EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107789/2020

Held by Cloud Video Platform (CVP) on 19, 20, 21 and 22 April 2022

Employment Judge P O'Donnell
Tribunal Member A H Perriam
Tribunal Member R Martin

Ms C Rolandi	**Claimant** **Represented by:** **Mr Brien, Counsel** **Instructed by Broudie, Jackson, Canter**
Crieff Hydro Ltd	**Respondent** **Represented by:** **Mr McGuire, Counsel** **Instructed by Rradar**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims for discrimination arising from disability, breach of the duty to make reasonable adjustments, harassment and victimisation under the Equality Act 2010 are not well founded and are hereby dismissed.

REASONS

Introduction

1. The claimant has brought complaints of disability discrimination and victimisation under the Equality Act 2010. The discrimination claims relate to events on and around 14 and 15 September 2020 when the

claimant was asked to move room in the respondent's staff accommodation to allow for repairs to her room. The victimisation claim relates to how certain belongings of the claimant, left behind in staff accommodation were handled by the respondent. These claims are all resisted by the respondent.

Evidence

2. The Tribunal heard evidence from the following witnesses:-

   a. The claimant.
   b. Ashleigh Pink (AP) – the respondent's Rooms Division Manager.
   c. Kristian Campbell (KC) – the respondent's General Manager.
   d. Karen Ritchie (KR) – the respondent's Duty Manager.
   e. Bence Banati (BB) – the respondent's Restaurant Manager for the Terrace Restaurant.
   f. Loredena Calin (LC) – who was a Supervisor at the respondent's Terrace Restaurant at the relevant time.
   g. Alvaro Leguizamon (AL) – Bar Supervisor at the Terrace Restaurant.
   h. Cristina Clarke (CC) – Food & Beverage Assistant.

3. The evidence-in-chief for these witnesses was given by way of witness statement which were taken as read.

4. There was an additional witness statement lodged on behalf of the claimant for someone who was not called to speak to it. The content of this statement was not put to any of the respondent's witnesses nor was it referred to in submissions. The Tribunal gave little weight to this statement and did not consider that its content was particularly relevant to the issues in dispute.

5. There are two other individuals who feature prominently in the facts of the case who did not give evidence. The Tribunal considers that it will assist to record them here along with the witnesses to provide a full list of the people referred to in the judgment. These individuals are:-

   a. Connor Waghorn (CW) – the claimant's supervisor.
   b. Gillian Barker (GB) – Employee Relations Adviser.

6. There was an agreed bundle of documents prepared by the parties along with two supplementary bundles. References to page numbers below are references to the pages in these bundles. Where there is reference to a page in the first supplementary bundle then it will be proceed with "S1" and a reference to a page in the second supplementary bundle will be proceeded with "S2".

7. Much of the facts of the case were not in dispute other than set out below. The Tribunal considered that the witnesses gave broadly credible and reliable evidence. There were some instances where the passage of time had clearly blurred the detail of events for some witnesses but not the extent that the Tribunal considered that their evidence was unreliable or lacked credibility.

8. There were, however, three disputes of fact between the claimant and AP which the Tribunal had to resolve in making its findings of fact.

9. The Tribunal should be clear that it did not consider that either the claimant or AP were seeking to mislead the Tribunal or had knowingly given false evidence. Rather, the Tribunal considered that the passage of time since the events giving rise to the claim had adversely affected their recall of events leading to matters being confused or conflated.

10. The first issue is whether the claimant was first told about the need to move out of her room to allow for repairs on 11 September 2020 (AP's position) or on 14 September 2020 (the claimant's position). It is worth noting that both witnesses gave a broadly similar account of these discussions in terms of the sequence of events and the main dispute between them is when these discussions took place and some of the detail as set out below.

11. The Tribunal preferred the claimant's account of when these discussions took place. Although AP's recollection is consistent with being notified of the need for the repair to be done by email dated 11 September and her reply on 14 September that the claimant had vacated the room during the intervening weekend (S2pp1-2), there is greater support for the claimant's position in the documents produced to the Tribunal.

12. In particular, the following documents support the claimant's version of events:-

    a. The claimant's mobile phone log (p197) shows no phone calls on 11 September (both witnesses agree that the first contact between them regarding the repairs was made by phone).
    b. The screenshot of text messages between the claimant and her supervisor, Connor Waghorn (CW), (pp205-206) where no mention is made of contact from AP on 11 September but does contemporaneously record the claimant saying that AP had contacted her on 14 September regarding this issue in circumstances where AP says there was no contact.
    c. An email from Gillian Barker (employee relations manager) on 15 September 2020 (pp211-212) in which she makes reference to *"the way Ashleigh had left things yesterday"* regarding the need for the claimant to vacate her room. This must be a reference to 14 September and Ms Barker, who had not been party to any discussion between the claimant and AP, could only have obtained information about what discussions had taken place and when from AP.

13. The Tribunal considers that AP did have a genuine but mistaken belief at the time that she had spoken to the claimant on 11 September after being contacted about the need for repairs and that she, given the passage of time, conflated the discussions on 14 September with what she believed had happened on 11 September. AP had described 11 September (a Friday) as a very busy day with a large volume of guests checking-in; the Tribunal considers that it is possible for someone to intend to carry out a task and genuinely believing that they had done so in circumstances where they had been very busy and had not actually carried out the task in question.

14. Taking all of these matters into account, the Tribunal prefers the claimant's evidence on this point.

15. The second issue relates to the allegation by the claimant that during their discussions on 14 September, AP had said to the claimant that if she did

not move out of her room by 8am on 15 September then her belongings would be removed and left in the corridor. AP denies making this comment.

16. Taking account of the following matters, the Tribunal prefers the evidence of AP on this issue:-

a. AP gave a plausible explanation in cross-examination that at that time she would not have had anyone else handle the claimant's belongings because of Covid risks and the restrictions in place at the time. This was consistent with the evidence which the Tribunal heard about the respondent's practice at the time of leaving rooms empty for 24 hours to minimise the Covid risks.

b. There is no mention of this in any contemporaneous correspondence. There are a series of text messages exchanged between CW and the claimant on 15 September (pp206-208) and neither of them make reference to this comment.

c. Further, the claimant corresponds by email with AP and Gillian Barker later on 15 September (pp210-214) raising her concerns about the contact she had received about vacating her room and makes no reference to this alleged comment.

d. The email correspondence continues on 16 September (p210) and no mention of the alleged comment is made.

e. The claimant's witness statement at paragraph 27 where she describes the alleged comment goes on to state that the comment caused her to have a panic attack which led to the involvement of the police and ambulance service. In cross-examination, the claimant accepted that the police and ambulance were not involved with her on 14 September. The witness statement goes on to describe the claimant having a panic attack on the way back from college on 15 September which involved the police and ambulance service. On 15 September, the claimant also received a message from CW in which he states that the claimant could be evicted immediately from her accommodation. The Tribunal considers that there may be a degree of confusion and conflation of these incidents in the claimant's recollection of events.

17. The third issue in dispute is whether, in November 2019, the claimant informed AP that she had PTSD. AP denied this and her position was that she was unaware that the claimant had this condition at the relevant time.

18. There was no other supporting evidence other than the evidence of the two witnesses; there was no-one else who had heard the conversation; there were no contemporaneous documents making reference to this; the medical questionnaire completed by the claimant (p119) and the subsequent risk assessment completed by BB (p120) were not disclosed to other managers.

19. The claimant did make reference to AP being aware that the claimant had difficulty adjusting to new living spaces during the email exchange on 15 September (p214) which was relied on by Mr Brien as supporting the claimant's position. However, the Tribunal does not consider that this is sufficient for it to draw an inference that AP was told that the claimant had PTSD; it is not a reference to the claimant having told AP that she had PTSD.

20. The burden of proof is on the claimant and in relation to this specific dispute the Tribunal does not consider that she has discharged that burden. It, therefore, does not find that the claimant informed AP of her PTSD in November 2019.

Findings in fact

21. The Tribunal made the following relevant findings in fact.

22. The claimant started employment with the respondent as a food and beverage assistant in the Terrace Restaurant with effect from 28 October 2019.

23. At the start of her employment, the claimant completed a medical questionnaire (p119) in which she disclosed that she had been diagnosed with Post-Traumatic Stress Disorder (PTSD) in 2018.

24. In light of that disclosure, BB (who was in charge of the restaurant in the hotel) conducted a workplace assessment. In particular, he wanted to

ensure that the claimant would be able to cope with the stress of working in the restaurant which could have up to 600 covers a night. A copy of the assessment is at p120 and records that the triggers for the claimant's PTSD are stressful conditions, high noise and aggressive behaviour. However, she indicated that she would be able to cope with working in the restaurant.

25. A copy of the medical questionnaire and the assessment was retained in the claimant's personnel file. However, the respondent would not routinely disclose information obtained from such questionnaires or assessments to other managers unless there is a genuine need to do so. The only step taken by BB was to refer the claimant to another manager who was involved in assisting staff with mental health issues. In particular, the fact of the claimant's PTSD and the triggers for it were not disclosed to AP and she did not have sight of the questionnaire or assessment prior to the events giving rise to the claim.

26. CW became aware of the fact that the claimant had PTSD in August 2020 when the claimant raised a complaint with BB about how CW had behaved towards her. BB had an informal meeting with the claimant and CW to resolve the issue and it was during that meeting that CW became aware that the claimant had PTSD.

27. The respondent provides accommodation to staff. This is seen as a way of attracting staff, particularly from further away or abroad, who may not otherwise have anywhere to stay near the hotel. It is only available for staff working full-time and is considered to be a temporary benefit to staff who are expected to find other accommodation if they stay with the hotel long-term, normally one year maximum term.

28. Staff who occupy this accommodation are subject to an accommodation agreement. This is a boilerplate agreement and a copy was at pp121-132. This was not the copy signed by the claimant but it is accepted by her that the version in the bundle reflects the agreement she signed.

29. Clause 5 of the agreement (p124) deals with issue of the respondent having access to rooms. It states that they will provide a minimum notice of 24 hours if they need access for maintenance work. No notice will be

given in certain circumstances such as the police seeking access, the smell of smoke and emergency situations. The clause states that what is an emergency will be determined at the respondent's discretion and gives some examples.

30. The claimant occupied accommodation supplied by the respondent throughout her employment with them. She initially shared a room with another employee who subsequently moved to another room. The claimant was moved to room 12 in the Melville building (Melville 12) in early 2020 and this was the room she occupied at the time that the events below occurred.

31. On 11 September 2020, AP received an email from the estates manager (S2p1-2) that the window in Melville 12 needed repair and that the person occupying the room would need to move out to allow for these repairs. At the time, the Covid rules in place required any room to be vacant for 24 hours or more before anyone else entered it.

32. On the morning of 14 September, AP sent an email to the estates manager (S2p1) stating that the room had been vacated over the weekend and so the work could be done. This email was sent because, the Tribunal has found, that AP had a mistaken belief that she had arranged this on 11 September.

33. However, the claimant had not been contacted about the need to vacate her room and was in her room doing an online college class when a workman came into her room. This surprised her and the workman left immediately.

34. On 14 September, there were an exchange of messages between the claimant and CW which appear at pp205-206:-

    a. At 12.41, the claimant received a message from CW asking when she was moving out of staff accommodation. This is a reference to the fact that the claimant had asked for a reduction in hours to allow her to attend college which would mean she was working less than full-time hours and so would need to move out of

accommodation. It was a separate matter from the need for the claimant to vacate the room to allow for repairs.

b. At 12.52, CW sends a message stating that AP had just called him and said that the window in the claimant's room was rotting and that access was needed to her room to fix it. He stated that the claimant could spend the day in another room.

c. The claimant replies to the 12.41 message at this point stating that she would be moving on 24 October.

d. There being no response to the 12.52 message, CW asks the claimant if she is going anywhere that day so that maintenance can have access.

e. The claimant then replied that she had classes online to 3pm and that anyone needing access to her room needs to contact her prior to entering her room.

f. She immediately follows this with a message stating that AP had just called her and said she should pick up a key for the new room at 3pm to which CW replied "*Okay*" bringing the conversation to a close.

35. There was a telephone conversation between AP and the claimant on the morning of 14 September as referenced in the message to CW. It was explained to the claimant by AP that essential maintenance work needed to be carried out and that the claimant would need to move to another room for the work to be carried out. She was asked to drop her room key at reception and pick up a key for the new room.

36. There was a lack of clarity in the discussions between AP and the claimant at this time (and the next day) as to whether the move was to be temporary (that is, until the repair was completed) or permanent (that is, until the claimant vacated the respondent's accommodation entirely on 24 October). As the Tribunal finds below, GB ultimately clarifies by email late on 15 September that the move is intended to be temporary although, as a matter of fact, the claimant never moved back to Melville 12 because she had returned to Italy.

37. The claimant attended reception at around 4pm that same day to speak to AP. AP advised her that she would need to vacate to Melville 12 and

move to a new room (North Baird 1) to allow for the repair work to her window. This needed to be done by the next day. The claimant stated that she could not do so as she had online classes that evening and had to attend college (which was in Alloa) by 8am the next morning.

38. The claimant did not move out of Melville 12 on 14 September and left early on 15 September to attend college. The journey involved a bus journey from Crieff to Stirling and then a second bus from Stirling to Alloa.

39. There was an exchange of messages between CW and the claimant on 15 September which appear at pp207-208:-

a. At 13.15, CW messages the claimant asking for her mobile number.
b. There is no response to this and at 17.40 CW again asks for her mobile number. He states that he will, otherwise, need to come to her room as it is urgent.
c. The claimant replies at 18.09 stating that she does not think it is appropriate to come to the room as she is attending college.
d. CW replies immediately that he needs her phone number or he will have no other choice as she needs to speak to her urgently.
e. The claimant replies that she is in college and CW immediately replies to this asking for her email so that he can email her and document *"it"*.
f. There is no reply to this and CW sends a final message at 20.01 that he has been to her room twice with the duty manager with no reply. He states that she was told that she had to be moved by 8am but had not moved. He stated that she must be out of her room by 12pm tomorrow or she will be evicted immediately. She will continue working 5 days until she moves from her accommodation and she should contact BB.

40. In the meantime, the claimant had been in contact with AP and GB. The email exchange between them on 15 September appears at pp210-214:-

a. At 16.04, the claimant emails AP copying in GB to raise concerns about the situation regarding the room move:-

i. The claimant acknowledges that there is a need to carry out the maintenance on her window but that she is feeling increasingly anxious due to the lack of understanding how this impacts on her.

ii. She states that she does not feel that her requests for support or flexibility have been listened to and that this has caused her a great amount of stress at a time when she should be studying.

iii. There is a reference to having less than 48 hours' notice and that she has trouble adjusting to new living spaces normally. She states that she had hoped for a lot more support and time to adjust to the move in order to avoid stress and anxiety.

iv. She makes reference to receiving multiple messages which she had been unable to answer because she had been in college.

b. At 16.18, AP replies to the claimant thanking her for her email and stating that the claimant had been given a key for her new room as serious works had to be done on Melville 12. She explains that the works have been rescheduled so that they require the claimant to move to the new room tomorrow (that is, 16 September) to allow Melville 12 to be vacant for 24 hours to safeguard against Covid. She concludes by asking the claimant to drop off the Melville 12 key in reception.

c. At 17.13, the claimant emails GB directly without copying AP stating that there has been no attempt to resolve the situation amicably or any consideration for the challenges to her mental health. She asks to take the matter forward as a formal complaint. The Tribunal notes that this is the first time in any of the correspondence or discussions around the room move that the claimant makes express reference to her mental health issues.

d. GB replies at 17.46 explaining that what has happened has been in accordance with the accommodation policy and that the claimant had been contacted today because AP had understood that how things had been left the day before was that the claimant understood the need to repair the window. GB stated that there

was still a need to do the repairs and that AP has taken account of the claimant's comments and rescheduled the works. She goes on to suggest that the claimant can move room with only essential belongings and then move back when the work is finished.

e. The claimant replies at 19.30 to say that she is happy with this proposal. She explains that she is anxious about going into work and has arranged to see her nurse tomorrow.

41. Whilst this exchange is taking place, the claimant is returning from college. She arrives in Stirling at approximately 18.30 to change buses. At this point, she experiences a panic attack which she attributes to the anxiety and stress arising from the messages she received that day. The police were involved and they put her in contact with a mental health adviser. The claimant does not mention this to anyone from the respondent in her emails on 15 and 16 September.

42. GB replies to the claimant's last email from 15 September at 13.50 on 16 September (p210) to say she is sorry to hear the claimant is unwell and reminding her of the absence reporting procedures. She states that the claimant should now complete the move and return her key by 12 noon on 17 September. This will be returned to her once the work is completed. The claimant replies at 15.33 (p210) to confirm that she will return the key by the time stipulated.

43. The claimant does move to the new room by 17 September. At the same time, she was signed off sick initially for 21 days with a fit note dated 17 September (p215) although it was common ground that she remained off sick for a longer period. The claimant remained in the new room for a short period and then went to Newbury to visit her then boyfriend. She then went home to Italy for an extended period.

44. There was evidence led about the claimant seeking to pursue a grievance about the events relating to the change of room. The Tribunal has not made any findings of fact in relation to these matters as they had no relevance to the issues which the Tribunal had to determine.

45. On 4 and 5 December 2020, AP and the claimant had an exchange of emails which appears at pp246-248:-

a. At 10.56 (the Tribunal notes that this, and the times below, are Italian times rather than UK given that the dates of these emails are in Italian), AP asks the claimant to whom she returned her keys for the two rooms.
b. The claimant replies at 11.45 to say that it was reception.
c. At 11.54, AP asks when this was done.
d. The claimant replies at 15.21 to say that she gave AP the keys for Melville 12 when AP gave her the keys to North Baird 1. She goes on to say that she handed in the keys for North Baird 1 to reception on 22 October. The claimant raises the issue of her belongings remaining in Melville 12 and that she will come to collect these when Covid restrictions are lifted.
e. At 15.54, AP replies that, as the claimant's belongings are still in Melville 12, that room cannot currently be used and that is why she is being charged for it.
f. The claimant sends a further email at 00.48 on 5 December stating that she does not believe that she should be charged for the room and that she hopes this is resolved soon so that she does not have to add this issue to *"the claim at the tribunal"*.
g. At 07.17 on 5 December, AP asks when the claimant will be collecting her belongings and the claimant replies at 15.55 to say that between Wednesday and Thursday her friend will come and clear out Melville 12.

46. In the event, no-one came to collect the claimant's belongings until 23 March 2021. On that date, a different friend of the claimant attended the hotel and took the claimant's belongings out of Melville 12, putting them in her car.

47. However, not all of the belongings could fit in the friend's car and some were left behind in bags sitting in the hotel reception. KR observed them beside the fire exit door where they had been left without any discussion.

48. No evidence was led by the claimant as to what was in these bags. A picture of them was produced at p262 but no evidence was led as to when this was taken nor was the friend who left them called to give evidence about what was in them. The Tribunal could not, therefore, make any

findings of fact about what was in these bags at the time when they were left in reception in March 2021.

49. At this time, the hotel was closed due to Covid restrictions and there was a minimal staff.

50. AP and KR both understood that the claimant's friend would return either the next day or shortly thereafter to collect these bags although there is some confusion between them as to whether AP told KR about this or vice versa.

51. However, the friend did not return to collect these and the bags remained in the hotel reception until around 26 April 2021 when the hotel was re-opening. KR had been instructed to tidy reception and so she moved the bags to BB's office.

52. The bags remained in BB's office until some time in May or June 2021 when he asked them to be moved; his office was quite small with the bags taking up room and they had begun to smell. They were moved to a storage cupboard in the bar of the Terrace Restaurant.

53. During the summer of 2021, AL and LC were involved in clearing out the storage cupboard. Neither of them could recall the exact date when this was done. They both looked in the bags to find out what was in them and could see old clothes, a uniform, tablecloth and some old glassware. Both of them accept that they did not conduct a detailed search through the bags.

54. LC gave them to CC when it became clear that the items in the bags belonged to the claimant as they had been friends. CC went through the bags finding old clothes, a teddy bear of the character "Stitch" and a handbag with the face of a cat on the front containing papers. CC retained this bag (and its contents) and the rest of the items were left in the bags in North Baird.

55. It was a practice at the hotel that when staff left accommodation and left items behind that other staff could take anything that they felt they could use with anything left being put in the bins.

56. This is what happened in this instance and CC noticed that the bags were no longer where she had left them in North Baird. She assumed that someone had disposed of them.

57. CC advised the claimant by text message (p262) that she had the cat bag and asked if the claimant wanted it. The claimant replied with the photograph asking CC if she had all of the bags in the photograph. CC replied that she only had the cat bag.

58. CC left accommodation at the hotel in August 2021 and left behind any belongings she did not want which included the cat bag.

59. In September 2021, the claimant messaged AP to enquire about her belongings and AP replied that she believed BB that he had these. A text message exchange between the claimant and BB took place on 19 and 20 September (pp253-255):-

    a. At 11.33 on 19 September, the claimant contacts BB to say that AP has told her that he has her belongings and that she was coming to Crieff on Friday and could collect these.
    b. BB replies that he has been away for 3 months, that the cupboards were cleaned whilst he had been away and that he did not know where her things were but would look into it.
    c. At 11.45 on 20 September, the claimant forwarded a message from AP stating that she had asked BB and another manager to organise collection.
    d. BB replies that AL had cleaned the cupboard and that he was investigating what had happened but AL was off on holiday at that time.

60. The claimant also messaged AP on 20 September stating that BB had told her that AL had cleaned out the cupboard where her belongings had been and asking why this had been done and where her things were. AP replies that BB is investigating and will keep her informed (p256).

61. The claimant follows up with BB on 29 & 30 September 2021 (p255) but receives no reply.

62. It is ultimately confirmed to the claimant via her representative that any belongings which had been left behind had been discarded.

Claimant's submissions

63. Written submissions were lodged by counsel for the claimant and these were expanded on in oral submissions.

64. The submissions begin by setting out the background facts which Mr Brien suggested should be found by the Tribunal. He highlighted particular issues which were in dispute relating to the reason for the claimant's move from her previous accommodation, the claimant telling AP she had PTSD and whether the claimant was first informed of the need to vacate her room for repairs on 11 or 14 September 2020. It was submitted that the claimant's evidence should be preferred in all these disputes and Mr Brien set out the reasons for that.

65. The submissions go on to address the issue of whether the claimant is disabled as defined in s6 of the Equality Act.

66. The issue of knowledge is then dealt with and the written submissions set out the basis on which it is said that the respondent had actual or constructive knowledge that the claimant was disabled. Reference is made to the medical questionnaire completed at the outset of the claimant's employment, the subsequent risk assessment by BB, the claimant's request to move room in 2019 and the knowledge of CW.

67. The Judge raised the question of the issue of the knowledge, in terms of Schedule 8 paragraph 20, which was required to engage the duty to make reasonable adjustments which was not addressed in the written submissions. Mr Brien made reference to the reasons why the claimant sought to move room in 2019, her email to AP of 15 September (p188) and the questionnaire/assessment (pp119-120). The Judge questioned how the questionnaire/assessment had any impact on AP's knowledge when she had not had sight of this at the relevant time. It was said that CW had knowledge of the claimant's PTSD and this showed the triggers for this.

68. Turning to the substantive claims, the written submission started with the breach of the duty to make reasonable adjustments. In terms of PCP, it was said that there were two; the policy in the accommodation agreement of giving staff 24 hours' notice of maintenance work; the fact that the claimant was given less than 24 hours' notice.

69. The Judge questioned whether the latter was capable of being a PCP where it was a one-off act. Mr Brien submitted that there was evidence that the respondent would give less than 24 hours' notice and there was likely to be a practice of giving less than 24 hours' notice for non-urgent work.

70. It was submitted that the claimant was placed at a substantial disadvantage given her PTSD and the triggers for it being stressful condition which would include having to move room at short notice.

71. There were said to be two breaches of the duty; the first on 14 September 2020 when both AP and CW made contact with the claimant to ask her to vacate her room; the second on 15 September when AP sent an email at 16.08 requiring the claimant to move room on the next day.

72. The adjustments which could have been made were said to be a longer period of notice and giving the claimant assistance to move room such as a van.

73. The submissions then turned to the claim for the claim for discrimination arising from disability. The written submissions stated that the unfavourable treatment were the repeated requests for the claimant to move room along with the threats to put the claimant's belongings in the corridor or that she would be evicted.

74. The Judge questioned whether it was being said that the mere request to move room was unfavourable treatment. Mr Brien submitted that a single request would not be unfavourable treatment and it was the repeated requests and the threats which amounted to unfavourable treatment.

75. It was submitted that the "something" arising in consequence of the claimant's disability was her inability to move room at short notice and this

was demonstrated by what was said in her email on 15 September at p188.

76. It was accepted that the respondent had a legitimate aim in asking the claimant to move room as they were seeking to carry out repairs but that the way in which they went about this was not a proportionate means of achieving this aim.

77. In relation to the claim of harassment, the alleged acts of harassment were said to be the same acts giving rise to the discrimination claims, that is, the communication from AP and CW to the claimant on 14 September.

78. It was submitted that the claimant had given evidence that these communications had the effect of creating an intimidating and hostile environment for her.

79. In terms of whether this conduct was related to her disability, it was submitted that, if the claimant had not been asking for more support in moving room, neither AP nor CW would have been contacting her in the manner in which they did.

80. Finally, the submissions turned to the claim of victimisation. It was submitted that the failure to store the claimant's belongings securely, return them to her and to have disposed of them amounted to a detriment.

81. AP and the respondent generally were said to have known about the claim by 5 December 2020 and were aware that the claimant wished to collect her belongings. The claimant also contacted AP about her remaining belongings in June 2021.

82. It was submitted that AP's frustration with the claimant is demonstrated in her response to the claimant's emails on 15 September is evidence supporting the assertion that there was a failure to return the claimant's belongings, a failure to store them properly and the belongings were disposed of because the claimant had brought a claim to the Tribunal.

83. The written submissions go on to address the issue of remedy but it is not necessary, in light of the Tribunal's decision to repeat these here.

Respondent's submissions

84. The respondent's counsel produced written submissions and supplemented these orally. These also started with submissions on the issue of disability status.

85. Mr McGuire submitted that the respondent's witnesses should be preferred in respect of any dispute of evidence. It was submitted that assertions made by the claimant in her witness statement regarding a lack of cooperation by the respondent was a very different picture from that painted in correspondence at the time. Similarly, the claimant's witness statement and diary did not set out any evidence that she had informed AP of her mental health issues on 14 September and, given how important this issue was, it was submitted that this would have been included in these documents. In trying to assert this at the hearing, it goes to her credibility and reliability.

86. The first substantive claim addressed in the submissions was discrimination arising from disability and, in terms of the knowledge issue in that claim, it is submitted that the respondent did not have sufficient knowledge; the mere reference to PTSD in the medical questionnaire and risk assessment was not sufficient and neither were the terms of the email correspondence between the claimant, AP & GB on 15 September.

87. In any event, it was submitted that the contact made by CW on 15 September did not amount to favourable treatment. Reference was made to the terms of messages and the context in which they were being sent. It is accepted that the final message from CW was more direct but was still not unfavourable treatment because it made the point that the claimant required to vacate her room and that she had been aware of this either from 14 September or 11 September depending on whose version of events is preferred.

88. The submissions go on to make reference to the test for causation in such a claim as set out in *Pnaiser* (below). It is submitted that the claimant was contacted by CW because she had not vacated her room and that the reason for this was because she had chosen to attend college on

15 September rather than moving room. This was not something arising or related to her disability.

89. Submissions were also made on the justification defence available in a discrimination arising from disability claim.

90. Turning to the reasonable adjustments claim, Mr McGuire set out the relevant statutory provisions and then turns to the issue of the PCP. He notes the PCP relied on as being the terms of accommodation agreement.

91. It is submitted that the claimant has not established that this PCP has placed her at a substantial disadvantage compared to persons who are not disabled. Reference is made to the reasons given by the claimant for not wishing or being able to move room and, in particular, that no reference was made by the claimant to any mental health issue causing her problems in her witness statement or her "diary".

92. In any event, the respondent did not have the requisite knowledge that the PCP was likely to place the claimant at a substantial disadvantage. Given that the claimant had not raised any issue relating to her mental health, the respondent could not have reasonably known that the claimant was put at a substantial disadvantage.

93. Even if the duty arose, it was submitted that the claimant remained in the same room on 14 September and so there was no disadvantage. The same analysis is said to apply to the events of 15 September.

94. In any event, adjustments were made to allow the claimant to remain in the same room until 17 September and that she need only move with essential items. The claimant confirmed, at the time, that she was happy with this.

95. In relation to the harassment claim, it was submitted that the conduct relied on was not related to disability. The reasons why CW had contacted the claimant on 15 September were in relation to the repairs needing done and were an attempt to contact to find out where she was.

96. Further, the messages did not have the prohibited purpose or effect; the Tribunal has to consider the claimant's perception of the conduct but that

is not all and it must look at all the facts of the case and determine whether it is reasonable for the conduct to have the effect complained of. It was submitted that it was not reasonable to have this effect.

97. Finally, in relation to the victimisation claim, it was submitted that this was time-barred and the reasons for this are set out. In any event, it is submitted that the claimant has not established that the belongings said to have not been returned to her were ones she had left behind in the staff accommodation. Reference was made to the evidence of the witnesses that the bags which had been left behind contained only old clothes, towels and uniforms but not the items which the claimant says were lost other than to a "cat bag" and a "Stitch" doll.

98. Fundamentally, it is submitted that there is no evidence whatsoever that any action or inaction by the respondent was because of the claim raised by her.

Relevant Law

99. Disability is one of the protected characteristics covered by the Equality Act 2010 and section 6 of the Act defines disability as a physical or mental condition which has long-term, substantial adverse effects on a person's day-to-day living activities.

100. The definition of discrimination arising from disability in section 15 of the 2010 Act is 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.*

101. The burden of proof in claims under the 2010 Act is set out in s136:-

> ***136 Burden of proof***

(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.

102. The burden of proving the facts referred to in s136(2) lies with the claimant. If this subsection is satisfied, however, then the burden shifts to the respondent to satisfy subsection 3.

103. In order for there to be unfavourable treatment, the claimant must be subjected to some form of detriment. The question of whether there is a detriment requires the Tribunal to determine whether "*by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work*" (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL).

104. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong* [2005] ICR 931 (as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] IRLR 870).

105. Guidance as to how to apply the test under s15 was given in *Pnaiser v NHS England [2016]* IRLR 170, EAT:-

a. Was there unfavourable treatment and by whom?
b. What caused the treatment, or what was the reason for it?
c. Was the cause/reason 'something' arising in consequence of the claimant's disability?
d. This stage of the test involves an objective question and does not depend on the thought processes of the alleged discriminator.
e. The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.

106. The case of *A Ltd v X* [2020] ICR 199 sets out guidance for Tribunals in assessing the employer's knowledge of disability:-

> *"In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:*
>
> *(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.*
>
> *(2) The respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2) ; it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.*
>
> *(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.*
>
> *(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017] ICR 610 , per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given*

impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at paragraph 31.

*(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the **Code** , which (relevantly) provides as follows*

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628 ; SoS for Work and Pensions v Alam [2010] ICR 665).

*(7) Reasonableness, for the purposes of section 15(2) , must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the **Code**."*

107. The duty to make reasonable adjustments is set out in s20 of the Equality Act with s21 making a breach of the duty an unlawful act. The relevant provisions of s20 are:-

(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 (PCP) *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.*

(4) …

(5) …

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

108. The issue of knowledge is an issue for a claim in relation to the duty to make reasonable adjustment. Paragraph 20 of Schedule 8 of the 2010 Act provides as follows:-

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

(a) …

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

109. The knowledge issue in respect of the duty to make reasonable adjustments has the same concepts of actual or constructive knowledge as the knowledge issue for s15 claims and the caselaw set out above in relation to s15 applies to the assessment of knowledge for the duty to make reasonable adjustments.

110. In *Wilcox v Birmingham CAB Services Ltd* EAT 0293/10, the EAT confirmed that the employer requires to have knowledge of both disability and disadvantage in order for the duty to make reasonable adjustments to be engaged.

111. What can amount to a PCP should be construed broadly but it does not apply to every act of unfair treatment and one-off acts of alleged discrimination (for example, dismissal) would not normally fall within the scope of a PCP. However, what may appear to be a one-off act could amount to a PCP if there is some evidence that it would be applied again in the future if similar circumstances arose (*Ishola v Transport for London* 2020 EWCA Civ 112).

112. In relation to the duty to make adjustments, the degree to which any adjustment would overcome the disadvantage to the claimant is relevant to whether the adjustment is reasonable (*HM Prison Service v Johnson* [2007] IRLR 951). Further, the duty is intended to integrate disabled people into the workplace and this is also relevant to whether any adjustment is reasonable (*O'Hanlon v Revenue and Customs Comrs* [2007] IRLR 404).

113. Harassment is defined in s26 of the Equality Act 2010:-

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

…

disability;

…

114. In Hartley v Foreign and Commonwealth Office UKEAT/0033/15 (27 May 2016, unreported) it was held that the question whether there is harassment must be considered in the light of all the circumstances of the case. Where the claim is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

115. However, even where certain elements of the test for harassment are met (for example, unwanted conduct and the violation of the claimant's dignity), the Tribunal must still consider the "*related to*" question and make clear findings as to why any conduct is related to a protected characteristic (*UNITE the Union v Nailard* [2018] IRLR 730; *Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495, EAT).

116. The test for victimisation is set out in s27 of the Equality Act 2010:-

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this 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.

117. It is important to distinguish between cases where the alleged detriment has a connection to the protected act but is not "because" of it from those cases where the detriment is directly because of the protected act.

118. For example, in *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, it was held that a refusal of a reference did not amount to

victimisation on the basis that it was not refused because of the fact that the claimant had brought a race discrimination claim but because of the imminence of the hearing in the case and the respondent's desire to protect their position in the litigation.

Decision - general

119. The Tribunal will deal with each of the claims in turn below given the specific factual and legal issues to be determined in each claim.

120. The question of whether the claimant was disabled as defined in s6 of the Equality Act remained in dispute between the parties. The Tribunal has not, ultimately, determined this issue because, even assuming that the claimant's medical condition met the definition, the Tribunal, for the reasons set out below, came to the view that those claims for which the claimant had to meet this definition would not succeed on their substantive merits.

Decision - victimisation

121. The central argument of this claim is that certain of the claimant's belongings were not returned to the claimant and that this was because she had carried out a protected act (that is, bringing the original proceedings). The detriment is framed as either a deliberate disposal of the claimant's belongings, a failure to securely store those belongings, a failure to return these to the claimant or a failure to take the proper steps to locate these.

122. The Tribunal is satisfied that the bringing of the proceedings was a protected act. There was a submission by Mr McGuire that, when AP was informed by the claimant of the proceedings, it was not said that it was a claim under the Equality Act or a discrimination claim. To the extent that he was suggesting that there could not be a protected act if it was not said that the claim was a discrimination claim then the Tribunal does not consider this is correct as a matter of law. It is not aware of any authority to support such an assertion and it considers that such a requirement would fundamentally undermine the protection provided by s27 of the Act.

123. The Tribunal does not consider that there is any link between the bringing of the claim and how the claimant's belongings were dealt with by various people in the respondent's organisation. There was certainly no direct evidence that the fact that the claimant had brought her claim to the Tribunal had had any influence on how her belongings had been dealt with by the respondent.

124. There was also no evidence from which the Tribunal considered they could draw an inference that the protected act had any effect on how the claimant's belongings were handled. It has taken into account all of the relevant facts but considers that the following factors are of particular significance:-

a. AP was the only person involved in the handling of the claimant's belongings who knew that she had brought Tribunal proceedings. There was no evidence that any of the other people involved with the belongings knew of the protected act. It was certainly not put to them in cross-examination that they knew of the protected act nor did the claimant give any evidence that she had told any of them that she was bringing Tribunal proceedings.
b. AP had very little involvement with the handling of the claimant's belongings other than email exchange in December 2020 which included a discussion about collecting these amongst other matters, arranging for one of the claimant's friends to collect the belongings in March 2021 and as a point of contact in September 2021 when the claimant asked about her remaining belongings. AP gave undisputed evidence that responsibility for belongings left behind by staff when they leave accommodation does not fall within her remit.
c. There were various people involved in the handling of the claimant's remaining belongings but there was no evidence that any of them were acting on AP's directions or that she was influencing what they did with the belongings. In particular, the final disposal of the belongings was carried out by LC and CC with no evidence of any involvement from AP.
d. The respondent did return the claimant's belongings in the sense that arrangements were made for a friend of the claimants to

collect these in March 2021. The reason why some of the claimant's belongings did not return to her at this time was because there was no room in the friend's car and not as a result of any action by the respondent or its staff.

e. There was no evidence that the respondent put up any obstacles or barriers to the claimant collecting her belongings. Indeed, the main barrier was the Covid related travel restrictions in place at the time which meant that the claimant had to remain in Italy and arrange for a friend to collect her possessions.

f. Other than two items (the "Stitch" doll and what was described as the "cat bag" containing papers), there was no evidence led that the other items which the claimant lists in her pleadings regarding the victimisation claim were in the bags left behind in March 2021. In relation to the "cat bag" this was retained by CC and the claimant was aware of this but there was no evidence of any steps being taken by either of them to have this bag returned to the claimant.

g. The evidence heard by the Tribunal, which it does not doubt, was that the remaining bags contained only old clothes and sheets along with some glassware.

h. The claimant's belongings were kept in secure locations over the relevant period; they were initially locked in her room; they were in BB's office; they were in a locked cupboard in the bar.

i. The only time when they were left in a location which could be said to be unsecure was when they were left in the reception area for approximately a month. However, they were left there by the claimant's friend without any agreement from KR and this was at a time when the hotel was closed with no guests and minimal staff.

j. It was not put to any of those handling the claimant's belongings that there was some other secure location where these could be stored either at the relevant time by the claimant or during cross-examination. There was no evidence before the Tribunal, therefore, that there was something else which AP should have done in December 2020 or March 2021 regarding the claimant's belongings. There was certainly no evidence that, at these times, the claimant had asked for the respondent to store her belongings

in a particular location; she knew these were in her room and had raised no concerns about this.

k. The Tribunal heard undisputed evidence that when someone leaves accommodation and leaves behind any possessions then the practice was to leave those in a common area for other staff to take anything they wished and for anything left to be disposed of. This is what was done in this case by CC and, whilst a victimisation claim does not involve the comparison exercise involved in claims of direct discrimination, it is a relevant part of the factual matrix that those involved acted in the way they have acted in similar circumstances in the past.

l. The only evidence on which it was submitted that the Tribunal should draw an inference that some of the claimant's belongings were not returned to her, not safely stored or there had not been a proper investigation to locate these items was the terms of AP's email on 15 September 2020 at p213. It is said that this email shows frustration on the part of AP. The Tribunal does not consider that the wording of this email demonstrates any particular frustration on the part of AP; it starts by thanking the claimant for her initial email; it repeats the need for work to be done; it explains that the work has been rescheduled to allow for the room to be empty for 24 hours for Covid reasons and so the room would need to be vacated the next day. None of the language used is intemperate and there is no suggestion of any frustration on the part of AP, let alone a sufficient degree of frustration which indicates that, on learning of the claim some months later, she would then seek to put the claimant at a detriment by depriving her of certain of her belongings.

m. In any event, when this email is considered in the context of the whole factual matrix, it does not provide sufficient evidence from which the Tribunal could draw an adverse inference of victimisation. In particular, the fact that the bulk of the claimant's belongings were returned, the circumstances in which the remainder came to be left behind and the fact that AP had no involvement with how that remainder was handled significantly

outweigh this one email which shows no real signs of frustration on the part of AP.

n. In terms of the allegation that insufficient investigation was done by AP in relation to locating the remaining belongings, the Tribunal considers that there was very little more that could be done by her. She identified that BB had been in charge of this and asked him to locate these. It is true to say that she could have carried out a search herself in September 2021 but there is no evidence that this would have resulted in any different outcome.

125. In these circumstances, the Tribunal considers that there is no link, either direct or inferential, between the protected act and how the claimant's belongings were handled. The claim of victimisation is, therefore, not well-founded and is hereby dismissed.

126. The respondent had raised the issue of time-bar in relation to the victimisation claim. In light of the Tribunal's findings on the substantive merits of this claim, it did not consider it necessary to determine the time-bar point and no findings have been made in relation to this.

Decision – discrimination arising from disability & harassment

127. The Tribunal will deal with these claims together because both claims rely on the same actions by the respondent and their employees as the acts of discrimination and harassment, that is, the communications from AP and CW on 14-15 September 2020 regarding the repairs and the need for the claimant to move room.

128. The first question for the Tribunal in the discrimination claim is whether these communications amount to unfavourable treatment in the sense that a reasonable worker would consider that they had been disadvantaged.

129. The Tribunal does not consider that, with one exception, a reasonable worker would consider that they were being disadvantaged by being contacted by their employer (through a manager and a supervisor) about the matter in question.

130. The initial contacts by AP and CW are to make arrangements for the repair to the window in the claimant's room and it is very difficult to see how this

is a detriment to the claimant nor how a reasonable worker would consider they had been disadvantaged by this. It is something which requires to be done and arrangements need to be made.

131. The repeated contact by CW on 15 September is not something which the Tribunal considers a reasonable worker would consider disadvantages them in circumstances where a supervisor is trying to contact them to discuss a matter and they do not reply for some time.

132. The Tribunal also notes that the contact from CW was not excessive; he makes initial contact by text message at 13.15 asking for the claimant's mobile number and does not chase this up until more than 4 hours later at 17.40 when he sends a second message; the claimant replies at 18.09 and there is then an exchange of messages in which he requests either the claimant's mobile number or email which she does not provide; he follows up with a final message at 20.01.

133. The same can be said of the contact between the claimant and AP on 14 September; AP makes initial contact by phone to explain the position with the claimant and then meets with her later in reception to hand over the key for the new room (which includes a discussion about why the move is necessary and why the claimant is reluctant to move).

134. For the most part, the content of the contact with the claimant is not such that the Tribunal considers that a reasonable worker would take the view that they were being disadvantaged. There is nothing in what was discussed between the claimant and AP on 14 September that would be inherently objectionable (bearing in mind that the Tribunal has found that AP did not make the comment about leaving the claimant's belongings in the corridor).

135. Similarly, the bulk of the messages from CW are simple requests for the claimant's contact details under explanation that he needs to speak to the claimant urgently. Again, there is nothing inherently objectionable to a reasonable worker in the wording of these messages.

136. The one exception to all of this is the final message from CW at 20.01 on 15 September which includes a threat that the claimant will be evicted

immediately. The Tribunal considers that a reasonable worker would find such a threat to be to their disadvantage and, indeed, AP accepted in cross-examination that CW had *"gone rogue"* in making this comment and it was contrary to the respondent's policies regarding staff accommodation.

137. The Tribunal, therefore, finds that this comment was unfavourable treatment of the claimant.

138. The Tribunal has given consideration as to whether the final comment by CW is sufficient, when looking at all of the contact with the claimant on 14 and 15 September as a whole, for it to find that all of the communications amount to unfavourable treatment. In other words to look at the matter as a whole rather than as separate incidents.

139. In the context of the whole facts of the case, the Tribunal does not consider that this last message is sufficient for it to conclude that a reasonable worker would consider that all of the communications had disadvantaged them. In particular, the Tribunal has taken into account the following matters:-

a. This message comes at the very end of the communications on 15 September.
b. More importantly, it comes after GB had become involved and found a solution to the claimant's concerns about moving room which would facilitate that process.
c. It is an outlier in terms of its tone and content.
d. The claimant does not, at the time, make reference to it to GB or AP. She does not, for example, forward it to either of them asking why it had been sent or querying if things had changed after a solution had been found.

140. The next question is what was the "something" which was the cause of that unfavourable treatment and whether it arose in consequence of the claimant's disability. In assessing this, the Tribunal considers that the cause of this comment cannot be looked at in isolation and the whole series of communications, of which this is the last, needs to be considered to put matters in context.

141. It is quite clear that the "something" which causes the initial contacts with the claimant by AP and CW on 14 September is the need for the window in her room to be repaired and for her to vacate the room for this to be done. This has no connection with the claimant's disability whatsoever and is clearly not something arising in consequence of her disability. Even if the Tribunal had found that these communications were unfavourable treatment then it would not have concluded that they were discrimination arising from disability for this reason.

142. The initial contact by CW with the claimant on 15 September was because she had not moved out of her room. This was the "something" but the Tribunal does not consider that this arose in consequence of the claimant's disability. The claimant's own evidence at paragraph 27 of her witness statement was that she was unable to move out because she had evening classes on 14 September and had to attend college on 15 September. This was what she told AP at the time and the Tribunal considers that this is the reason why she had not moved room.

143. The reason for CW contacting the claimant multiple times on 15 September culminating in the final message at 20.01 was that she had either not replied to him at all or had not supplied the contact details in question. The lack of reply was, on the claimant's own evidence in paragraph 29 of her witness statement and what was said in the messages she sent that day, her attendance at college. She does not assert, either at the time or in her evidence, that she did not reply or did provide the contact information for a reason arising from her disability.

144. Further, the claimant was capable of engaging in a detailed email exchange with AP and GB later on 15 September after she had finished at college. These later communications by the claimant indicate that her disability was not in any way the cause of her lack of response to CW and it was, rather, her attendance at college which was the cause of any failure to respond.

145. The claimant's attendance at college is a reason wholly unrelated to the claimant's disability and so the Tribunal finds that the repeated contact from CW including the final message (which the Tribunal considers can

amount to unfavourable treatment) were not caused by something arising from the claimant's disability.

146. In these circumstances, the Tribunal considers that the claim for discrimination arising from disability is not well-founded and it is hereby dismissed.

147. Turning to the harassment claim, there may be a question as to whether the communications relied on as acts of harassment (or, at least, the initial communications on 14 September) are capable of amounting to unwanted conduct where the claimant had agreed to the terms of the accommodation agreement which included a term regarding repairs. Inherent in the relevant clause of the agreement is a need for the respondent to communicate with employees about repairs (which would include any need to move room to allow for these to be done).

148. However, this was not a point argued before the Tribunal and the Tribunal considered that it may be too technical an approach. Rather, it concluded that, absent any express invitation from the claimant, the communications in question were unwanted conduct.

149. Turning to the question of whether this conduct had the purpose or effect prohibited by s26 of the Equality Act, the Tribunal considers that there is no evidence that either AP or CW had engaged in these communications for the prohibited purpose.

150. As set out above in relation to the discrimination claim, the initial communications on 14 September were for the purpose of arranging for the repair to be done, the initial contact on 15 September by CW was because the claimant had not moved room and the later messages from him were for the purpose of trying to secure the claimant's contact details in circumstances where she was not responding. None of this provides any evidence that either AP's or CW's purpose in sending these communications was that prohibited under s26.

151. Turning to the question of whether the communications had the prohibited effect, the Tribunal, with one exception, agrees with the submission by Mr McGuire that it would not be reasonable for these communications to

have that effect for similar reasons as relied on above in relation to the unfavourable treatment element of the discrimination claim.

152. Whilst the Tribunal accept that the claimant found these communications upsetting, it has to be the case that an employer is entitled to contact an employee about matters such as those in this case, to renew that contact when that employee does comply with an instruction and to repeat the contact where the employee does not reply. So long as the volume of communication is not excessive and the wording of any communication does not go beyond what is necessary then it cannot be said that it was reasonable for such communications to have the prohibited effect.

153. As set out above, the Tribunal does not consider that the volume of communication was excessive nor that the wording was such that it reasonably had the prohibited effect.

154. However, there is one exception to this and it is the same as in the discrimination claim; the Tribunal does consider that it was reasonable for the final message from CW at 20.01 to have had the prohibited effect. This does go beyond what was reasonably necessary in terms of its wording, specifically the threat of immediate eviction which AP accepted was not in keeping with the respondent's policy. There can be no doubt that such a threat would reasonably create the prohibited effect in terms of s26 as it clearly creates an intimidating or hostile environment.

155. As with the discrimination claim, the Tribunal has given consideration as to whether the communications should be looked at as a whole in considering whether it was reasonable for them to have the prohibited effect. For the same reasons as set out above does not consider that the final comment is enough for it to be reasonable for the whole series of communications to have the prohibited effect.

156. The question then is whether this particular comment is related to disability. The Tribunal bears in mind that this is a broad test and the comment does not need to be because of disability. The Tribunal has looked at the whole context of how this comment came to be made in assessing this matter.

157. The Tribunal considers that the comment was made as a result of CW's frustration in the lack of response from the claimant to his earlier communications and her failure to move out of her room. As noted above, it is the claimant's own evidence, as set out in her witness statement and in the contemporaneous messages to CW, that she was unable to move and not replying to him because she was at college. This reason is entirely unrelated to the claimant's disability and there is nothing asserted by the claimant in the evidence from which the Tribunal could conclude that her lack of response to CW's messages was related to her disability.

158. The Tribunal should be clear that even if it had found that it was reasonable for the whole exchange of communications on 14 and 15 September to have the prohibited effect then it would not have found that these were related to disability for the same reasons as it found that the communications were not related to disability.

159. In these circumstances, the Tribunal concludes that the claim of harassment is not well-founded and is hereby dismissed.

160. The Tribunal would comment that there appears to be a lack of joined-up communication on 15 September by all those involved which, whilst it might not have entirely avoided the issues which arose, clearly did not assist matters. There was no evidence that CW was keeping AP apprised of his attempts to contact the claimant, AP did not inform CW that the claimant had contacted her and that she (and GB) were dealing with the issue, the claimant did not inform CW that she was going to raise the matter with AP and nor did the claimant inform AP (and GB) that she was continuing to receive contact from CW. If all those involved had taken a more coordinated approach to the matter then it may well have assisted.

Decision – duty to make reasonable adjustments

161. The first question for the Tribunal in relation to the claim that the respondent breached the duty to make reasonable adjustments is whether the respondent applied a PCP to the claimant. Two possible PCPs were advanced on behalf of the claimant; the terms of the accommodation agreement in which staff are given a minimum of 24 hours' notice of any maintenance work to be carried out on their room; the actual

circumstances of this case where the claimant was given less than 24 hours' notice.

162. The Tribunal considers that the terms of the accommodation agreement relating to notice amount to a PCP on the basis that it was agreed by the respondent's witnesses that this is the practice adopted by the respondent in relation to such matters. Indeed, the respondent did not seek to argue that this did not amount to a PCP.

163. The Tribunal does not consider that the actual notice given to the claimant of less than 24 hours amounts to a PCP. Although the concept of the PCP should be construed broadly, one-off acts do not generally fall within the scope of PCP unless there is evidence that what happened in this case would be likely to happen again in future instances. However, the evidence heard by the Tribunal is that the respondent has always given at least 24 hours' notice of maintenance work and frequently gives more than that. There was, therefore, no evidence that what happened in this case was likely to happen in the future or had happened in the past.

164. The Tribunal, therefore, finds that the respondent did apply a PCP to the claimant which was the minimum notice of maintenance work set out in the accommodation agreement.

165. The next question is whether this PCP placed the claimant at a substantial disadvantage as disabled person. The Tribunal did have some difficulty in understanding what the disadvantage was said to be; the written submissions on behalf of the claimant simply makes an assertion that the claimant was placed at a substantial disadvantage given that she has PTSD and the triggers for this condition but does not specify the disadvantage.

166. To the extent that the disadvantage is said to be a difficulty in moving out of the room with 24 hours' notice, the claimant's own evidence in her witness statement was, as discussed above, that she could not do so because of her college commitments on 14 and 15 September. The other reason why she had difficulty in moving given in the statement is the volume of her possessions and the distance to the building containing her

new room. Neither of these reasons are in anyway connected with the claimant's disability.

167. The claimant does state that she suffered a panic attack on the evening of 14 September but her witness statement ascribes this to the alleged threat that her belongings would be left in the corridor if she did not move (something which the Tribunal has found was not said) and not the amount of notice being given.

168. The only reference to the amount of notice in contemporaneous correspondence is in the claimant's email to AP and GB at 16.04 on 15 September (pp213-214) where she states that she had less than 48 hours' notice and does not consider this reasonable. She goes on to explain that she has difficulty adjusting to new living spaces and would have hoped for more support and time to adjust.

169. The Tribunal has given anxious consideration as to whether the claimant has discharged the burden of proving that she was placed at a substantial disadvantage as a disabled person and it is persuaded, but only just, that she has done so. The Tribunal finds that the claimant was disadvantaged in adjusting to the new living arrangements by the PCP applied to her because the effects of her PTSD make it difficult for her to adjust to new circumstances, such as a change of room, in a short period of time.

170. The next question for the Tribunal is whether the respondent, specifically AP, had the requisite knowledge, in terms of Schedule 8, paragraph 20 of the Equality Act, for the duty to be engaged. It is AP's knowledge which is to be considered because the alleged breaches of the duty relied on by the claimant are both said to be carried out by her; the first on 14 September when the claimant was asked to vacate her room (one request did come via CW but it is clear from the message he sent to the claimant that he was simply relaying a request from AP and was not the decision-maker himself); the second alleged breach was said to occur on 15 September when AP sent an email to the claimant at 16.18 (p213) renewing the request for her to vacate her room.

171. It was quite clear from the evidence that AP did not have actual knowledge of the claimant's PTSD at any time prior to 14 and 15 September 2020.

She had not had sight of either the claimant's medical questionnaire (p119) in which the claimant disclosed her PTSD or the subsequent risk assessment (p120). The only person outside of HR who had seen these was BB and there was no evidence that he had disclosed the information contained in these documents to AP. Further, there was no evidence that anyone else had disclosed the claimant's PTSD to AP.

172. Further, there was no evidence that the claimant had disclosed her PTSD to AP during their discussions on 14 September; the claimant's witness statement makes no mention of this and although the claimant sought in cross-examination to assert that she had raised her mental health in those discussions, the Tribunal considers that, given the importance of this to the claim, if she had then this would have been said in her witness statement.

173. In terms of constructive knowledge, there is no evidential basis whatsoever from which the Tribunal can conclude that AP, prior to asking the claimant to vacate her room on 14 September, could reasonably be expected to have known that the claimant was disabled. There was no suggestion of any information being in AP's possession which would have given her the impression that the claimant was disabled nor was there anything which should have prompted her to investigate further.

174. Further, there was no evidence that AP had actual or constructive knowledge that the claimant would be placed at a substantial disadvantage by the application of the PCP on 14 September. There was no evidence whatsoever that AP had any information in her possession that asking the claimant to move room with 24 hours' notice would cause her any issues at all.

175. The Tribunal, therefore, concludes that prior to applying the PCP on 14 September, AP did not have the requisite knowledge for the duty to make reasonable adjustments to be engaged. It was not, therefore, engaged when the PCP was applied on 14 September and so there could not be a breach of the duty.

176. The position is different when AP emails the claimant at 16.18 on 15 September. At that point in time, she has had sight of the claimant's

email of 16.04 and, indeed, is replying to it. The claimant's email raises issues about the amount of notice, that the situation is causing her increasing anxiety and stress, that she requires more support and time to adjust to the move, that she does have difficulty with adjusting to new living spaces and that there was an impact on the claimant's day-to-day life.

177. Whilst the Tribunal does not consider that this gives AP actual knowledge that the claimant is disabled or that the PCP would place her at a substantial disadvantage, applying the guidance in *A Ltd v X,* the Tribunal does consider that the information disclosed in this email was such that AP should have taken steps to investigate the position further. She was on notice that the claimant was experiencing stress and anxiety, that she had difficulty adjusting to new living spaces and needed more time and support. This was now a situation where there was a basis for AP to make further enquiries about why the claimant was experiencing these issues but she did not do so. In such circumstances, the respondent has not discharged the burden of proving that AP could not reasonably be expected to have the requisite knowledge in terms of Schedule 8 paragraph 3.

178. The Tribunal does consider that the duty to make reasonable adjustments at the point when AP had sight of the claimant's email (which must have been sometime between 16.04 and 16.18 being the times of the claimant's email and AP's reply). However, the Tribunal should be clear that the duty was not engaged at any earlier time on 15 September.

179. The question then is whether or not the respondent complied with the duty. Although AP's immediate response was to again apply the PCP in her email of 16.18, she did extend the deadline for the move to the next day meaning that the claimant was given more time to adjust to the move and undertake.

180. Further, this was not the end of the matter and the email exchange continued that day and into the next, now involving GB, and further adjustments were made; in her email of 17.46 on 15 September (pp211-212), GB indicates that the claimant only need move on a temporary basis, taking only essential belongings with her; in her email of 13.50 on

16 September (p210), GB gives the claimant until 17 September to move rooms.

181. In her responses to these emails (pp211 & 210), the claimant indicates that she is happy with these proposals and she is then able to move rooms. There was no evidence led before the Tribunal that after the adjustments were made by AP & GB that the claimant had any further difficulties in moving room or adjusting to the move and the Tribunal can only conclude from this that these adjustments had removed any disadvantage.

182. In summary, the Tribunal finds that the duty to make reasonable adjustments was not engaged until the claimant's email of 16.04 on 15 September when AP had constructive knowledge of the claimant's disability and the disadvantage. There could not be a breach of the duty at any time earlier than this. Once the duty was engaged, the respondent made adjustments which overcame the disadvantage to the claimant and so they did not breach the duty once it was in play.

183. In these circumstances, the Tribunal does not consider that the claim for breach of the duty to make reasonable adjustments is well-founded and is hereby dismissed.

Employment Judge: **P O'Donnell**
Date of Judgment: **05 May 2022**
Date sent to parties: **05 May 2022**