complex symptoms which I understand have been attributed to the chickenpox virus'.

29. The Claimant was absent for around six months; she began a phased return to work on 5 June 2016. She was working in the toddler room, as she had been before her absence.

30. In July 2016 the Claimant's line manager, Ms Hercules, retired.

31. An OH report was prepared by Dr Claire Piper (Consultant Occupational Physician) on 9 August 2016. She wrote:

> '[The Claimant] developed a rash which I understand was diagnosed as chickenpox in December of last year. She has previously suffered with chickenpox and has been unfortunate in that it is extremely rare for an individual to have a second episode. Unfortunately, the episode has also been associated with complications. The rash has persisted and while it was initially more widespread, remains in areas of her body, particularly the back of her right leg and ankle area. She is also suffering with significant problems with pain. She has regular and constant episodes of shooting pain and also joint aches. She has a right-sided limp and this appears to be due to hypersensitivity around the ankle area.
>
> Due to her persisting symptoms she was reviewed by a dermatologist to confirm her diagnosis. She received treatment in the form of a nerve type painkiller. The symptoms associated with hypersensitivity and shooting pains are likely due to what is described as neuropathic pain. This means that the pain is nerve related and is associated with the chickenpox virus.
>
> […]
>
> She is suffering with fatigue and reduced energy levels which she estimates are around 50% of usual.'

32. Dr Piper recommended that:

> 'from a medical perspective I do not consider that she is fit enough to manage the full duties associated with her role. The key issue is the physical tasks and at the moment she would need to be restricted to light and sedentary type duties. It is a management decision as to whether she could be accommodated at work with these adjustments. She is struggling with frequent periods of manual handling through her shift. I would suggest that you meet with her to consider if an adjustment to lighter and sedentary duties could be accommodated. The other option would be to consider if any alternative roles are available on a temporary basis.'

Dr Piper also advised that a stress risk assessment be undertaken, which was not done at that stage.

33. On 19 September 2016, the Claimant began another period of long-term sickness absence by reason of pains in her leg; it lasted for 50 days.

34. On 3 October 2016, a stage 1 attendance management meeting took place, at which Ms Fayemi proposed a move to the pre-school room. The Claimant thought this unsuitable because she would have to be outdoors more often, and the cold affected her pain. She asked to be redeployed to an administrative role, because she no longer felt fit enough to perform the duties of an NEO. However, there was no such administrative role available.

35. On the same day Claimant complained to HR about the proposal and again asked for other duties, such as accounts, business administration or finance. In that letter she made express reference to the Equality Act 2010 and used the language of the statute (PCP, physical feature, auxiliary aid, substantive disadvantage, reasonable adjustments etc.)

36. The Claimant returned to work on 7 November 2016.

37. An OH report was prepared on 13 December 2016. It referred to advice from the Claimant's GP, Dr Ali-Zubair, who wrote:

> 'She suffers with neuralgia which is likely to be post-herpetic in its aetiology affecting the right leg. In addition to the obvious pain this causes, there is also significant lethargy. This used to disturb her sleep significantly which has subsided but tiredness in the morning remains an issue. There is an associated mild leucopenia which I am investigating. Symptoms are felt to be worse in cold weather… Amitriptyline […] reduced the neuralgia but causes tiredness … This condition is likely to persist in the coming months and the aim will be symptomatic control. She would feel more at risk if outdoors or if left without any medication.'

38. In the OH report itself, Dr Piper wrote:

> 'you will be aware that I recommended that she would require temporary adjustments and restrictions, and I did not consider her fit to manage the full duties associated with her role. I do not have up-to-date information regarding her current symptoms or functional ability. If for example, she has returned to work on adjusted and restricted duties, you may wish to await further progress before seeking further input from the occupational health department. If she has remained absent from work and feels unable to work with the adjustments and restrictions that I previously recommended, I would advise that a further IMA appointment is arranged in my clinic.'

39. Dr Piper then recorded that the Claimant's symptoms commenced in December of the previous year and 'as such, she is approaching the 12-month period and may be deemed to be covered by the disability provisions of the Equality Act 2010 going forward.'

<u>The move to the baby room (Issues B1-3 and E1)</u>

40. On 22 February 2017, a staff meeting took place, at which Ms Fayemi announced changes to the rooms to which staff were allocated, to take effect six weeks later, on 3 April 2017. It was the usual practice at the Centre, of which

staff were aware, of rotating staff after an OFSTED inspection. An inspection had taken place in January 2017. This was in part to ensure that staff did not stagnate, but continued to develop their skills working with children across all age groups. The majority, but not all, staff were moved as part of this exercise. The Claimant was to move from the toddler room to the baby room. Her line manager there would be Ms Nicola Weeks.

The grievance of 13 March 2017 (Issue F1)

41. On 13 March 2017, before the move took effect, the Claimant submitted a grievance about the decision to move her to the baby room. The grievance contains complaints of disability discrimination. The Claimant complained that the baby room was unsuitable to her because of her disability; that no risk assessment had been conducted; and that medical advice had been disregarded. Again, she made extensive reference in the grievance to the provisions of the Equality Act 2010, which are broadly correct summaries of the law. Asked where she had got this information, the Claimant told the Tribunal that she had a 'leaflet' at home; she said that she would bring it in (she did not). We think it more likely that the Claimant had had some form of advice or assistance by this point.

42. The grievance was assigned to Ms Jeannie Terry to investigate.

43. On 17 March 2017, a risk assessment of the baby room took place. It was conducted by Mr R. Aherne. He carried the assessment out at lunchtime, when the children were asleep. The Claimant said that this did not give him a true picture of the operation of the room. She was also unhappy that he did not speak to her about the assessment. We agree with that criticism: it is unusual for a risk assessment to be conducted without direct input from the individual concerned.

44. The assessor considered three categories of potential hazard: lifting babies for changing; comforting babies; and bending and moving from floor level to an upright position. He suggested control measures to minimise all three hazards and assessed the risk in each case as low.

45. Ms Terry met the Claimant on 24 March 2017, when the Claimant reiterated the difficulties which she considered would be caused by the conditions in the baby room.

The discussion of 30 March 2017

46. On 30 March 2017, Ms Fayemi had a discussion with the Claimant about two incidents raised by a colleague, Ms Afsun Hakim. She later recorded the outcome of that discussion in a letter dated 7 June 2017 (see below, paras 62-64).

47. The first incident concerned the Claimant allowing a group of children to use the toilets while Ms Hakim was helping another group of children, who were washing their hands. Ms Hakim thought that the Claimant's children should wait until her children had left the area. Ms Fayemi agreed with the Claimant that was unreasonable. However, from the accounts of both of them, she concluded that the way in which the Claimant had spoken to Ms Hakim was inappropriate.

48. The second incident involved a child who had accidentally spilled a large quantity of milk on the floor. Ms Hakim instructed the child to clean it up. The Claimant was worried about the child slipping and intervened. Again, Ms Fayemi thought that the Claimant was right to intervene, but concluded that the way in which she spoke to Ms Hakim was inappropriate.

The outcome of the grievance

49. On 11 April 2017, Ms Terry sent the Claimant her grievance outcome report. The grievance was not upheld. Ms Terry decided that the Claimant should move to the baby room, but with some adjustments, which should be reviewed on a monthly basis: she should only be assigned to children in the older age bracket, who were less in need of support, although she would still be required to change and lift all the children from time to time; a cushion should be provided for the Claimant to use when sitting; an adult-sized chair should be provided; the Claimant should seek support from her peers, if she was feeling unwell; and consideration should be given to the Claimant doing late shifts where possible.

50. Ms Fayemi implemented the adjustments. In fact, she went further than the recommendations in one respect, in that she exempted the Claimant from lifting children altogether, and colleagues were alerted to the need to help her as and when required. Ms Fayemi agreed that the Claimant should only be allocated later shifts (9.30 to 17.30 and 10.00 to 18.00). In the light of these steps we think the Claimant's characterisation of Ms Fayemi (in her written closing submissions) as being unwilling to offer support was not justified.

51. Ms Terry also recommended some steps to ensure that the position was kept under review: that a three-way meeting take place between the Claimant, Ms Fayemi, and Ms Weeks, who would be the Claimant's line manager in the baby room; that Ms Weeks should report back formally to Ms Fayemi about the Claimant's well-being, on a monthly basis or if a difficulty arose; and that the Claimant should be referred back to OH after she had received the results of her neurology appointment, and a follow-up meeting arranged between the Claimant, Ms Fayemi and Ms Weeks. These steps were not taken, which was highly regrettable; if they had been, it may be that problems and concerns might have been picked up earlier.

52. In her outcome letter Ms Terry also recorded that Ms Fayemi had said that '[the Claimant's] prolonged absences have caused resentment and upset as staff have taken on additional work'.

53. The Claimant alleged that, in practice, colleagues were not consistent in providing help. We find, on the balance of probabilities, that they were. On 9 May 2017 a supervision meeting took place between the Claimant and Ms Weeks. Although the notes are not signed, we are satisfied that they are an accurate record of the discussion. They record: 'Lorraine said she is happy with the support she has been given in the room'. Ms Weeks and Ms Fayemi both confirmed that the Claimant's colleagues did help her. We accept their evidence.

Janet Fayemi's discussion with the Claimant on 19 May 2017 (Issues C1, D1, E2 and F4)

54. On 17 May 2017 Ms Janine O'Brien (Senior NEO) emailed Ms Fayemi to tell her that one of the Claimant's colleagues, Ms Naomi O'Garro, had reported an

incident, in which a baby had been left to cry for a lengthy period. Ms O'Garro spoke to an agency worker who was in the baby room, who said that the Claimant had told her not to pick the child up. Ms O'Brien expressed her concern about this. To be clear: the concern about the crying baby was not about the Claimant not picking the baby up, but about her instructing her colleague not to do so; the agency worker was not disciplined because she merely followed an instruction given to her by the Claimant.

55. On 18 May 2017, a parent wrote to Ms Fayemi to say that she had been excited by seeing her child in a costume and tried to take a photograph of him. This was not permitted under the Centre's rules; there were signs on the walls saying so. The parent wrote:

> 'I didn't have any other children in the photo and by the time I took the photo, Lorraine startled me, speaking to me loudly to put my phone away. I can appreciate rules and regulations explained to me quietly and in a calm manner, but this didn't feel comfortable.'

56. Ms Fayemi met the Claimant on 19 May 2017 to discuss the two incidents. Ms Fayemi later recorded their discussion in a letter sent to the Claimant on 8 June 2017 (see below).

57. As for the incident with the crying baby, before the Tribunal the Claimant denied having told the agency worker not to pick the child up (in other words she appeared to recall the incident). However, at the time in 2017, Ms Fayemi's letter recorded that the Claimant said that she 'could remember a child crying but not the actual details or the child that was crying'. Ms Fayemi reminded the Claimant that she had a duty to make sure the children that were in distress should be met with loving, attentive and responsive adults who were able to meet their needs; it was not acceptable for a child to be ignored and left to cry for a long time.

58. Ms Fayemi had also, separately, dealt with an incident concerning two other members of staff who, it was said, had left a child cry for a period of time (the Claimant relied on them as comparators). She looked into the incident and concluded that one member of staff had been carrying another child in need of comfort, while the other was trying to console the child in question, who did not want to be picked up. She was satisfied with their explanations.

59. As for the parent's complaint, Ms Fayemi's letter recorded the Claimant explaining that she had previously spoken to the parent about not using her mobile phone and that:

> 'this might have prompted the manner in which you had spoken to. However, you did accept that there was no intention of your part because offence. It was agreed that I would feedback to the parent and explain that there was no intent on your part to upset and that you would also approach the parent to offer your sincere apologies.'

60. The Tribunal is satisfied that both complaints had to be investigated by the Respondent, and that Ms Fayemi's letter accurately records the discussion she had with the Claimant at the time, which Ms Fayemi conducted in a professional manner.

The incident of 5 June 2017 (Issues C2, E3 and F5)

61. On 5 June 2017, Ms Weeks had a discussion with the Claimant about the way in which she had reprimanded a child; the child had put another child at risk of having their fingers caught in a door. Ms Weeks was on the other side of the room. She heard the Claimant reacting strongly to the misbehaviour and speaking to the child in a harsh tone of voice. The Claimant put the child in a chair for a timeout. Ms Weeks crossed the room and intervened, telling the Claimant that she thought she had chastised the child inappropriately. The Claimant reacted angrily and stormed out of the room to speak to another manager.

Ms Fayemi's letters of 7 June 2017 (Issues C3, E4, F6) to confirm the content of the discussion of 30 March 2017; and 8 June 2017 (C4, D2, E5, F7) to confirm the content of the discussion of 19 May 2017

62. On 7 June 2017, Ms Fayemi wrote to the Claimant to confirm the discussion she had had with the Claimant on 30 March 2017 about the incidents raised by Ms Hakim (paras 46-48). The letter was not a disciplinary sanction, it was a standard-setting letter, i.e. a reminder of what was expected of staff members.

63. The letter recorded that the Claimant had reflected on the incidents and acknowledged that she could have handled both incidents better. She also understood how her comments might have upset Ms Hakim. Ms Fayemi reminded the Claimant of the need to behave professionally at all times, showing respect to other staff, children, professionals and service-users. She enclosed a copy of the Respondent's code of conduct.

64. Ms Fayemi also sent a standard-setting letter to Ms Hakim (who was not disabled).

65. The next day, 8 June 2017, Ms Fayemi sent the Claimant a further standard-setting letter, confirming the content of their discussion on 19 May 2017 about the parent's complaint and the incident with the crying baby (see above, para 54 onwards).

66. Ms Fayemi explained to the Tribunal that she had started recording her discussions with staff in letters more frequently around this time because HR had identified that the lack of a written record of the way she handled incidents was a weakness in her management style. She explained that she also write similar letters to members of staff other than the Claimant. We accept her evidence. We are satisfied that there was nothing inappropriate in either of the letters she wrote to the Claimant: they are clear and courteous.

Ms Fayemi's letter about timekeeping on 18 October 2017 (Issues C5, E6 and F8)

67. Timekeeping was a general problem in the Centre. Ms Fayemi raised it with all staff on three occasions, on two of which the Claimant was present. Ms Fayemi also spoke to the Claimant individually (and informally) on at least one occasion.

68. By this point, Ms Fayemi had agreed that the Claimant would only work late shifts, to assist her with managing tiredness, which the Claimant had said was worse early in the morning. She also said that she sometimes struggled in the mornings because of pain in her joints.

69. Notwithstanding this, the Claimant continued to be late for work: she was late on 18 September, and 9 and 10 October 2017. Notes were kept of these occasions, which record her saying that two of them were because of tiredness, one because of a personal emergency.

70. On 18 October 2017, Ms Fayemi wrote to the Claimant about her lateness. She reminded her that she had adjusted her shift pattern to accommodate her condition. She observed that the Claimant had been late on several occasions and, when she did arrive work, did not always go straight to her room to begin work. She pointed out that this was having an adverse effect on her ability to maintain the right child/adult ratio in the room. She reminded the Claimant that she should telephone if she was running late and said that she would expect to see an improvement in her timekeeping.

The grievance letters of 19 and 31 October 2017 (Issue F2)

71. On 19 October 2017, the Claimant made a written complaint, in which she alleged that, by raising her timekeeping with her, Ms Fayemi was harassing her. She also complained about Ms Weeks, stating that she had not bothered to investigate why the Claimant was late. She characterised this as 'incompetence' and an 'inability to manage the room effectively'.

72. On 31 October 2017, the Claimant raised a further complaint of bullying and harassment against Ms Fayemi and Ms Weeks. In this second letter she complained about the fact that her managers had raised with her the issues set out above (the incident with the crying baby, the parent complaint, timekeeping etc). She characterised this as 'malicious victimisation by my manager'.

73. We observe that, in this same letter, the Claimant confirmed that the three key children assigned to her were mobile, and that staff had been informed that she should not be required to lift young/immobile babies. However, she asserted that this had become a source of resentment among her colleagues.

74. On 6 November 2017 the Claimant was absent from work because of a personal emergency.

Further complaints about the Claimant

75. On 8 November 2017, a parent, to whom we will refer as 'Parent S', complained to Ms Fayemi about the Claimant's behaviour towards her. Ms Fayemi set up a three-way meeting that day between her, the Claimant and Parent S to seek to resolve the issue informally.

76. On 9 November 2017 Parent S sent a two-page letter, in which she formally complained about the Claimant's manner towards her, which she described as unapproachable, unpleasant, defensive and unwelcoming. She gave examples, one of which was that she had asked the Claimant to make sure that her child always had her bottle of milk, but that the Claimant had questioned/challenged her about this on several occasions. She also complained about the way the Claimant had conducted herself at the meeting the previous day, describing her as aggressive and confrontational. The letter ended as follows:

> 'I would also appreciate that the matters above are investigated urgently and I would like a written conclusion of the investigation, if not, I will have no other alternative but to take my complaint further and contact Ofsted'.

The allegation that the Respondent created and falsified evidence against the Claimant (Issue F12)

77. On 9 November 2017, a member of staff, Ms Samantha McCabe complained about comments made by the Claimant which she considered racially inappropriate. She reported that the Claimant, who was preparing a display for Black history month, had said that she was having difficulty because she had realised that 'there are no Black children in the Centre'. According to Ms McCabe, the Claimant found a Black child and took her out of the room with her, but ignored a mixed-race child who was also in the room.

78. On 13 and 14 November 2017, the Claimant took two days' emergency leave because her brother was in hospital.

79. Around this time, a number of members of staff raised concerns, and made statements, about the Claimant's behaviour. A number of individuals were interviewed in the course of the grievance and disciplinary investigations. The Claimant herself acknowledged that she may not have been her normal self around this time and attributed it to the fact that her brother was seriously ill and she was preoccupied with that. There is ample evidence in the contemporaneous documents that the atmosphere in the baby room was negative, that the relationship between the Claimant and Ms Weeks was strained, and that this was having an effect on others.

The invitation to an investigatory meeting (Issues C6, E7 and F9)

80. On 22 November 2017, Ms Jean Kelly, a senior officer from another children's centre invited the Claimant to a disciplinary investigatory meeting on 5 December 2017 to discuss the contents of Parent S's formal complaint. The Claimant alleges that the meeting was instigated by Ms Fayemi and Ms Weeks. It was not: Ms Terry asked Ms Kelly to investigate, because she (Ms Terry) was already dealing with the Claimant's grievance and she felt it was not appropriate for her to deal with this matter at the same time.

81. On 4 December 2017, the Claimant began a period of sickness absence for stress at work. She did not return to work before her dismissal, although she did attend the investigatory meeting the following day.

82. Ms Kelly considered that the Claimant's response at the meeting to the allegation was at times, defensive, at times challenging; she avoided answering questions, so that Ms Kelly had to repeat questions to secure an answer, before moving onto the next matter. The Claimant did not acknowledge any blame on her part in relation to the matters raised by Parent S. The minutes of the meeting were sent to the Claimant, but she declined to sign them.

83. Ms Kelly considered that further investigation was required. She conducted interviews with Ms Fayemi and Ms Weeks later the same day. In the course of these interviews, and prompted by Ms Kelly's questions, both Ms Weeks and Ms Fayemi raised some of the issues which they had been dealing with previously in their management of the Claimant, for example the incident with

Ms Hakim, the incident of the child being chastised, the issue of timekeeping and so forth. Ms Fayemi identified a pattern in the Claimant's behaviour, which was that it was often the manner in which she spoke to people, rather than what she said, which caused upset. She also observed that she had been told, by Ms Weeks, that the atmosphere in the room was unpleasant, and that the Claimant was ignoring Ms Weeks, which was upsetting her greatly.

84. As a result of the information she had received, Ms Kelly conducted further investigator interviews: on 19 December 2017, she spoke to Ms N. Jones and Ms N. O'Garro. Ms Jones said that she had observed the Claimant being 'distant towards the room leader [Ms Weeks], sometimes she may not respond when the room leader is talking or show acknowledgement'. Both Ms Weeks and Ms O'Garro observed that the staff knew that the Claimant should not be lifting children, and should ask for assistance, but she had recently been picking up the children, without asking for assistance. Ms O'Garro found this confusing; Ms Weeks said that she assumed that the Claimant had good days and bad days.

85. Ms Kelly observed in her evidence at Tribunal that everyone she spoke to 'said more or less the same thing, but in different ways, which led me to believe they were telling the truth'.

86. On 2 January 2018 the Claimant wrote to Ms Kelly saying that she had not had a fair opportunity to discuss her relationship with parents. She also queried why the HR person at the interview, Ms Thompson, had asked the Claimant about her relationship with her colleagues, which the Claimant argued fell outside the remit of Ms Kelly's investigation. Ms Kelly invited her to a further meeting on 23 January 2018. The Claimant declined to attend and accused Ms Kelly of harassing her while on sick leave.

87. In the meantime, Ms Kelly invited Ms Terry to attend a meeting with her as part of her process, in the course of which Ms Terry gave her own view about the situation. By this time, both Ms Kelly and Ms Terry had interviewed many of the same people. At this interview Ms Terry effectively provided Ms Kelly with a summary of what she would be saying in the grievance outcome which she sent to the Claimant five days later. She told Ms Kelly that she regarded the letters which Ms Fayemi had sent to the Claimant as appropriate; moreover, she was satisfied that Ms Fayemi was not singling the Claimant out but had also written standard-setting letters to other employees. She stated that she had found a number of concerns about the Claimant's behaviour and practice which caused her concern. She also observed that she was worried about the Claimant's emotional well-being and would be recommending that she be referred back to OH as one of the outcomes of her investigation. The substance of the interview was properly recorded in a formal interview minute, and so was transparent.

88. A formal response to Parent S's complaint was sent on 20 December 2017, confirming that a formal disciplinary investigation had been started, and that a new key worker had been allocated to her child.

<u>Ms Fayemi's correspondence with the Claimant while the latter was on sick leave (Issues C7, E8, F10); the application of the sickness absence procedure (Issue E9)</u>

89. In the meantime, a separate process began of managing the Claimant's absence from work. On 13 December 2017 Ms Fayemi wrote to the Claimant,

inviting her to a stage 1 absence meeting on 21 December 2017. The Claimant replied on 18 December 2017, saying that she would not attend. She wrote that she believed it was improper for her to attend a meeting with Ms Fayemi, who was the subject of an outstanding grievance she had brought.

90. The meeting on 20 December 2017 took place, but the Claimant did not attend.

91. On 21 December 2017 Ms Fayemi wrote to the Claimant:

> 'In your absence we held a stage 1 meeting to discuss the best ways to support you back into work. Your sick note from your GP cites stress at work, and for this reason we would like to invite you to take part in a stress risk assessment, designed to allow you to discuss in depth the reasons you are experiencing stress at work. We would like to invite you to come to Comberton CC on 4th January at 10 a.m. for a pre-meeting to go through the forms you'll be completing and to explain the process, so you fully understand how the actual stress risk assessment will be done. This meeting can be held with either just yourself and Sharon, or include your line manager. The actual stress risk assessment will take place at Comberton CC on Monday 8th January at 10 a.m., and will be attended by yourself, your line manager and Sharon Brown from HR.'

92. The meeting on 4 January 2018 did not go ahead. On 15 January 2018 Ms Fayemi renewed the invitation in a letter set out in similar terms, inviting the Claimant to attend the stress risk assessment pre-meeting on 23 January 2018. The Claimant did not attend the reorganised meeting.

<u>The second grievance outcome (Issues F16 and F17)</u>

93. In her outcome letter dated 21 January 2018, Ms Terry did not uphold the Claimant's complaints. The letter was accompanied by a detailed report. She concluded that the correspondence about lateness was appropriate, in the light of the warnings which had been given and the adjustments which had been made; and she did not conclude that the Claimant had been treated differently from other staff, or subjected to bullying or harassment.

94. From her interviews with the Claimant's colleagues and managers, she identified concerns with the Claimant's own behaviour, in particular her conduct towards Ms Weeks, and recommended these be dealt with under the disciplinary procedure. In addition, she wrote as follows:

> 'There have been at least three letters to LM outlining her behaviour and why it's not acceptable. She hasn't worked with her managers to rectify this – seemingly ignoring and blaming them.
>
> LM's complaints have all been investigated thoroughly which [has] taken prolonged periods of time to conclude. The number of her complaints [is] a response to LM being managed much more effectively. This is the second complaint she has taken at this year; both of which are not founded. I am mindful of the grievance policy which states that "employees who abuse the grievance process by making complaints (either singular or multiple) that are false and not made in good faith will be liable to disciplinary action."

> JF feels that LM's behaviour towards NW is a response to being made to work in baby room. JF also reports that LM has taken out this grievance as a response to attempts to manage her behaviour. As the Investigating Officer, based on my findings, I agree with this statement.
>
> I find no evidence to support LM's claim of bullying and harassment and suggest that her behaviour towards her management could be deemed as such.'

In the closing summary of the concerns which Ms Terry considered should be investigated, the final bullet point was:

> 'The number [of] complaints (2) LM has submitted since March 2017.'

95. Ms Terry also had concerns about the Claimant's wellbeing and referred her to OH (as she had told Ms Kelly she would). She invited the Claimant to a meeting on 1 February 2018 to discuss her decision. The Claimant did not attend, but submitted the letter referred to in the next paragraph.

<u>The appeal against Ms Terry's grievance outcome (Issue F15)</u>

96. On 1 February 2018 the Claimant appealed against the dismissal of her grievance. Among other things, she alleged that there had been 'overwhelming harassment and bullying' occurring at the Centre, and that other staff were too frightened to log a complaint for fear of losing their jobs. She complained that she had previously asked for mediation between herself and her manager, but this had been overlooked. She alleged that Ms Terry had overlooked Ms Fayemi's shortcomings and contended that Ms Fayemi had 'wilfully harassed me the next day' after her emergency leave. She finished by stating that she was 'deeply distressed' and that she was unable to attend any meetings to discuss the outcome of the grievance.

<u>OH report in February/March 2018</u>

97. The Claimant attended an OH appointment on 22 February with Dr Helen De Coteau Grant, who produced a report with an amended date of 1 March 2018. The conclusion was that:

> 'in my clinical opinion, based on the information given at a consultation today, Ms Morris remains unfit to return to work at this time as stress symptoms persist and she is currently unable to function in her work environment. Ms Morris will be reviewed by her GP on 28/02/2018.'

98. In the recommendation section she recorded that the Claimant was likely to remain off sick for the next 4-6 weeks; that it was the Claimant's perception that the relational issues at work were the source of her ill-health (as to which she could not comment) but she recommended that management investigate those concerns to determine whether there were any actions that could be taken in addressing any substantial concerns of the Claimants; that management may wish to perform an individual stress risk assessment. She observed that, if Ms Morris's concerns were resolved, she could see no reason why she would not be able to give a good standard of reliable service and attendance in the future. Finally, she asked that, if the Claimant remained off sick for the next eight weeks, she be referred to OH for a review.

The disciplinary investigation report (Issue F13)

99. Ms Kelly completed her disciplinary investigation and sent her report to the Claimant on 12 March 2018; she invited the Claimant to a disciplinary hearing on 20 March 2018. As a result of her further interviews with the Claimant's colleagues and managers, the ambit of the disciplinary concerns had grown from the initial complaint lodged by Parent S. It was summarised in the disciplinary allegations, which were as follows:

> 'failing to foster and develop good relationships with parents to ensure that planning for their children is in partnership with them;
>
> behaving in an unprofessional, rude manner towards G's mother on 9 November 2017 bringing the trust into disrepute;
>
> failing to work with manager colleagues in a professional manner to provide appropriate support to colleagues whilst carrying out her role;
>
> failing to promote and maintain a culturally sensitive environment to ensure educational and development opportunities for children reflect the racial and cultural backgrounds;
>
> on two occasions LN's behaviour towards the children in LM's care amounted to neglect.'

100. These were plainly serious allegations, which could have led to the Claimant's dismissal. They were supported by a compendious report, which contained transcripts of interviews and other contemporaneous documents. It gave an overview of behavioural and other concerns which had arisen in relation to the Claimant over the previous month. They included the matters which had been referred to in the standard-setting letters by Ms Fayemi.

The disciplinary hearing on 20 March 2018 (Issues F11 and F18)

101. On 5 March 2018, Ms Yvonne Turner (HR Business Partner) invited the Claimant to two hearings on 12 March 2018, at which both the grievance appeal and the disciplinary matters would be dealt with by Ms Lavelle (Head of Section with responsibility for school admissions, pupil benefits and the planning of school places). Although it might be inappropriate in some contexts for both processes to be conducted by the same manager, we were satisfied that here, where the substance of the grievance appeal and the disciplinary process overlapped to such an extent, it made sense. In particular, it avoided the risk of two managers dealing with similar territory and arriving at contradictory conclusions. Ms Lavelle was a senior manager, who had had no previous contact with the Claimant. We are satisfied she was entirely independent.

102. The Claimant replied to Ms Turner the same day, saying that she would not be able to attend for health reasons and that 'continuous dialogue at this time is not improving my current state of health'. Ms Turner replied on 7 March 2018, stating that it was important to resolve the issues that had been raised and that the meetings were part of that process. She offered to reschedule the meetings to 20 March 2018 and asked the Claimant to let her know by 9 March 2018 whether she would be able to attend.

103. She had not heard back from the Claimant by 12 March 2018 and so wrote to her, stating that, if she was unable to attend the hearing, the meetings would go ahead in her absence. If she was not going to attend, she encouraged her to provide a written response (she attached written questions). The Claimant replied on 15 March 2018, stating that she could not attend because she was undergoing counselling. Ms Turner replied, stating that the meetings would go ahead in her absence. No written submissions had been received by 19 March 2018.

104. On 20 March 2018 at 10.26 a.m., the Claimant wrote to Ms Turner informing her that her daughter had been sent home from school because she was unwell and she would not be able to attend the meetings scheduled for that day. Ms Turner responded as follows:

> 'thanks for your email. I'm sorry to hear that your child is unwell. I do hope that your child recovers soon. It is unfortunate that you are unable to attend the meetings today. These are rescheduled meetings from 12 March 2018. In addition, questions were sent to you to provide a written response to your grievance appeal. I asked you to submit this by Monday 19 March. I have not received your written response. Regarding your disciplinary meeting, again you are given the opportunity to submit any documentation or evidence to support your case. I have not received any submission from you. As stated in my earlier email to you (dated Thursday, 15 March 2018 at 09.35) that the meetings will go ahead in your absence, as every effort has been made for you to either attend or provide written submissions. Outcome letters will be sent to you in line with the policies.'

105. At the hearings, the management case was presented by Ms Kelly. Ms Terry, Ms Fayemi and Ms Weeks attended as witnesses.

<u>The outcome of the two processes</u>

106. On 21 March 2018 Ms Lavelle wrote to the Claimant, dismissing the grievance appeal. In particular, she found that the Claimant had not asked for mediation with her manager in this context, although she had participated in mediation in the past.

107. The outcome of the disciplinary hearing was that the Claimant was given a final written warning, to remain on her file for two years.

108. Ms Lavelle told the Tribunal that she decided not to dismiss the Claimant because she had some concerns about a lack of robustness in the way that she had been managed, including the lack of regular appraisals/PDRs. She was satisfied that the events alleged happened as described. She did not consider that management had pursued the Claimant because of some other agenda.

109. The decision was confirmed in a letter dated 23 March 2018.

<u>The stage 1 absence meeting</u>

110. On 23 March 2018, Ms Biddy Hutton conducted a stage 1 absence meeting, which the Claimant attended unrepresented.

111. Ms Hutton summarised the content of meeting in the letter sent to the Claimant on 27 March 2018. The Claimant told her that over the previous six months she had found it increasingly difficult to work with her current line manager and felt that the relationship had irretrievably broken down; she described the working situation as 'a nightmare'. She felt 'unsupported, humiliated and had lost confidence as a practitioner'. She felt that a change of room and of room leader would not assist in her returning to work as she felt the culture of the centre had changed.

112. Ms Hutton offered her mediation to repair the breakdown of communication, but the Claimant said that she felt too stressed at that point to decide whether she would consider mediation. Ms Hutton recorded the Claimant stating that she felt the relationship with her line manager 'is beyond repair and you do not feel your line manager's approach will change even after taking part in mediation'. Ms Hutton offered the Claimant time to think about whether she would participate and revert to her in five working days. The Claimant was not able to offer or suggest any additional support that the Centre could put in place to support her back to work. Ms Hutton concluded:

> 'In conclusion I cannot see any alternative or any further support we can put in place at this level other than recommending mediation. Your current sicknote expires on 30th April and we will expect you to return to work on the 1 May 2018. This will give you sufficient time to build on your progress with telephone counselling and, if you wish to take up the offer of mediation, this can take place and form part of your return to work plan.'

113. In a letter dated 9 April 2018, the Claimant identified what she described as factual inaccuracies in Ms Hutton's letter. One of the amendments she proposed was that it should read: 'I feel uncertain about [whether] a change of room would assist in returning to work'. At the hearing, the Claimant denied making even this statement, even though it was contained in one of her own letters. This affected our view of her credibility on this issue.

<u>The appeal against the disciplinary warning</u>

114. On 13 April 2018, the Claimant sought to appeal against the final written warning. She provided further information about her appeal in a letter of 16 April 2018. In a letter dated 25 April 2018, she was informed that her appeal was out of time and would not be considered. The Claimant challenged that decision, but it was restated in a letter dated 3 May 2018.

<u>The stage 2 attendance meeting on 21 May 2018 and dismissal (Issues E10 and F19)</u>

115. Ms Fayemi reviewed the Claimant's ongoing sickness absence and, on 3 May 2018, she invited the Claimant to a stage 2 absence meeting. The letter expressly warned the Claimant that one of the possible outcomes of the meeting was dismissal.

116. The Stage 2 formal attendance hearing on 21 May 2018 was chaired by Mr Tim Wooldridge, Early Years Strategy Manager at Hackney Learning Trust.

117. The Claimant attended the meeting, again unaccompanied.

118. Mr Wooldridge had before him, and took into account, the Claimant's medical certificates and copies of the OH reports, including the most recent 2018 report.

119. Ms Fayemi presented the management case. She pointed out that the Claimant had a high level of sickness absence, totalling 289 days in the previous two years. She summarised the Claimant's medical condition, and the adjustments that had been made to accommodate it. She summarised the attendance management process to date. She observed:

> 'LM's long-term absence from work has had a wide and far-reaching impact on the Children Centre's ability to deliver good quality service to its stakeholders. This has led to permanent staff taking on more children, taking agency staff on board, it has made parents anxious, had a cost and time impact on the centre from management point of view and the ongoing level of absence is unsustainable.'

120. The Claimant confirmed that she had not attended the risk assessment meetings, because she had been advised that her counselling sessions should take precedence over it. As for mediation, the Claimant said that 'it would have been a good idea in July-October 2017 but offered in March 2018'.

121. At the conclusion of the hearing, the Claimant was asked a series of questions including the following:

> 'Q what can the Children Centre do now to support you back to work at the expiration of your sick leave 10/06/18?
>
> A It does not look like they want to support me, they did not at the beginning.
>
> […]
>
> Q What can the Children Centre do now to support you back to work, could you consider going to a different room, could they change parameters?
>
> A That is a very difficult question, the environment there is very hostile.'

122. In her closing statement at the meeting, the Claimant said that she 'believes she has been blamed for everything and does not believe mediation will work as it's just a formality'.

123. Mr Wooldridge gave active consideration to alternatives to dismissal, but concluded that there was no end in sight to the Claimant's extensive absences and that they were no longer sustainable. He concluded that dismissal was the appropriate sanction. He confirmed this in a letter of 23 May 2018:

> 'Your absence has increased significantly and you remain unfit for work. You show no enthusiasm or commitment to engage in any form of mediation to resolve your workplace stress that you say is a contributing factor to your absence and, in addition, you are unable to suggest any other measures the Children's Centre could put in place to support you back to work. The Centre management has offered to perform an individual work stress risk assessment but you declined and continue to

> refuse to take up the offer. You exhibit little desire to return to work at the end of the current period of sickness and I have no indication that you intend to return to work in the foreseeable future. Comberton Children's Centre is unable to sustain the level of absence and therefore, having considered all the evidence relating to your level of attendance, together with any mitigating circumstances, I have reached the decision to dismiss you on ill-health grounds, with 11 weeks' notice, effective from Monday, 21 May 2018. You are not required to work your notice period.'

124. The Claimant was told that she had a right to appeal; the time limit for appealing was subsequently extended to 8 June 2018.

<u>The appeal against dismissal (Issue F20)</u>

125. The Claimant lodged an appeal on 8 June 2018. The main grounds were that it was inaccurate to suggest that she had declined to engage in mediation and the stress risk assessment; and the fact that she had not been referred back to OH.

126. On 19 July 2018 Ms Donna Thomas (Strategic Manager, Children Centre Services) conducted an appeal hearing. The Claimant attended with her union representative, Mr Marvin. The management case was presented by Mr Wooldridge. At the hearing the Claimant was asked whether she thought she would have been able to return to work, had she been referred back to OH; she replied that the question was speculative and gave no conclusive response. As for mediation, she stated that it had been offered to late; she also did not feel that her manager was willing to reflect because she had heard that her manager denied that there had been a breakdown in the relationship between them.

127. The appeal was dismissed; the decision was confirmed in a letter dated 25 July 2018. Ms Thomas concluded that the Claimant had declined to engage in mediation, refused to participate in a stress risk assessment and offered no suggestions about alternative adjustments which might support her return to work in the forcible future. She upheld the decision to dismiss on the basis of the Claimant's lack of engagement and the impact of the Claimant's continued absence on both staff and service users. The service could not continue to support a level of absence which required agency staff to be recruited to cover the 289 days of absence, in order to maintain the required child/staff ratio. In her evidence before us, Ms Thomas observed that not only did the Claimant not give any commitment to returning to work in the near future, she did not even articulate any desire to do so.

128. The effective date of termination was 6 August 2018. The Claimant lodged a sixth ET1 on 31 August 2018.

<u>The undated allegation relating to a disagreement with Ms Weeks (Issue C8)</u>

129. Although no date was advanced for this allegation, it appears to be accepted that the Claimant and Ms Weeks had a disagreement at some point about whether, if the Centre had run out of full-fat milk, it was appropriate to give children semi-skimmed milk. Ms Weeks considered that it was preferable to give the children something, rather than nothing. The Claimant took the view that, if the parents had asked for full-fat milk to be given to their children, that was the only type of milk it would be proper to give. Ms Weeks consulted a colleague, who took the view that it was fine to give the children semi-skimmed milk. The

Claimant considered that she was being undermined as a practitioner and subjected to public humiliation.

Findings of fact on disability

130. On the balance of probabilities, we accept the Claimant's evidence that, from December 2015 onwards, and up to her dismissal, she suffered from neuralgia/hypersensitivity/neuropathic pain. She frequently experienced pain, and heightened sensitivity, particularly in her right leg and ankle. That pain was exacerbated by cold conditions (indeed, at the Tribunal hearing she found the temperature of the room uncomfortably cold, and arrangements were made to adjust the temperature). She also suffered from tiredness, particularly early in the morning. She took medication to control the pain, without which we find, on the balance of probabilities, the effects of her condition would have been significantly worse. By December 2016, the effects had lasted a year.

131. That evidence is consistent with the contents of the OH reports, produced by Dr Claire Piper, on 9 August and 13 December 2016.

Findings of fact on time limits

132. Because the Claimant had not given evidence in her statement about why she did not present her claims earlier than she did, the Tribunal asked a series of open questions before she was cross-examined to elicit her explanation. She said that she did not know she could bring a discrimination claim in the Employment Tribunal until she commenced ACAS early conciliation in 2018. She denied that she knew about time limits for bringing the claim before then.

133. This was the only explanation advanced by her for not presenting her claims earlier. We did not accept it. As early as 3 October 2016, the Claimant was making references in written complaints to the concepts of disability discrimination and the language of the Equality Act 2010. She acknowledged that Dr Claire Piper had referred to the Equality Act in her December 2016 OH report. She herself had asked for reasonable adjustments, and complained of being discriminated against, in her grievance of March 2017, by which time we have found she had taken advice.

134. We are satisfied that the Claimant was aware from October 2016 at the latest of her right to complain of disability discrimination. On the balance of probabilities, given that she had plainly either researched, or taken advice on, discrimination claims, we think it more likely than not that she also knew about the relevant time limits. We found her evidence that she did not know about the ability to claim, and the periods for doing so, until 2018 to be implausible and self-serving.

The law: disability discrimination

Time limits

135. S.123(1)(a) EqA provides that a claim of disability discrimination must be brought within three months, starting with the date of the act to which the complaint relates.

136. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

137. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

138. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which will usually include: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

<u>The burden of proof</u>

139. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court 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.**

140. Their effect was conveniently summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
>
> **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**

(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

141. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

The definition of disability

142. S.6(1) EqA provides:

> **A person (P) has a disability if –**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and adverse long-term effect on P's ability to carry out normal day to day activities.**

143. 'Substantial' is defined in s.212(1) EqA as 'more than minor or trivial', and is a low threshold.

144. The 'long-term' requirement is developed in para 2, Sch.1 to the EqA, which provides, so far as relevant:

> **(1) The effect of an impairment is long-term if –**
>
> **(a) it has lasted for at least 12 months,**
>
> **(b) it is likely to last for at least 12 months, or**
>
> **(c) it is likely to last for the rest of the life of the person affected.**
>
> **(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.**

145. 'Likely', in this context and elsewhere in the provisions defining disability, means 'could well happen', rather than 'more likely than not to happen' (*Boyle v SCA Packaging Ltd* [2009] ICR 1056, HL).

146. Sch.1, para 5(1) EqA provides (the doctrine of deduced effects):

> **(3) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:**
>
> **(a) measures are being taken to correct it, and**
>
> **(b) but for that, it would be likely to have that effect.**
>
> **(4) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.**

147. The Guidance gives non-exhaustive examples of day to day activities:

> **'[D2] In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.'**

148. The Tribunal's focus should be on what the employee cannot do (or what they can do with difficulty) rather than on what they can do. The EqA does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial. Unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial (*Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591 EAT at [14-15]).

149. In *J v DLA Piper UK LLP* [2010] ICR 1052 EAT, Underhill P gave the following guidance at [40]:

> **'(1) It remains good practice in every case for a Tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in *Goodwin*.**
>
> **(2) However, in reaching those conclusions the Tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.**
>
> **[…]'**

<u>Knowledge of disability</u>

150. Knowledge of disability is relevant to the claims under ss.15 and 20 EqA. The burden is on the Respondent to show that it did not know that the Claimant was disabled (actual knowledge), or that it ought not reasonably to have known that he was disabled (constructive knowledge).

151. There is a further requirement in a reasonable adjustments claim: that the employer knew, or ought reasonably to have known, that the disability was likely

to ('could well') put the Claimant at a substantial (more than minor or trivial) disadvantage in comparison with non-disabled persons.

152. For these purposes the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day activities. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person'. The responsible employer must make his own factual judgment as to whether the employee is or is not disabled. In doing so, the employer will rightly want guidance from occupational health. When seeking outside advice from clinicians, the employer must not simply ask in general terms whether the employee is a disabled person within the meaning of the legislation, but pose specific *practical* questions directed to the particular circumstances of the putative disability. The answers to such questions will then provide real assistance to the employer in forming his/her judgment as to whether the criteria for disability are satisfied. (*Gallop v Newport City Council (No.1)* [2014] IRLR 211 at [36-44]). The relevant case law was summarised by HHJ Eady QC (as she then was) in *A Ltd v Z* [2020] ICR 199 EAT.

Failure to make reasonable adjustments: s.20-21 EqA

153. S.20 EqA provides 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's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **[…]**

154. S.21 EqA provides as relevant:

> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
>
> **[…]**

155. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal (*Morse v Wiltshire County Council* [1998] IRLR 352).

156. In *Rider v Leeds City Council* EAT 0243/11, the EAT held that the carrying out of an assessment as to what reasonable adjustments might be made in respect of a disabled employee was not, of itself, capable of amounting to a reasonable adjustment. In *Smith v Salford NHS Primary Care Trust* UKEAT/0507/10, the Employment Appeal Tribunal held that:

> '**Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage … within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify.'**

Direct disability discrimination

157. S.13(1) EqA provides:

> **A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

158. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

159. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].

160. The protected characteristic need not be the main reason for the treatment. It must have a 'significant influence' on the reason for the treatment: *Nagarajan v London Regional Transport* [1999] IRLR 572 [576].

161. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010, the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic (para 36).

Discrimination arising from disability: s.15 EqA

162. S.15 EqA provides as follows:

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

163. The correct approach to a claim of this sort was considered by the Court of Appeal in *City of York Council v Grosset* [2018] IRLR 746 *per* Sales LJ (at para 36 onwards):

> **'36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.**
>
> **37. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" ...**

> **38. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something" ….'**

164. In *Pnaiser v NHS England* [2016] IRLR 170, Simler J accepted that:

> **'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.'**

165. It is then necessary to look to the employer's defence of justification. S.15(1)(b) EqA provides that the unfavourable treatment may be justified, if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question must be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (*Allonby v Accrington & Rossendale College & Others* [2001] ICR 1189 CA).

166. The correct approach to applying the test was summarized by HHJ Eady QC in City of Oxford Bus Services Ltd v Harvey, UKEAT/0171/18/JOJ at [22]. Proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment. To be proportionate, a measure must be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

<u>Harassment related to disability</u>

167. Harassment related to disability is defined by s.26 EqA, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
> **…**
> **race**
> **…**

168. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

169. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 (at para 47) held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

170. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ (at para 12), referring to the above, stated:

> **'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

Victimisation

171. S.27 Equality Act 2010 ('EqA') provides as follows:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
> **…**

172. The Tribunal must determine whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as s/he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

173. There will be cases where an employer has subjected an employee to a detriment in response to the doing of a protected act but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. For example, where the reason relied on is the manner of the complaint (*Martin v Devonshires Solicitors* [2011] EqLR 108 EAT). Before a case could be regarded as analogous to *Martin*, it is necessary to identify some feature of the protected acts, which could properly be regarded as separable from them, as being the reason for the treatment (*Woodhouse v West North West Homes* [2013] IRLR 773).

174. The Court of Appeal emphasised the importance of focusing on motivation, rather than 'but for' causation in *Dunn v Secretary of State for Justice* [2019] IRLR 298 at [44]:

> **'In the context of direct discrimination, if a Claimant cannot show a discriminatory motivation on the part of a relevant decision-maker he or she can only satisfy the 'because of' requirement if the treatment in question is inherently discriminatory, typically as the result of the application of a criterion which necessarily treats (say) men and women differently. […] There is an analogy with the not uncommon case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled: the mishandling is not discriminatory simply because the grievance concerned discrimination.'**

Unfair dismissal

175. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

176. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it— ...**
>
> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
>
> **[…]**
>
> **(3) In subsection (2)(a)—**
>
> **(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and**
>
> **[…]**
>
> **(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

177. A fair procedure by reason of capability would normally, depending on the circumstances, involve consultation with the employee; ascertaining the up-to-date medical position; an opportunity to improve attendance; and, where appropriate, considering the availability of alternative employment.

178. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view,

and another quite reasonably take another. If the dismissal falls within that band, then the dismissal is fair; if it falls outside that band, it is unfair.

179. The band of reasonable responses also applies to the procedure followed by the employer. In a capability case, the EAT held in *Pinnington v City and County of Swansea* EAT0561/03 at [67], that the range of reasonable responses test applies equally to the way that an employer informs themselves of the true medical position, applying the Court of Appeal's decision in *Sainsbury plc v Hitt* [2003] ICR 111. The employer is not required to 'leave no stone unturned'.

180. As to the decision to dismiss, the issue is not whether, objectively speaking, the employee was or was not capable of remaining in employment, but rather whether it was within the range of reasonable responses to treat the employee's ill-health as sufficient grounds for their dismissal. The EAT in *DB Schenker Rail (UK) Ltd v Doolan* [2010] UKEAT/0053/09 noted how easy it can be for Tribunals to fall into the substitution mindset in cases of ill-health. Tribunals must therefore guard against the temptation to test matters according to what they would have decided if they had been in the employer's shoes.

181. As to whether the employer can be expected to wait any longer for the employee to recover, in *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145, Underhill LJ observed at [36]: 'The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality.'

Polkey

182. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

183. Guidance as to the enquiry the Tribunal must undertake was provided in *Whitehead v Robertson Partnership* UKEAT [2002] 7 WLUK 539 at [22].

> **'[…] it is, we think, incumbent upon the Employment Tribunal to demonstrate their analysis of the hypothetical question by explaining their conclusions on the following sub-questions:**
>
> **1. what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?**
>
> **2. depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct even although the Employment Tribunal found as a fact that misconduct was not made out for the purposes of the contribution argument; alternatively, if for some other substantial reason, was that a sufficient reason for dismissal: similarly, capability.**
>
> **3. even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?'**

Contribution

184. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110).

Conclusions: disability

185. Ms MacLaren observed in closing submissions that the neuralgia, hypersensitivity and neuropathic pain that the Claimant complained of were conditions which 'have no outward signs that are capable of independent verification and they are entirely self-reported'. She submitted that the Claimant gave some inconsistent evidence in relation to symptoms, and indeed referred to some symptoms which were not reflected in the medical records available. She also relied on the fact that a neurologist, Dr Richard Sylvester, who examined the Claimant in April and May 2017 concluded that the Claimants nerve conduction studies were normal with no evidence of any sensory neuropathy. Ms MacLaren's submission was that the Claimant had exaggerated symptoms for the purpose of this litigation and invited the Tribunal to conclude that she had failed to discharge the burden of proving that any condition was substantial. For reasons which we set out below we do not accept that submission. In reaching our conclusions, we note that the Respondent was given permission to instruct an expert on the issue of disability but elected not to do so. While we remind ourselves that the burden is on the Claimant to prove disability, the Respondent had every opportunity to seek to secure evidence which would enable it more effectively to challenge the Claimant's own account of her health conditions, and elected not to do so.

186. We have already made findings of fact that the Claimant suffered from leg/ankle pain and sensitivity and tiredness from December 2016 up to her dismissal. We have concluded, on the evidence available to us and on the balance of probabilities, that these were caused by the disabilities relied on by her.

187. We are satisfied that the Claimant's impairments had a more than minor trivial effect on her day-to-day activities: her pain and sensitivity affected her mobility: she had to avoid cold environments and avoid the risk of bumping into things; her susceptibility to tiredness significantly affected her ability to function early in the mornings. We have also found (para 130) that the adverse effects would have been worse, had the Claimant stopped taking her medication.

188. We have already found that the effects had lasted 12 months by December 2016.

189. Consequently, we are satisfied that the Claimant was a disabled person from December 2016 at the latest.

190. Further we are satisfied that the Respondent had actual knowledge of the Claimant's disability by December 2016 at the latest, by reason of Dr Piper's

report, which gave them sufficient information and advice to put them on notice of the position.

Initial conclusions as to time limits

191. The Claimant first contacted ACAS on 10 May 2018. She presented her first ET1 on 27 June 2018. On her best case, any act before 11 February 2018 is out of time.

192. The allegation relating to the disciplinary investigation report (12 March 2018), and all subsequent allegations, are in time. Everything else is *prima facie* out of time.

<u>The decision to move the Claimant from the Toddler room to the baby room, taken in February 2017, and the requirement from March 2017 that she work in the baby room requirement to work in the baby room</u>

Failure to make reasonable adjustments (Issues B1-3) and disability-arising discrimination (Issue E1)

193. The Claimant complains about this decision as a failure to make reasonable adjustments (Issues B1-3) and discrimination arising from disability (Issue E1).

194. The decision to transfer the Claimant from the toddler to the baby room was announced on 22 February 2017 at a staff meeting. This took effect in March 2017. The Claimant complained about the move by way of a grievance, which was rejected on 11 April 2017. It was a positive decision by the Respondent not to revoke the decision in respect of the Claimant's room assignment. The most that could be said is that there were continuing consequences, insofar as the Claimant found working in the baby room uncongenial thereafter; however, continuing consequences are not the same as 'conduct extending over a period'. In our judgment, time runs from 11 April 2017. The primary time limit expired on 10 July 2017. The Claimant presented her claims in relation to these decisions nearly a year out of time. We are not satisfied that there is evidence which could give rise to a finding of conduct extending a period, linking these matters to the Claimant's later complaints: these were discrete decisions.

195. We considered whether it would be just and equitable to extend time. The delay is very substantial. We have already rejected as implausible the Claimant's reliance on lack of knowledge as her explanation for that delay (para 134). We have concluded that the Claimant simply elected not to complain to a Tribunal at the time, but to move on. While there is prejudice to the Claimant, if time is not extended, there is also significant prejudice to the Respondent, if it is. The passing of time inevitably has an adverse effect on memory, which is especially important in discrimination cases, where the mental processes of individuals are closely scrutinised. Time limits are strictly enforced and the Claimant has not persuaded us that it would be just and equitable to extend time in these circumstances. The Tribunal lacks jurisdiction to hear these claims and they are dismissed.

<u>The allegations concerning the conduct of line managers in 2017</u>

196. We considered whether some of the earlier acts from 2017, for example, the earlier stages of the disciplinary investigation and/or the attendance

management processes, might amount to conduct extending over a period, taken together with one or more of the in-time acts. Even if they were, if we conclude that none of the in-time acts were discriminatory, then allegations relating to earlier discriminatory conduct cannot be linked with them, and the Tribunal would have to decide to exercise its discretion on a just and equitable basis, before accepting jurisdiction.

197. Further, in considering that question, we reminded ourselves that there was a four-month gap between Ms Fayemi's two letters of 7/8 June 2017 and the next allegation chronologically (the letter about timekeeping on 18 October 2017), in respect of which no acts of discrimination are said to have occurred.

198. Ms MacLaren also reminds us that the last time the Claimant was at work was 4 December 2017 and that all the complaints relating to Ms Fayemi and Weeks' management of her are out of time, including Ms Fayemi's initial involvement in the attendance management and disciplinary investigation processes.

199. Because the Claimant's primary case is that there was a campaign against her, led by Ms Fayemi and Ms Weeks, and the guidance in the authorities about not taking a fragmented approach, we consider it appropriate in this case to seek to reach conclusions on the remaining claims before us, before finally resolving the issue of time limits in relation to these claims.

Conclusions: the allegations of discrimination

The grievance of 13 March 2017

Issue F1 (protected act): the grievance of 13 March 2017

200. We have already found that the grievance contained complaints of disability discrimination by reference to the Equality Act 2010.

201. The Respondent submits that this grievance, and the other grievances relied on as protected acts, were made in bad faith. We reject that submission. Although we have concluded that the Claimant could not accept that the decisions made by her managers, lacked insight into why those decisions were taken, and jumped to the conclusion that there must be discrimination, we are satisfied nonetheless that her belief that there had been discrimination was genuine; she was not acting in bad faith.

On 19 May 2017, Janet Fayemi discussed two incidents with C, in which a parent complained C had spoken to her abruptly, and a member of agency staff had complained that C had told her not to pick up a crying baby. C says she was asked to pick up a baby when Janet Fayemi knew she could not, and was being isolated when the agency staff not also disciplined.

Issue C1 (harassment)

202. Complaints were made by a parent and an agency worker. We are satisfied that that they were genuine complaints.

203. We accept that this was unwanted conduct, in that the Claimant did not welcome these issues being raised with her. However, there was no evidence it was related in any way to the Claimant's disability. The sole reason why Ms Fayemi

raised them was because they raised potentially serious issues, and they had to be addressed. For that reason alone, the claim of harassment related to disability is not well-founded.

204. For completeness, the Claimant told us that she felt that raising these issues with her created the proscribed environment for the purposes of her harassment claim ('violated [her] dignity' and/or created an 'intimidating, hostile, degrading, humiliating or offensive environment'). We have concluded that she regarded any criticism of her as creating that environment; in our judgement, it was not reasonable for this conduct to do so. Ms Fayemi's handling of these matters was courteous and professional.

D1 (direct discrimination), E2 (disability-arising discrimination) and F4 (victimisation)

205. Insofar as the same matters are complained about as direct disability discrimination and disability-arising discrimination, we have already found that Ms Fayemi's sole reason for acting as she did was unconnected with the Claimant's disability. We have also concluded it was unconnected with the fact that she had made a protected disclosure. For that reason, these claims are not well-founded.

206. In relation to the direct discrimination claim, we have already found (para 58) that the comparators relied on by the Claimant were in materially different circumstances and so were not true comparators. We have concluded that Ms Fayemi would have treated someone in the Claimant's circumstances, but without her disability, in the same way.

207. As for the disability-arising claim, the 'something arising' relied on by the Claimant in the list of issues was her disability-related absences; she suggested for the first time at the Tribunal hearing (on 24 November 2021) that there was an additional element, i.e. the 'resentment and upset' of staff required to take on more work while she was on sick leave. Even though this was raised after the close of the Claimant's case, Ms MacLaren did her best to deal with it. We are satisfied that neither factor played any part in Ms Fayemi's conduct in relation to these matters.

208. As for the victimisation claim, we are satisfied that the fact that the Claimant had done a protected act had no influence on Ms Fayemi's decision to speak to the Claimant; she would have acted in the same way, and for the same reasons, had the Claimant not done a protected act. For these reasons the claims are not well-founded.

<u>On 5 June 2017, Nicola Weeks, C's line manager, raised C's conduct in respect of the manner in which C had disciplined a child</u>

Issue C2 (harassment), E3 (disability-arising) and F5 (victimisation)

209. We have concluded that the sole reason Ms Weeks raised the Claimant's conduct in disciplining the child was because she regarded it as inappropriate, and it was her role to manage the Claimant and pick up on any such lapses of judgement.

210. We note that, in cross-examination the Claimant asserted that the reason why Ms Weeks reacted as she did was because the child whom the Claimant

reprimanded was Ms Weeks' key child. That, of course, is a non-discriminatory explanation for the act.

211. We are satisfied that Ms Weeks' actions had nothing whatsoever to do with the Claimant's disability, with anything arising from it, or with the fact that the Claimant had done a protected act.

212. For the purposes of the harassment claim, even if we were to accept that the Claimant subjectively perceived that Ms Weeks' actions created the proscribed environment, we do not think it was reasonable for it to do so: Ms Weeks acted professionally; the Claimant overreacted by storming out of the room. For these reasons the claims are not well-founded.

<u>On 7 June 2017, Janet Fayemi wrote to C to confirm the contents of a discussion on 30 March, in respect of the manner in which C had spoken to her colleague, Afsun Hakim</u>

Issue C3 (harassment), E4 (disability-arising) and F6 (victimisation)

<u>On 8 June 2017, Janet Fayemi wrote to C to confirm the contents of the discussion of 19 May 2017</u>

Issue C4 (harassment), D2 (direct), E5 (disability-arising), F7 (victimisation)

213. We have found as a matter of fact (para 66) that that reason why Ms Fayemi recorded the two discussions with the Claimant in these letters was because she had been advised by HR that her failure to do so was a weakness in her management style. That was good advice: it is good practice, when an issue has arisen, to make a proper record of it. We are satisfied that that was the sole reason why she wrote these letters.

214. There was nothing to suggest that the Claimant's disability played any part whatsoever in Ms Fayemi's writing them; for that reason alone, the claims of harassment, direct discrimination and disability-arising discrimination are not well-founded. Nor was there anything to support the Claimant's case that they were written because she had done a protected act. For that reason, the claim of victimisation is not well-founded.

215. Further, there was nothing inappropriate in these letters: in our judgement they did not constitute a detriment (for the purposes of Issues D2 and F7), or unfavourable treatment (Issue E5). As for the harassment claim (Issue C4), although the letters were unwanted, we have concluded that, even if the Claimant subjectively perceived that they created the proscribed environment, it was not reasonable for them to do so. We accept Ms Stroud's submission that it was a measured and appropriate step.

<u>On 18 October 2017, Janet Fayemi wrote to C to raise issues relating to C's punctuality, failure to start work upon arriving, and failure to notify the children's centre when she was running late; C says she was being harassed by R's failure to make allowance for her need to work later</u>

Issue C5 (harassment), E6 (disability-arising) and F8 (victimisation)

216. The sole reason why Ms Fayemi wrote to the Claimant about time-keeping was because she continued to be late, despite earlier warnings (paras 67-70). It had

nothing to do with the fact that she had done a protected act. The victimisation claim (Issue F8) is not well-founded.

217. We have found (para 69) that the Claimant's lateness was, in part at least, because of tiredness which, in turn, was related to her disability. We are satisfied that it was certainly not Ms Fayemi's intention, by reminding the Claimant about the importance of punctuality, to create the proscribed environment (Issue C5). Insofar as the Claimant perceived that it had that effect, in our judgement it was unreasonable for it to do so. A reasonable employee would have immediately grasped Ms Fayemi's rationale and focused on improving her own record. Moreover, the Claimant was not singled out. The conduct does not begin to approach the threshold for harassment and the claim is not well-founded.

218. Although the Claimant's lateness was related (in part at least) to her tiredness, which arose from her disability, tiredness was not the 'something arising' relied on in her pleaded case and for that reason alone the claim (Issue E6) is not well-founded. If it had been, we would have been satisfied that Ms Fayemi wrote the letter in pursuit of a legitimate aim: the needs of the children/service users/C's fellow employees (by ensuring that the Centre was properly staffed from the beginning of the working day). Writing the letter was a proportionate means of achieving that aim: Ms Fayemi had already made adjustments for the Claimant's tiredness; she had tried to address the Claimant's subsequent lateness orally and informally, yet the Claimant continued to be late; raising the matter in writing was justified. Given our conclusions above, we are satisfied that, if there had been any discriminatory impact on the Claimant, it was slight and was outweighed by the importance of the legitimate aim. Further, writing the letter was reasonably necessary, because raising the matter orally had not achieved the required outcome.

<u>Issue F2 (protected acts): grievance letters of 19 and 31 October 2017</u>

219. The Respondent concedes that the two grievance letters contains complaints of discrimination but maintains that they were made in bad faith, an argument we have already rejected.

<u>C says R brought evidence against C directly after taking Emergency Leave in or around 15 November 2017 and "created hostility" by "falsifying events around Black History, Emergency Leave, Stage 2 Grievance by calling each individual staff members out of the room to have discussions without C", and "producing a detailed account of C's actions by way of diary entries"</u>

Issue F12 (victimisation)

220. The Claimant was asked in cross-examination to clarify this allegation (Issue F12). She explained that it referred to the evidence which individuals gave to the grievance and disciplinary investigations, insofar as they were critical of her, in November onwards. She considered the evidence was not given in good faith. This allegation was, in effect, a catch-all allegation, in which the Claimant drew together the negative feedback which was given about her by her colleagues, and characterised it as victimisation.

221. However, it became clear in the course of the hearing, that more often than not, the Claimant used the term victimisation in its colloquial sense of colleagues

picking on her, rather than in its legal sense of unfavourable treatment because she had made a complaint of discrimination. When it was suggested to her that none of this treatment was because she had raised a grievance, the Claimant at first appeared confused, then asserted that it was 'everything to do with that'.

222. We have concluded that the sole reason why the Claimant's colleagues raised concerns about her was because that reflected their genuinely-held views about her behaviour. The sole reason why they made (brief and factual) records of their concerns was because it was necessary, and good practice, to do so. We have concluded that there is no cogent evidence, beyond a bare assertion by the Claimant, that they acted as they did because she had done protected acts.

On 22 November 2017, Jean Kelly wrote to C to invite her to an investigatory meeting, to discuss the contents of a written complaint by [Parent S], a parent of a child in C's care, relating to C's behaviour on 8 and 9 November 2017. C says the meeting was instigated by Janet Fayemi and Nicola Weeks. C alleges that she should not have been subject to disciplinary proceedings as she was unwell

Issue C6 (harassment), E7 (disability-arising) and F9 (victimisation)

223. We have already found that the investigation was not instigated by Ms Fayemi or Ms Weeks (para 80). The sole reason why Ms Kelly invited the Claimant to the meeting was because Parent S had made a formal complaint and insisted that it be investigated. The Claimant accepted in oral evidence that it had to be investigated. The decision had nothing whatsoever to do with the Claimant's disability or the fact that she had done a protected act. Accordingly, these claims fail.

Following the commencement of C's absence on or around 4 December 2017 for stress related sickness absence, Janet Fayemi wrote to C on three occasions on or around 13 December 2017. 21 December 2017 and 15 January 2018 to invite her to attend a stage 1 absence meeting on 21 December 2017, to reschedule the meeting to 23 January 2018, and to invite C to a stress risk assessment. C alleges that she should not have been sent letters whilst unwell or required to attend meetings

Issue C7 (harassment), E8 (disability-arising discrimination) and F10 (victimisation)

The application of the sickness absence procedure

E9 (disability-arising discrimination)

224. In cross-examination the Claimant accepted that, procedurally, Ms Fayemi was acting correctly but that it was 'definitely her purpose' to harass her by sending these letters. We reject that allegation. We are satisfied that Ms Fayemi's sole purpose was to manage the Claimant's absence, in accordance with the Respondent's policy, and to seek to support her back to work. Although the letters were related to the Claimant's absence, and they were unwanted, it was not reasonable to regard them as creating the proscribed environment: they were simply proper steps in an applicable administrative process; there was nothing improper in Ms Fayemi writing to the Claimant or inviting her to meeting; indeed, she would have been failing in her responsibilities had she not done so. The claim of harassment (Issue C7) fails.

225. The Respondent concedes that the writing of the letters was because of something arising from the Claimant's disability (her absence from work) and that it amounted to unfavourable treatment. We have concluded that the actions were taken in pursuit of legitimate aims: to seek to support the Claimant back to work; to ensure that staff sickness absence was properly managed; and to maintain acceptable staffing levels. We are satisfied that the actions were reasonably necessary to achieve those aims. Indeed, it is difficult to see how the aims could be met by not taking this action. We are satisfied that that the needs of the business outweighed any discriminatory impact on the Claimant which, in our view, was slight: we found her evidence as to the impact of these letters to be exaggerated. The claim of disability-arising discrimination (Issue E8) fails.

226. The fact that the Claimant had an outstanding grievance did not excuse her from attending work, nor did it mean that Ms Fayemi should not continue to manage her. There were already two senior managers, Ms Terry and Ms Kelly, involved in determining the grievance and disciplinary investigations. We have already recorded our conclusion that the sole reason why Ms Fayemi took these steps was to seek to support the Claimant back to work; she was not influenced by the fact that the Claimant had done a protected act; she would have treated an employee who had equally high absence levels, but who had not done protected acts, in precisely the same way. The claim of victimisation (Issue F10) fails.

Jeannie Terry not upholding C's grievance

F16 (victimisation)

Jeannie Terry making recommendations that C should be subject to further disciplinary investigation

F17 (victimisation)

227. We were satisfied from the contemporaneous documents, and having read Ms Terry's statement, that the sole reason why she rejected the grievance (Issue F16) was because she considered that it was not well-founded. Insofar as there is an overlap between the allegations made in the grievance and the allegations made in these proceedings, we think that conclusion was a sound one.

228. As for the fact that Ms Terry recommended that the Claimant should be subject to disciplinary proceedings (Issue F17), we had regard to the fact that Ms Terry included in a summary of the conduct which merited that step 'the number [of] complaints (2) LMS submitted since March 2017'. Of course, those complaints also contained protected acts. We reminded ourselves that the necessary link between the protected act and the detriment is not a 'but for' test of causation, it is a 'reason why' test of motivation. In our judgement, it was clear from Ms Terry's letter that the 'reason why' Ms Terry recommended that the bringing of complaints by the Claimant be considered as a potential disciplinary matter was because she had formed the view that the Claimant had deployed her complaints as a response to legitimate attempts to manage her behaviour. Indeed, Ms Terry quoted the relevant section in the Respondents grievance policy which provided that 'employees who abuse the grievance process by making complaints (either singular or multiple) that are false and not made in good faith will be liable to disciplinary action.' It is clear that Ms Terry believed

that that was what the Claimant had done. The fact that the Tribunal has come to a different conclusion on the issue of bad faith is irrelevant; what matters in this context is what Ms Terry believed. An employer is entitled to investigate the possibility that its grievance procedure is being used improperly, in a manner which is consistent with the employee becoming unmanageable, provided that the Tribunal is satisfied that those reasons are properly separable from the doing of the act itself.

229. We considered whether we could draw an inference from the fact that Ms Terry did not attend to give evidence, but we declined to do so. There was a good reason for non-attendance: Ms Terry's medical difficulties made it impracticable for her to attend. In any event, we were satisfied that there was sufficient evidence in the contemporaneous documents and Ms Terry's witness statement for us to make a positive finding in respect of this claim.

230. In our judgement, the sole reason why Ms Terry recommended disciplinary action was because she was concerned about a pattern of behaviour by the Claimant, which had come to her attention in the course of investigating the grievance, and which she considered required investigation under the Respondent's disciplinary procedure, including the making of complaints which she regarded as vexatious (i.e. Claimant was using complaints to avoid being effectively managed). We are satisfied that, in this instance, Ms Terry's reason for referring the matter for disciplinary consideration was 'properly separable' from the fact that the Claimant had done a protected act. Accordingly, these victimisation claims fail.

Was C's letter of 1 February 2018 (her appeal against Jeannie Terry's dismissal of her grievance) a protected act?

F15 (victimisation)

231. The Respondent's position was that this appeal was 'arguably' a protected act. We have concluded, by a narrow margin, that it is, reading together the references to equality, the impact on the Claimant's health and the use of the term harassment.

C also relies on her belief that the disciplinary process relating to [Parent S's] complaint was not completed before another disciplinary process was commenced in March 2018

F13 (victimisation)

232. This allegation is factually correct: the disciplinary process concerning the complaint by Parent S was incorporated into the later disciplinary process, which included other matters. We have concluded that the sole reason why this happened was because, in the course of their investigations, Ms Kelly and Ms Terry became aware of other matters of concern, which they considered ought properly to be dealt with at the same time, under the same disciplinary process. There was nothing improper in that. We are not satisfied that there was evidence from which we could reasonably conclude that these decisions were materially influenced by the fact that the Claimant had done protected acts. The claim of victimisation (Issue F13) fails.

Jeannie Terry giving evidence in the subsequent disciplinary proceedings in relation to the matters which arose in her investigation. C says Jeannie Terry had no basis to give evidence as she did not know what was happening on site

F18 (victimisation)

233. Ms Terry gave evidence in the subsequent disciplinary proceedings because she had relevant evidence to give. The fact that she had not witnessed the incidents herself did not render her evidence irrelevant. She had interviewed both the Claimant and a number of staff members in the course of her grievance investigation; based on the information she had gathered, it was she who had recommended that additional matters be investigated under the disciplinary policy; it was perfectly proper that she be given the opportunity to explain why she had reached her conclusions.

234. In our judgement, the Claimant has not proved facts from which we could reasonably conclude that the fact that she had done protected acts played any part in this decision. The victimisation claim (Issue F18) fails.

Janet Fayemi and Nicola Terry's role as witnesses in the disciplinary hearing of 20 March 2018, following which C was given a final written warning

F11 (victimisation)

235. We have concluded that the sole reason why Ms Fayemi and Ms Weeks gave evidence at the disciplinary hearing was because they had because they had relevant evidence to give: they had both first-hand and indirect experience of the Claimant's conduct, having dealt with concerns raised by colleagues. There was nothing from which we could reasonably conclude that their participation in the process was influenced by the fact that the Claimant had done protected acts. The victimisation claim (Issue F11) fails.

C8 (harassment) - C makes an additional allegation that on an unspecified occasion she disagreed with Nicola Weeks and an unnamed teacher over whether babies could be given skimmed milk

C8 (harassment), F14 (victimisation)

236. These allegations were misconceived. This was nothing more than a minor difference of opinion between practitioners. In our judgement, to suggest that the Claimant was undermined or humiliated by this incident was at best an overreaction, at worst a deliberate exaggeration. In any event, we are satisfied that the disagreement had nothing whatsoever to do with the Claimant's disability (Issue C8) or the fact that she had done protected acts (Issue F14). Both claims fail.

Mr Wooldridge dismissed the Claimant

E10 (disability-arising) and F19 (victimisation)

237. We have concluded that the reasons for the Claimant's dismissal were those given by Mr Wooldridge at the time: the Claimant's high level of sickness absence, the fact that there was no prospect of a return to work in the

foreseeable future and the ongoing impact of those absences on the organisation.

238. In our judgment there was no evidence from which we could reasonably conclude that Mr Wooldridge was influenced in any way by the fact that that the Claimant had done protected acts. The claim of victimisation (Issue F19) fails.

239. Because the reasons identified above relate to the Claimant's absence from work, the Respondent accepts that the dismissal was because of something arising, in part at least, from the Claimant's disability (although we note the Claimant's most recent absences had been for stress). Dismissal is, self-evidently, unfavourable treatment. The outcome of Issue E10 turns on justification.

240. We are satisfied that the decision to dismiss was taken in pursuit of legitimate aims. The Respondent needed its permanent employees to attend work, so that it could deliver its services in an efficient way, which was fair to other employees and met its obligations to service-users. If an employee took lengthy periods of sickness absence, either permanent staff had to take on more work/children, or the Respondent had to engage agency staff, which had an adverse effect on continuity (for both children and parents), as well as leading to increased cost.

241. We turned to the balancing exercise required to determine whether dismissal was proportionate. The impact on the Claimant of dismissal was, of course, very great. On the other hand, the Claimant's absences were exceptionally high; the impact on service-provision was substantial; there was no prospect of a return to work in the foreseeable future; the Claimant had rejected other steps which might have facilitated a return to work (a stress risk assessment, mediation); there were no further reasonable adjustments (adjustments had been made in the baby room and the Claimant was no longer saying that a move back to the toddler room would have enabled her to return); her own position had been for some time that the relationship between her and her managers had broken down. In the circumstances, we have concluded that the legitimate aims outweighed the discriminatory impact and that the dismissal was reasonably necessary in all the circumstances.

<u>Donna Thomas failed to allow her appeal against dismissal</u>

F20 (victimisation)

242. We deal with this issue briefly because we are satisfied that there is nothing from which we could reasonably conclude that Ms Thomas's decision was influenced in any way by the fact that the Claimant had done protected acts. The claim of victimisation (Issue F20) fails.

Time limits: final conclusions

243. Because we have concluded that none of the in-time acts of alleged discrimination are well-founded, it follows that none of the out-of-time allegations (the pre-11 February 2018 acts) can amount to conduct extending over a period. Therefore, the Claimant requires an extension of time.

244. The Tribunal has concluded that it is not just and equitable to extend time in relation to any of the acts which pre-date the beginning of the disciplinary

process. As we have already concluded, the Claimant was aware of her rights and of time limits throughout; the delay was substantial (from around a month to nearly a year); no satisfactory explanation was given for that delay; given our conclusion as to the underlying merits of the claims, the prejudice to the Claimant of time not being extended is less that it would otherwise have been, whereas the prejudice to the Respondent, given the passing of time and the effect on memories, remains significant. In all the circumstances, we do not exercise our discretion to extend time.

245. Consequently, the Tribunal lacks jurisdiction in respect of the claims listed at paragraph 3 of the Judgment and they are dismissed for that reason.

246. We do, however, extend time in relation to the claims in relation to the period from November 2017 onwards, in part because the delay is shorter (and the prejudice to the Respondent less substantial), and in part because, although we have concluded that there was not discriminatory conduct extending over a period, there was a connection between the procedures and it was reasonable for the Claimant to delay issuing proceedings until the outcome of the disciplinary proceedings was known to her. However, in the event, none of those claims have been upheld.

Conclusions: unfair dismissal (Issues G1-G6)

247. For the reasons given above, we conclude that the reason for dismissal was capability (ill-health).

248. There is considerable overlap between the question of whether dismissal is justified for the purposes of a s.5 EqA claim and the question of whether it falls within the band of reasonable responses for the purposes of an unfair dismissal claim (see *Bolton St Catherine's Academy v O'Brien* [2017] IRLR 547). Nonetheless, we have conducted a separate analysis of this claim.

249. The Claimant's principle basis for submitting that the Respondent acted unreasonably in dismissing her for capability was an alleged failure by it to establish the true medical position. She maintained that the Respondent's last medical advice was from 2016. That was factually incorrect. Mr Wooldridge had a medical report from February/March 2018, which he took into account (para 118).

250. We have concluded that he acted reasonably in not re-referring the Claimant to OH (as she argued he should have done), because he concluded that it would have served no purpose: he concluded that there was no prospect of the Claimant returning to work within a reasonable period; she could identify nothing which would facilitate a return; indeed the relationship with her managers had broken down and she declined to engage in mediation or participate in a stress-risk assessment. As for adjustments, his understanding at the time was that returning the Claimant to the toddler room would not have solved the problem. In the light of the statements the Claimant had made herself, we consider that was a reasonable conclusion.

251. We are satisfied that the extent of the Respondent's consultation fell within the band of reasonable responses. Considerable efforts were made to encourage the Claimant's return to work, in particular offers of mediation and a stress risk assessment; the Claimant declined to engage with them.

252. As we have already found, there were compelling business reasons why the Respondent could not sustain further lengthy absences by the Claimant. We reject the Claimant's submission (in her written closing) that 'cost implications' were the main driver for the dismissal; the impact on quality of service provision of such lengthy periods of absence was paramount. The process of managing the Claimant's absence had itself taken up a great deal of management time. Despite the Respondent's best efforts to encourage the Claimant back to work, no potential return date was ever provided by the Claimant at any stage. The Claimant submits (in her written closing) that the Respondent had no evidence that her illness was 'life-long'. That is correct, but that was not the issue Mr Wooldridge had to decide. The Respondent had reached the point where it could not reasonably be expected to wait any longer for the Claimant to return. Redeployment was not an option, given the nature of the Claimant's role, and the absence of the kind of administrative roles she had previously enquired about. Finally, we reject the Claimant's submission that Mr Wooldridge was not an independent decision-maker: in our judgement he approached the hearing in a thoughtful and balanced manner.

253. We unanimously conclude that, in all the circumstances, it was within the range of reasonable responses to treat the Claimant's ill-health as sufficient grounds for dismissal. The dismissal was fair.

254. If we are wrong that the dismissal was fair, we unanimously conclude that the employment relationship would inevitably have ended within a short period, because (on the Claimant's own account) the employment relationship had broken down beyond repair; indeed (para 126) she was critical of Ms Fayemi for not acknowledging the breakdown in their relationship.

255. We are not satisfied that there is a sound basis for a finding of contribution, a point which was barely pursued in closing submissions.

The Claimant's remaining case

256. A separate case management order will be sent out in relation to the Claimant's seventh case, which has previously been stayed.

Employment Judge Massarella
Date: 28 March 2022

APPENDIX: LIST OF ISSUES
(Consolidation of lists prepared by EJ Burgher and EJ Russell)

A: DISABILITY

The disability impact statement is at [334-337]. R says there are issues of credibility in light of GPs notes and letters from the neurologist, Dr Richard Sylvester.

A1. Did C have a physical or mental impairment? C relies on neuralgia and/or hypersensitivity of her nervous system and/or neuropathic pain which causes hypersensitivity related to nerve ends.

A2. If so, and disregarding the effects of medication and other treatment, did it have a substantial (i.e. more than minor or trivial) adverse effect on her ability to carry out normal day-to-day activities?

A3. Was that adverse effect long-term: at the material time had it lasted for at least 12 months, was it likely to last for at least 12 months, or was it likely to recur or to last for the rest of the Claimant's life?

B: FAILURE TO MAKE REASONABLE ADJUSTMENTS CONTRARY TO Ss.20-21 EQUALITY ACT 2010 (EqA)

C relies on the decision to move her from the Toddler room to the Baby room, taken in February 2017, and the requirement from March 2017 that she work in the Baby Room. The Claimant alleges that the following PCP's were applied to her. The Claimant says that working in the Baby room involved a strenuous manual workload and required her to work close to the ground and to lift babies.

B1. Did the Respondent impose a requirement (PCP) that the Claimant was required to work in the Baby Room?

B2. Did this put the Claimant at a substantial disadvantage in comparison with persons who do not have her disability (as defined in A1)? The Claimant relies upon anxiety, stress, body pains and tiredness as a consequence of her impairments. The Respondent disputes that the medical evidence evidences such substantial disadvantage.

B3. Did the Respondent fail to take a reasonable step to avoid the disadvantage? The Claimant says that it should have allowed her to work in the Toddler Room.

Has the Claimant brought her claim in time? The Claimant's case is that the reasonable adjustment should have been made in February/March 2017. The claim was brought on 27 June 2018. If not, should the Tribunal extend time on grounds that it would be just and equitable to do so?

C: HARASSMENT RELATING TO DISABILITY, CONTRARY TO S.26 EqA

C relies on the following conduct:

C1. On 19 May 2017, Janet Fayemi discussed two incidents with C, in which a parent complained C had spoken to her abruptly, and a member of agency staff had complained that C had told her not to pick up a crying baby. C says she was

asked to pick up a baby when Janet Fayemi knew she could not, and was being isolated when the agency staff not also disciplined.

C2. On 5 June 2017, Nicola Weeks, C's line manager, raised C's conduct in respect of the manner in which C had disciplined a child.

C3. On 7 June 2017, Janet Fayemi wrote to C to confirm the contents of a discussion on 30 March, in respect of the manner in which C had spoken to her colleague, Afsun Hakim.

C4. On 8 June 2017, Janet Fayemi wrote to C to confirm the contents of the discussion of 19 May 2017.

C5. On 18 October 2017, Janet Fayemi wrote to C to raise issues relating to C's punctuality, failure to start work upon arriving, and failure to notify the children's centre when she was running late; C says she was being harassed by R's failure to make allowance for her need to work later.

C6. On 22 November 2017, Jean Kelly wrote to C to invite her to an investigatory meeting, to discuss the contents of a written complaint by [Parent S], a parent of a child in C's care, relating to C's behaviour on 8 and 9 November 2017. C says the meeting was instigated by Janet Fayemi and Nicola Weeks. C alleges that she should not have been subject to disciplinary proceedings as she was unwell.

C7. Following the commencement of C's absence on or around 4 December 2017 for stress related sickness absence, Janet Fayemi wrote to C on three occasions on or around 13 December 2017. 21 December 2017 and 15 January 2018 to invite her to attend a stage 1 absence meeting on 21 December 2017, to reschedule the meeting to 23 January 2018, and to invite C to a stress risk assessment. C alleges that she should not have been sent letters whilst unwell or required to attend meetings

C8. C makes an additional allegation that on an unspecified occasion she disagreed with Nicola Weeks and an unnamed teacher over whether babies could be given skimmed milk.

In each case, did the conduct relate to C's disability?

If so, did the conduct have the purpose of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

If not, taking into account C's perception, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect, did the conduct have the effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

Has C brought her claims in time? If not, should the Tribunal extend time to hear her claim?

D: DIRECT DISABILITY DISCRIMINATION CONTRARY TO S13 EqA

C relies on two discrete acts.

D1. Janet Fayemi's discussion with C on 19 May 2017 relating to the incident with the agency staff.

D2. Janet Fayemi's letter of 8 June 2017 relating to the same incident.

Was the Claimant treated less favourably than a person without her disability was, or would have been treated?

Was the treatment because of her disability?

C relies on a hypothetical comparator. C says there was a previous incident in relation to the same child earlier in the same week. The parent of Child A confided in C that it was not acceptable that Chantelle and Naomi did not pick up her child. Chantelle told C that the parent had raised a complaint. C also compares her treatment to the agency worker involved in the incident for which C was provided with the letter of 8 June 2017.

Has C brought her claim in time? If not, should the Tribunal extend time to hear her claim?

E: UNFAVOURABLE TREATMENT CONTRARY TO SECTION 15 EqA

Alternatively, do the incidents set out below amount to unfavourable treatment because of something arising in consequence of a disability?

E1. The decision to move her from the Toddler room to the Baby room, taken in February 2017, and the requirement from March 2017 that she work in the Baby Room

E2. On 19 May 2017, Janet Fayemi discussed 2 incidents with C in which a parent complained C had spoken to her abruptly, and a member of agency staff had complained that C had told her not to pick up a crying baby.

E3. On 5 June 2017, Nicola Weeks, C's line manager, raised C's conduct in respect of the manner in which C had disciplined a child;

E4. On 7 June 2017, Janet Fayemi wrote to C to confirm the contents of a discussion on 30 March, in respect of the manner in which C had spoken to her colleague, Afsun Hakim.

E5. On 8 June 2017, Janet Fayemi wrote to C to confirm the contents of the discussion of 19 May 2017;

E6. On 18 October 2017, Janet Fayemi wrote to C to raise issues relating to C's punctuality, failure to start work upon arriving, and failure to notify the children's centre when she was running late;

E7. On 22 November 2017, Jean Kelly wrote to C to invite her to an investigatory meeting, to discuss the contents of a written complaint by [Parent S], a parent of a child in C's care, relating to C's behaviour on 8 and 9 November 2017. C says the meeting was instigated by Janet Fayemi and Nicola Weeks.

E8. Following the commencement of C's absence on or around 4 December 2017 for stress related sickness absence, Janet Fayemi wrote to C on 3 occasions on

or around 13 December 2017, 21 December 2017 and 15 January 2018 to invite her to attend a stage 1 absence meeting on 21 December 2017, to reschedule the meeting to 23 January 2018, and to invite C to a stress risk assessment.

E9. The application of the sickness absence procedure.

E10. Tim Woolridge dismissed her.

In respect of each incident, what is the "something arising"? C relies on her disability-related absences. C says she suffered from anxiety, stress, body pains and tiredness.

Was R's treatment a proportionate means of achieving a legitimate end? R will rely upon the needs of the service-users and/or children and/or C's fellow employees and/or need to maintain standards of professional behaviour when communicating with children, parents and colleagues.

Has C brought her claim in time? This will include consideration of whether there was conduct extending over a period?

If not, is it just and equitable to extend time?

F: VICTIMISATION CONTRARY TO SECTION 27 EqA

Janet Fayemi and Nicola Weeks

In relation to Janet Fayemi and Nicola Weeks, C relies on 2 protected acts:

F1. Raising breaches of the Equality Act 2010 in her grievance of 13 March 2017

F2. Raising breaches of the Equality Act 2010 in her grievance of 31 October 2017

R does not accept that the above grievances are protected acts:

F3. Insofar as the grievances contained allegations of discrimination, were they false, and made in bad faith?

C relies on the following detriments:

F4. On 19 May 2017, Janet Fayemi discussed 2 incidents with C in which a parent complained C had spoken to her abruptly, and a member of agency staff had complained that C had told her not to pick up a crying baby.

F5. On 5 June 2017, Nicola Weeks, C's line manager, raised C's conduct in respect of the manner in which C had disciplined a child.

F6. On 7 June 2017, Janet Fayemi wrote to C to confirm the contents of a discussion on 30 March, in respect of the manner in which C had spoken to her colleague, Afsun Hakim.

F7. On 8 June 2017, Janet Fayemi wrote to C to confirm the contents of the discussion of 19 May 2017.

F8. On 18 October 2017, Janet Fayemi wrote to C to raise issues relating to C's punctuality, failure to start work upon arriving, and failure to notify the children's centre when she was running late.

F9. On 22 November 2017, Jean Kelly wrote to C to invite her to an investigatory meeting, to discuss the contents of a written complaint by [Parent S], a parent of a child in C's care, relating to C's behaviour on 8 and 9 November 2017. C says the meeting was instigated by Janet Fayemi and Nicola Weeks.

F10. Following the commencement of C's absence on or around 4 December 2017 for stress related sickness absence, Janet Fayemi wrote to C on 3 occasions on or around 13 December 2017, 21 December 2017 and 15 January 2018 to invite her to attend a stage 1 absence meeting on 21 December 2017, to reschedule the meeting to 23 January 2018, and to invite C to a stress risk assessment.

F11. Janet Fayemi and Nicola Terry's role as witnesses in the disciplinary hearing of 20 March 2018, following which C was given a final written warning.

F12. C says R brought evidence against C directly after taking Emergency Leave in or around 15 November 2017 and "created hostility" by "falsifying events around Black History, Emergency Leave, Stage 2 Grievance by calling each individual staff members out of the room to have discussions without C", and "producing a detailed account of C's actions by way of diary entries".

F13. C also relies on her belief that the disciplinary process relating to [Parent S's] complaint was not completed before another disciplinary process was commenced in March 2018

F14. C makes an additional allegation that on an unspecified occasion she disagreed with Nicola Weeks and an unnamed teacher over whether babies could be given skimmed milk.

Has C brought her claim in time? This will include consideration of whether there was conduct extending over a period?

If not, is it just and equitable to extend time?

Victimisation by **Jeannie Terry**

C relies on her appeal against Jeannie Terry's dismissal of her grievance of 1 February 2018 as the protected act, and Jeannie Terry's dismissal of her grievance as the detriment:

F15. Was C's letter of 1 February 2018 (her appeal against Jeannie Terry's dismissal of her grievance) a protected act?

If so, did Ms Terry subject the Claimant to the following detriments because she had done the protected act?

F16. Not upholding C's grievance;

F17. Making recommendations that C should be subject to further disciplinary investigation.

F18. Giving evidence in the subsequent disciplinary proceedings in relation to the matters which arose in her investigation. C says Jeannie Terry had no basis to give evidence as she did not know what was happening on site.

Victimisation by **Tim Woolridge** and **Donna Thomas**

The Claimant also alleges that the following were acts of victimisation:

F19. Tim Woolridge dismissed her.

F20. Donna Thomas failed to allow her appeal against dismissal.

G: UNFAIR DISMISSAL

C was absent from work from 4 December 2017 until her dismissal by Tim Woolridge on grounds of ill health, a decision communicated to C on 23 May 2018. C was given 11 weeks' notice, which C was not required to work. Accordingly, the effective date of C's dismissal is 6 August 2018.

G1. Was C dismissed for a potentially fair reason, namely, capability?

G4. Was C's dismissal within the range of reasonable responses taking into account:

(a) the nature of C's illness;

(b) the length of C's absence;

(c) the need to replace an absent employee;

(d) the steps taken to find the true medical position; C says R's last medical advice was from 2016. (R will say it was in receipt of an OH report dated 1 March 2018);

(e) the steps taken to make reasonable adjustments in the case of a disabled employee. C says reasonable adjustments were not made. R did not explore transferring C back to the toddler room.

G5. If not, would C have been fairly dismissed in any event?

G6. Did C contribute to her dismissal by her own blameworthy conduct?