Case No: 1402963/2019

EMPLOYMENT TRIBUNALS

Claimant: Miss L Callaghan

Respondent: Lidl Great Britain Limited

Heard at: Bristol On: 24, 27, 28, and 31 January, and 1 February 2022 (Evidence)

3 February 2022 (Chambers)

28 April 2022 (Writing)

10-17 May 2022 (Writing when time was available)

Before: Employment Judge Midgley
Mr H Launder

Mr C Williams

Representation
Claimant: In person.
Respondent: Mr T Perry, Counsel

RESERVED JUDGMENT

UPON the parties consenting to the claims in Schedule 1 attached to this Judgment being determined at the hearing ("the Grievance Claims") and the claims in Schedule 2 being stayed ("the Stayed Claims") pending the determination of the Grievance Claims.

AND UPON hearing evidence and submissions from the parties on the Grievance Claims.

The unanimous Judgment of the Tribunal is that:

1. The claims of direct sex discrimination contrary to section 13 Equality Act 2010 ("EQA 2010") are well founded and succeed on the limited basis detailed in the Reasons below.

2. The claim of failure to comply with the duty to make reasonable adjustments contrary to section 21 EQA 2010 is well founded and succeeds.

3. The claim of victimization contrary to section 27 EQA 2010 is well founded and succeeds.

4. The claims of direct disability discrimination contrary to section 13 EQA 2010, harassment (related to disability) contrary to section 26 EQA 2010 and discrimination arising from disability (contrary to section 15 EQA 2010) are not well founded and are dismissed.

5. The Stayed Claims are restored, reserved to this Tribunal, and directions will be sent to the parties in respect of them and a remedy hearing under separate cover, following receipt of the parties' representations as to the appropriate course.

REASONS

Claims and Parties

1. By a claim form presented on 12 July 2019, the claimant, who was employed by the respondent from 1 August 2017 until her resignation which took effect on 24 March 2019 as a Supply Chain Administrator / Assistant Team Leader, brought claims of disability discrimination, unauthorised deduction of wages, and unpaid holiday pay. The respondent is a well-known supermarket.

2. The procedural history of the claim is carefully and helpfully set out in the Case Management Summary of EJ Bax dated 12 March 2021, it will not be repeated here. Suffice it to say that the claims enlarged to include complaints of sex discrimination, but the wages and holiday pay complaints were dismissed as being out of time. EJ Midgley had previously found that it was just and equitable to extend time in relation to the last acts relied upon in relation to the discrimination claims (at that stage the precise allegations were yet to be finalised), and jurisdiction was accepted on that basis, but the question of whether the earlier allegations were linked to those which permitted to proceed was left for determination at this hearing.

3. The essence of the claim which we had to consider is that the claimant alleged that Mr Carter had bullied her and treated her unfairly, had discriminated against her because he doubted that her knee injury was a disability, and at an away day at Centre Parcs, had harassed her by taking her face in his hand and refusing to let go. She alleged that the respondent's investigation into those

matters which found there was inappropriate contact, but not of the form she alleged, and no discrimination was flawed and itself discriminatory, that the grievance appeal repeated that failing, and that in requiring her to walk a significant distance to a block for her grievance interview and in requiring her to travel to London for her grievance appeal interview the respondent breached the duty to make reasonable adjustments. Lastly, the claimant alleged that Mr Carter had ignored and ostracised her after she submitted her grievance.

4. As is often the case, the claims included a multitude of other allegations which were really facets of the same arguments, splitting out each complaint into its distinct parts, or less serious or fundamental to the case. At the case management hearing before EJ Bax, by example, the Judge identified 144 separate allegations.

Procedure, Hearing and Evidence

5. We were provided with an agreed bundle of documents of 699 pages. The claimant produced witness statements for herself and Mr Lee Clark. The respondent produced witness statements for the following:

5.1. Mr Jonathan Carter, Regional Head of Supply Chain, who was the subject of the claimant's grievance complaint, ("JC");

5.2. Mr Graham Clark, a Regional Director, who heard the claimant's grievance, ("GC");

5.3. Mr Andrew Wilkins, a Regional Head of HR at the Avonmouth Regional Distribution Centre, who provided advice and support in relation to the claimant's grievance, ("AW"); and

5.4. Mrs Kirsty-Anne McIntyre, a Senior Consultant – Employment Law and member of the Respondent's Head Office Employment Law team and a qualified solicitor, who heard the claimant's grievance appeal, ("KM").

6. Due to pressures on Tribunal resources, although the case was listed for nine days, EJ Midgley was the only judge he was able to hear the case and he had only six days available to do so. In consequence, prior to the hearing, the Tribunal raised the reduced listing and suggested that proposed solutions might be discussed on the morning the first day of the hearing.

7. Consequently, when the parties attended, we proposed that the hearing could address the allegations relating to the grievance and victimisation in the six days on the basis that if they were not proved all the claims would be out of time, and that if they were proved, whilst the issue of limitation in relation to the remaining claims would remain, the parties might wish to consider their positions on the basis of the Tribunal's findings. The parties took time to consider and consented to that approach.

8. We were greatly assisted by the respondent's preparation of a helpful chronology and a reading list, by the parties' willingness to restrict the claims to be determined in the manner that we suggested, and by the parties' abilities to focus their questions and arguments upon those claims. Mr Perry

in particular was fair and balanced in the manner in which he asked questions of the claimant and assisted her (given she was a litigant in person). We reiterate our gratitude for that approach and commend him for it.

9. At the outset of the hearing, the respondent tentatively applied for a Rule 50 Order in respect of Mr Carter. We say tentatively, because the application was not supported by any evidence from Mr Carter indicating why he needed such an order, and the respondent recognised the difficulty that created for the application. The claimant did not seek the protection of an anonymity Order or a Restricted Reporting Order. For reasons that were given orally at the time, we refused the application.

10. The first day was taken for reading, and the remaining days for evidence, with submissions being made on the fifth day and deliberations in chambers on the final day.

Recusal Application

11. During the course of the second day of the hearing, when Mr Perry was cross-examining the claimant in relation to the allegations of vicitmisation he stated, "I suspect my instructions will be that you were not ignored at all;" he later referred the claimant to a comment in a grievance interview in which JS said the grievance investigator had told him not to speak to the claimant. Mr Perry suggested to the claimant that that could be the reason for any lack of contact between JC and the claimant. The Tribunal was concerned by the questions and alerted Mr Perry to lack of evidence on the point in JC's statement. Mr Perry reflected on the matter and sought permission to ask one supplementary question, asking JC whether he had any comment to make on the relevant passages in the claimant's statement.

12. We permitted that limited expansion of the evidence. On the fourth day, during his evidence, when asked the question above, JC stated that it also became apparent that the claimant was keeping a little black book and was noting matters down, which made him "wary and a little bit scared of her" and suggested it was that fear that led him to avoid speaking to the claimant.

13. Given that evidence given was not in JC's statement, had not been put to the claimant, and was in every sense new and untested, the Employment Judge sought to ask questions to test its veracity of the evidence and to clarify what the precise fear was and what its causes were.

14. The relevant exchange was as follows:

Q: What did you believe the purpose of Miss Callaghan's notes, that she was making, was?

A: I just thought it was a record of my behaviour and tracking my behaviour and what was happening in the department and what I was saying, yeah, I was obviously extremely upset of the allegations that had been made, and yeah, it was part of this vendetta which I mentioned before.

Q: What did you think she would do with the notes?

A: Potentially make a complaint, a further complaint, and use them against me. Obviously, you have seen that she had recorded one of the meetings, which I wasn't aware of; um, and I was completely shocked about, and yeah, I didn't know what, what her capabilities were, and yeah what she could do with that information.

Q: What sort of complaint did you think she might use them for?

A: A potential grievance in the future or use them against me for something in in the future.

Q: Did you think that that complaint might include allegations of harassment on the grounds of sex or disability?

A: No, absolutely not, no

Q: You didn't think that she was going to raise any further complaint about that?

A: No

Q: Why was that?

A: Because I hadn't done anything wrong, but I thought that she could twist things potentially and take them out of context

Q: It may be that my question wasn't sufficiently clear, and if so, I apologise, I will try and rephrase it: the evidence you have told me so far is that you believe the notes were to record your behaviour, which you believed was part of Miss Callaghan's vendetta against you, and that you thought those notes might be used against you in a complaint. What I was asking was not whether you thought that such a complaint was based on truth or anything like that, but what you believed the subject or nature of that complaint might be; what she might be saying that you did?

A: Well, I don't know, what she would be saying that I did, but yeah, I hadn't done anything wrong. I think I was just uneasy that someone was recording things that I was doing and saying without my knowledge

Q: Was it any part of the reason for your fear that you thought that she might make another complaint that you acted improperly or treated her unfairly because of her disability?

A: Um, I suppose yes, yes, I was concerned that she might potentially use information against me.

15. On the outset of the fifth day, the respondent made an application for the Tribunal to recuse itself arising out of the Judge's last two questions to Mr Carter, above, which he described as leading questions. The grounds of application were that the questions would lead the fair and impartial observer to perceive that there was a real risk of bias because the Tribunal had descended into the arena and had effectively cross-examined the witness

and/or was seeking to create a case of victimisation which differed from that advanced by the claimant.

16. Mr Perry stressed in making the application that he was making no allegation that the Tribunal's questioning of the respondent's witnesses was, save for that last two questions, in any way the cause of concern, and that he was making no allegation that the Tribunal was or had been hostile to the respondent or its witnesses. The respondent's primary concern was that in asking the final question of the witness there was a risk of apparent bias because it appeared the Tribunal was seeking to enlarge the allegation of victimisation beyond that pleaded by the claimant to include an allegation that the reason for Mr Carter's actions was fear of a further complaint, rather than the pleaded case, which was the fact that she had made a complaint.

17. We took time to consider that application and replayed the recording of the exchange in question. We rejected the application because in our judgment the fair minded and informed observer, having considered the facts, would not conclude that there was a real possibility of bias on the following basis:

    17.1. First, the questions asked of Mr Carter were not leading questions: they did not introduce new evidence but merely sought clarity in relation to the answers that he had given for the first time in supplemental questions, and which had not been put to the claimant. Mr Carter could have easily answered the last question with a 'no' as with a 'yes;' it was an open question. That was not to descend into the arena, but was only, "when… necessary to clear up any point that has been overlooked or left obscure" (see Jones v the National Coal Board [1957] 2 QB 55 per Lord Denning MR at paragraph 64).

    17.2. Secondly, the case the respondent had to answer was the pleaded case as clarified in the issues, as the claimant was a litigant in person. In order to amend the case, it would have been necessary for the claimant to amend the claim. No such application had been made and we had not invited the claimant to make one. The Judge's question could not and did not of itself change the basis of the claim; a fair-minded and impartial observer with knowledge of the facts of the case and Tribunal procedure would have known and understood that.

    17.3. Thirdly, the assessment of the appearance of bias does not permit the act complained of to be viewed in isolation but requires that its effect is considered in the context of the case as a whole. Here that context included the fact that the respondent was not alleging that the Tribunal had been hostile to its witnesses, or had sought to cross-examine them, or had acted improperly or unfairly at any other stage, or otherwise acting in any way which could have or did give rise to the risk of apparent bias. It also included that Mr Carter was the last witness to give evidence, and it appeared that the question most strongly objected to was the last question.

18. We therefore rejected the application. The parties provided written submissions and expanded upon them orally. The parties' submissions were helpful and focused and we are grateful to the parties for their efforts: we thank Mr Perry for his balanced and fair submissions which identified legal arguments which

assisted the claimant as well as the respondent, thereby complying with his duty to the court where the claimant was a litigant in person. The claimant's written submission, as with her, questions were focussed, helpful and to the point. They were a credit to her.

19. There was only sufficient time for the Tribunal to deliberate and reach its conclusions, which were unanimous. In consequence we reserved Judgment. The Judge apologies for the time it has taken to write up the Judgment and any anxiety or frustration caused to either party or the respondent's representatives.

The Issues

20. The issues were agreed at a case management hearing before EJ Bax on 21 March 2021 and are recorded in his Order.

21. Whilst respecting the Judge's approach, we have slightly restructured the allegations in relating to the grievance investigation (3.2.6 to 3.2.9, and 8.1.10 to 8.1.13) so to clarify the aspects of the grievance said to be a failure properly to investigate. Similarly, we have inserted square brackets to distinguish the legal claim from the factual allegation relied upon. Where that has led to the change in numbering, it is shown with underlying.

22. The consequence is that the following issues (which relate to the Grievance Claims) were to be determined at the hearing:

Direct disability discrimination (Equality Act 2010 section 13)

3.2 Did the Respondent do the following things:

3.2.2 Mr Clark informed the Claimant that to gain career progression that she would have to work in stores

3.2.3 In November 2018, Mr Clark failed to halt the RPAC recruitment exercise whilst the Claimant's grievance was being investigated;

3.2.6 The respondent failed properly to investigate the Claimant's grievance:

3.2.6.1 In the grievance investigation witnesses were asked about their relationship with the Claimant, rather than her relationship with Mr Carter;

3.2.6.2 The grievance outcome was focused on opinions rather than facts, [the evidence collected focused on her disability and great weight was placed on her need to have many 1:1s and that it created an atmosphere in the office and the need for the claimant to provide medical evidence when she walked with a limp and wore a knee brace.]

3.2.6.3 The outcome did not address the points raised;

3.2.6.4 The respondent failed to interview people;

3.2.7 The respondent failed to provide her with all information obtained in the investigation and witness statements were not released in an unredacted form;

3.2.8 The Respondent failed to follow the correct grievance process;

3.2.10 The grievance appeal was delayed;

3.2.11 The investigator for the appeal was less senior than that for the grievance as a result they were influenced by the grievance investigator and it was not completed properly.

3.3 Was that less favourable treatment?

Direct sex discrimination (Equality Act 2010 section 13)

4.2 Did the Respondent do the following things:

4.2.1 Failed to properly investigate the Claimant's grievance in that not

everyone was spoken to.

4.2.2 The grievance outcome did not properly take into account the evidence. [Mr Carter said it was a group hug, but no other witness said this happened. The Claimant said that he held her face. One witness said that Mr Carter was unprofessional. Mr Carter's version was accepted.]

4.2.3 The grievance appeal investigation did not speak to witnesses that the Claimant suggested and very few questions were asked about what happened at all. [Mr Carter was spoken to again and said he could not recall and gave a different version of events].

4.2.4 The appeal outcome did not properly take into account the evidence gathered, particularly Mr Carter's inconsistent accounts and it supported Mr Clark's original decision.

4.3 Was that less favourable treatment?

Discrimination arising from disability (Equality Act 2010 section 15)

5.1 Did the Respondent treat the Claimant unfavourably in the following way:

5.1.4 The grievance outcome was focused on opinions rather than facts, [the evidence collected focused on her disability and great weight was placed on her need to have many 1:1s and that it created an atmosphere in the office and the need for to provide medical evidence when she walked with a limp and wore a knee brace]. The outcome did not address the points raised;

5.1.5 In his grievance interview, Mr Carter said that the Claimant should have disclosed her disability in her interview.

5.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that: she had to take time off to attend medical appointments and excessive pain that she experienced. [sic]

5.3 Was the unfavourable treatment because of any of those things?

5.4 Was the treatment a proportionate means of achieving a legitimate aim?

Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

7.1 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7.2. Did the Respondent operate the following PCPs:

7.2.6 Grievance and mediation meetings were held in the administration block, 500m from where the Claimant worked in Avonmouth, or in London.

7.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was caused excessive pain by having to walk and/or travel.

7.6 Did the Respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

7.7 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests a supply chain meeting room in Avonmouth, 20m from her desk, could have been used.

7.8 Was it reasonable for the Respondent to have to take those steps and when?

7.9 Did the Respondent fail to take those steps?

Harassment related to disability, (Equality Act 2010 s. 26)

8.1 Did the Respondent do the following things:

8.1.1 The respondent failed properly to investigate the Claimant's grievance:

8.1.10.1 In the grievance investigation witnesses were asked about their relationship with the Claimant, rather than her relationship with Mr Carter;

8.1.10.2 The grievance outcome was focused on opinions rather than facts, [the evidence collected focused on her disability and great weight was placed on her need to have many 1:1s and that it created an atmosphere in the office and the need for the claimant to provide

medical evidence when she walked with a limp and wore a knee brace.]

8.1.10.3 The outcome did not address the points raised;

8.1.10.4 The respondent failed to interview people;

8.1.10.5 Witness statements were not released in an unredacted form;

8.1.10.6 The Respondent failed to follow the correct grievance process;

8.2.1 The grievance appeal was delayed;

8.2.2 The investigator for the appeal was less senior than that for the grievance as a result they were influenced by the grievance investigator and it was not completed properly.

8.2 If so, was that unwanted conduct?

8.3 Did it relate to the Claimant's protected characteristic, namely disability?

8.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

8.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it Is reasonable for the conduct to have that effect.

10. Victimisation (Equality Act 2010 s. 27)

10.1 Did the Claimant do a protected act as follows:

10.1 .1 Raising a grievance on 29 November 2018

10.2 Did the Respondent do the following things:

10.2.1 Between the grievance and the end of her employment, Mr Carter would ignore her, withheld drinks tickets at the Christmas party and would not speak to her for 6 weeks (allegation 73).

10.3 By doing so, did the Respondent subject the Claimant to detriment?

10.4 If so, was it because the Claimant had done the protected acts?

Factual Background

23. The claimant was first employed by the respondent in August 2017 as a Supply Chain Administrator, but at the time of the events in question had been seconded to the role of an Assistant Team Manager, firstly at WestonSuper-

Mayor and, from 7 November 2018, at Avonmouth. The respondent is company which is a household name and which carries on business as a supermarket.

The claimant's disability

24. At the time of the events in dispute, the claimant had been diagnosed with the following conditions which amounted to a disability: functional patella alta (an abnormally high knee), fat pad oedema (micro trauma to the fat pad within the knee) and patella tendonitis (wearing down the tendon). The primary symptom of all of those conditions was pain in the knee and reduced mobility. The claimant wore a visible knee brace from August 2017 until the end of her employment at the respondent. Whilst she was employed by the respondent she attended numerous medical appointments, which culminated in orthopaedic surgery in January 2019 shortly before the grievance appeal hearing. The respondent accepts that those conditions amounted to a disability.

The claimant's line management

25. Shortly after her appointment, the claimant was moved to the Ordering Team. The claimant's line manager there was Mr Lee Clark ("LC"). The claimant had a very good relationship with LC and disclosed to him that the details of her knee condition, advised him of her medical appointments, and kept him regularly appraised of any days on which the pain in her knee or the medication she was taking to manage it had an impact on her ability to perform her duties. As a consequence of those discussions, LC excused the claimant from conducting data checks, and if the claimant's pain was acute or her medication was affecting her, would divert calls that she would usually have taken to him. LC had a high opinion of the claimant's abilities and attitude to her work. The claimant's view of LC was equally positive.

26. LC' s manager was Mr Jonathan Carter, The Regional Head of Supply Chain, ("JC"). He was initially based at the Western-Super-Mayor Regional Distribution Centre ("RDC"), but subsequently moved to the Avonmouth RDC following its opening.

The Respondent's Policies

27. The respondent operated the following policies which are of relevance to this claim: the Anti-Harassment Policy-08/17; the Grievance Procedure-05/18; and the Equal Opportunities Policy. The relevant sections of those policies are as follows:

The Anti-Harassment Policy ("The harassment policy")

28. The harassment policy explicitly states that it covers harassment and bullying which occurs both in and out of the workplace, such as on business trips or at events or work-related social functions. The preamble identifies that harassment, bullying or victimisation will not be tolerated and may be treated as gross misconduct. An obligation is placed on managers to ensure that such behaviour is not accepted and that all employees are treated with respect and dignity.

29. A critical requirement of the harassment policy is known as the "grandfather principle," which requires that any allegation of harassment must be investigated by the appropriate disciplinary superior of the subject about who the complaint is made. There is no dispute in this case that Mr Graham Clark, the respondent's Regional Director, was not JC's disciplinary superior.

30. The policy expressly refers to the Equality Act 2010 and the Protection from Harassment Act 1997. It provides the following definition of harassment:

> Harassment is any unwanted physical, verbal or non-verbal conduct which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. A single incident can amount to harassment.
>
> All investigations (if possible) will look at the effect and these grounding circumstances of the behaviour on the recipient. It is immaterial that the harassment may be unintentional, disguised or indirect.

31. That definition is consistent with s.26 EQA 2010. Amongst the examples identified as potential harassment are inappropriate and offensive jokes, abusive behaviour, exclusion, unwanted physical contact, and leering. The policy identifies sexual harassment as harassment based on gender, amongst other protected characteristics.

32. The 'formal' procedure requires than any complaint of harassment is sent in writing to the employee's disciplinary senior or the Head of Administration at the employee's RDC. Thereafter, an investigation which would include the interviewing of relevant witnesses will be conducted. Appeals under the harassment policy are addressed in the same manner as those under the disciplinary policy.

The Grievance Policy

33. The respondent's grievance policy is a more general policy intended for the investigation and resolution of complaints that are not complaints of harassment. Part of the policy requires the complainant to attend a meeting to discuss the grievance; the meeting can occur before or after the investigation into the matters raised the grievance begins.

34. The policy permits an appeal, identifying that an appeal hearing should take place within 14 days of receipt of the appeal letter and specifies that an appeal is by way of a review and not a rehearing of the original grievance.

<u>The events which form the subject of the claim</u>

35. On 1 June 2018 the claimant began her secondment as an Assistant Team Manager. Between 8th to 11th June 2018 JC organised an activity weekend at Centre Parcs for his team, which included the claimant. The claimant attended on 8th but left early on 9th June 2018.

36. Between 10 June and 29 November 2018, a number of events occurred about which the claimant complains in these proceedings. It is unnecessary however

to recite them all at this stage because they are not directly relevant to the issues or our conclusions. However, it is worthy of note the following:

36.1. On 27 September 2018, during a meeting to discussion the claimant's expression of interest in a Warehouse Assistant Team Manager Role, JC responded very aggressive and angrily when the claimant asked if he would permit her to attend an agreed first aid course, slamming his hands on the desk and shouting "for fucks sake, it's a fucking first aid course, you can do it some other time." It was an outburst that left the claimant in tears;

36.2. In November 2018 JC called the claimant "sneaky" when she was wearing her coat rather than hanging it on the hooks on the wall or on her chair, which latter course JC had directed would lead the employee in question to pay a 10p fine to the NSPCC charity box;

36.3. On 23 November 2018, JC's Team were required to contribute to the "Tongue in Cheek Awards" by making nominations for employees for particular awards; and

36.4. At some stage prior to 27 November 2018 (the date is immaterial) before the claimant's grievance she had submitted an application to the respondent for an RPAC role. ON 27 November 2019, JC told that claimant that her application was not progressing to the next stage.

<u>The claimant's grievance</u>

37. On 29 November 18 the claimant submitted a written grievance to Graham Clark, the Regional Director ("GC") complaining about the actions of JC. She found it a very daunting experience to submit the grievance and was concerned about its impact upon her career prospects. She had discussed the contents of the grievance with LC, who supported her in making the complaints.

38. The grievance began with a summary:

> "Details of grievance
>
> I am raising this grievance as I feel like I have been consistently treated unfairly over the course of at least several months and had been subjected to shouting, exclusion, inappropriate offensive jokes, unwanted physical contact, intimidation, unreasonable criticism, undermining, blocking promotion, excessive workloads and non-cooperation.
>
> For the purposes of this letter I will write all incidences in date order with as much detail as possible. Some of the incidences reported don't necessarily apply to myself, but I have included them to demonstrate the general behaviour of someone who is in a position of power."

39. The first incident the claimant detailed was one on the Centre Parcs social weekend. She described how, after several drinks, she was having a conversation with JC, before stating,

> "during this conversation he held onto my face with both hands. I asked him to let go as I felt uncomfortable, yet I had to ask three times before he actually let go. During the course of this evening he had also….pressed me on why I wasn't going swimming and told me it was "ridiculous" to feel uncomfortable. As a result of JC's actions on this evening I left the weekend early, leaving Saturday afternoon."

40. The claimant accepts that she did not expressly articulate an allegation of sexual harassment, notwithstanding that was the complaint she was seeking to make. However, in her words she "left enough crumbs for [the respondent] to reach the same conclusion without me having to make the specific allegation." She believed that making an express allegation of sexual harassment would cause the respondent to 'reel back,' whereas identifying facts that would lead to the conclusion that sexual harassment had taken place would provide the best chance getting the best outcome without damaging her career.

41. In relation to the event in November concerning her coat, she recorded that JC had called her "sneaky for wearing her jacket in front of the entire office. She wrote,

> "[JC] is aware that I do not want to hang my coat on the hooks. I don't want the possibility of someone else putting on my jacket and finding personal items in the pockets, or the humiliation of walking across the room/picking up my bag to access sanitary products without the room seeing/asking where I in going, so I choose to wear my jacket."

42. In relation to the RPAC application the claimant detailed how JC had called her to a meeting to tell her that her application was not progressing, expressing unhappiness that she had applied without telling him and in circumstances where he had suggested that she not apply. She alleged that he told her that the reason she had not progressed was a lack if experience but also said that he could not envisage working with her as a manager. She did not ask, however, for the application process to be paused, pending the outcome of her grievance.

43. The claimant ended the grievance with what she identified as "general ongoing points". Amongst those points were the following:

> "inappropriate comments-for example, [JC] called [a female employee] (who was pregnant at the time), "fat" in the weekly team meeting. She was very upset by this and still is.
>
> Knee - I have a bad knee, I wear a knee brace every day and I am scheduled for orthopaedic surgery. I asked for no special treatment, except that I can't date check. [JC] has indicated several times that he doesn't feel there is anything wrong with my knee. I had to provide a medical letter in order for him to stop questioning me."

44. The claimant ended by saying that JC had overstepped the boundaries on several different occasions over a period of months, and she wished, as an outcome, to be treated fairly, respectfully and given equal opportunity to train,

develop and progress. She suggested that JC should apologise and receive some training or further development to avoid a repeat of his conduct.

The grievance investigation and outcome.

45. The case was allocated to GC who was supported by Mr Andrew Wilkins, the respondent's Regional Head of HR, ("AW"). AW has no formal qualifications in HR. Whilst the respondent conducts equality and diversity training, at the time of the incidents in question it maintained no record of which employees and staff had undertaken that training.

46. GC's evidence, which we accept, was that although he was aware that the claimant had some form of condition which affected her knee, he was not aware that that condition amounted to a disability. Had he received more recent or more thorough Equality and Diversity training, it may well be that that shortcoming could have been avoided.

47. Whilst GC was aware that it was not necessary for a grievance to expressly state that it was a compliant of harassment or of disability discrimination for it to be investigated as such, he stated that he did not form the view that the complaints the claimant had made included complaints of harassment related to sex or of disability discrimination. When asked which element of harassment, by reference to the respondent's harassment policy, was missing from the complaint relating to the conduct of JC on 8 June 2018 (whether unwanted conduct, related to sex/disability, and which had the effect of creating a hostile, degrading, or otherwise underlining the claimant's dignity), GC stated that his view was that the missing element was unwanted physical contact.

48. GC did not discuss which policy the grievance should be considered under with AW.

49. GC directed AW to arrange for interviews of all those who were available on the 4 and 5 of December 2018. GC interviewed the claimant, JC, LC and a number of other employees who worked in the same RDC as the claimant. GC asked the questions, and AW minted the meetings. All the meetings were conducted in the Administration Block, which were approximately 500m or so from the claimant's workstation.

50. In the claimant's interview, when discussing the incident at Centre Parcs, the claimant stated that JC was drinking a lot, that "he put his hands round my face, I asked him three times let me go, this was intimidating;" later adding "clearly I wasn't looking at him, so he grabbed my face to turn me round, this really went over the line." In relation to the comments GC was alleged to have made about swimming, the claimant stated that she was not comfortable, that JC said "he didn't care what [she] looked like" but that he kept pushing her and other female staff to go swimming. She suggested that the only female who went swimming was Iris, but she was also uncomfortable. She added that there JC made "lots of body comments," which felt uncomfortable.

51. In relation to the complaint the JC called her sneaky for wearing her coat, she stated that JC had instructed employees not to put their coats on the backs of their chairs (but on the coathooks), but that made her uncomfortable as a male

employee had put on a female's coat and pulled out a lipstick. Consequently, she wore her jacket in the office and would not take it off, and JC called her sneaky for doing so.

52. JC was interviewed on 4 December 2018. He was asked about his working relationship with the claimant and stated that administratively she was very good, being quick and accurate, but that she 'did not fit into the department,' suggesting that three or four members of the department had raised concerns about her with him in which they complained that they were afraid of her (naming a male employee, a female employee and LC), and in consequence he had to give her negative feedback as LC was not willing or able to do so.

53. In relation to the allegation of unwanted touching at Centre Parcs, JC suggested that he and the claimant and others had had a group hug, prompting the claimant to say that if he did it again she would 'knock him fucking out' and he had apologised. He was expressly asked about holding her face and replied, "it didn't happen." He similarly denied that he had pressurised anyone to go swimming.

54. When accepted that he had called the claimant sneaky, but explained that when the team moved to Avonmouth there were coat stands and so 'as a bit of a joke and to raise money' he fined people who put their coats on their chairs 10p which was donated to the NSPCC. He reported that the claimant had been fined on two occasions and had then opted to wear her coat, and he had commented that it was a bit sneaky.

55. He accepted that he had made some comment about a pregnant employee's weight as a joke, although he did not accept that he had called her fat, stating that she 'had not taken it the right way' so he apologised.

56. He ended by suggesting that the claimant had a vendetta against him, that she was stirring up problems, and created a bad atmosphere: in order to break up what he perceived to be a clique involving the claimant LC, he had moved the claimant to a different team and that team were unhappy with the claimant and suggested that the move had affected the team's productivity and morale. Thus, it was part of his defence to the allegations of bullying and harassment that (a) members of the team had complained about the claimant, (b) LC did not appear to be willing to provide her with negative feedback, and (c) in consequence it had been necessary for him to do so.

57. At the end of the interview, GC instructed LC that he should refrain form anything but essential contact with the claimant during the process of the grievance. JC accepted in his evidence that he had ignored and/or avoided the claimant on the occasions detailed in her statement at paragraph 70 between 4 and 19 December 2019.

58. LC was interviewed and suggested that the claimant could be blunt or abrupt, but had built a good relationship with some team members, that there were only a couple of members staff with whom her relationship was tense, not the team as a whole, and while he did not regard her manner to be a cause of concern, she could improve her personal skills. When discussing the coats, he stated that some female members of staff had expressed concern that it made it

difficult to collect something that they needed from their coats without being noticed.

59. After his interview, LC emailed GC to advise him that on 28 November 2018 LC had told him that "if [the claimant] continues with her negative attitude like this, there is only one thing that will happen – she'll leave the office through the back door;" and "she will never be promoted to CAT5 or CAT4 whilst I'm here."

60. GC interviewed other members of the teams in Avonmouth, questioning them as to the atmosphere in the teams and the reasons for it. Many of those individuals supported JC's view that the claimant had struggled to fit it, and that she could be brash, rude and/or lacking empathy for colleagues and disrespectful to her managers at times. A limited number were very critical of her.

61. Of those who were at Centre Parcs, GC asked whether they had observed any 'tension.' They were not asked whether they had seen JC touch or hug the claimant or whether they had seen any physical contact between them. The pregnant employee confirmed that JC had referred to her as fat, that she did not take it as a joke, but did not take it personally and that JC had apologised to her. One of those interviewed suggested that JC had acted inappropriately, dancing with some members of the team and not others, and that he had applied a "not unfair amount of pressure" on people to swim.

62. When considering the claimant's allegation concerning her application for the RPAC role, in respect of which the claimant had implied (if not directly alleged) that JC had effectively torpedoed her application so as to prevent it progressing on its merits, GC reviewed the applications and satisfied himself that the individual who was to be offered the role was the appropriate candidate.

<u>The grievance outcome and GC's conclusions</u>

63. GC wrote to the claimant providing any outcome on 14 December 2018. He reached the following conclusions:

The Centre Parcs Incident

63.1. GC did not uphold the complaint. He noted that JC had admitting placing his arm around the claimant, but no other person witnessed the incident and so he was "unable to determine whether there was physical contact in the way you described." He found however that there was unwanted physical contact which "could be deemed unprofessional." He concluded in relation to the issue that JC's comments and actions "could be deemed as unprofessional on occasions throughout the weekend. The events took place in a social setting, and I do not believe that JC acted in this way out of malice."

Coats and sneaky comment

63.2. GC noted that the claimant's concern in relation to the practice of hanging coats was that other members of the team might find personal items if they picked up her coat, and that they might see her

accessing sanitary products. GC concluded that JC had called the claimant sneaky, and that the comment "could have been taken in the wrong way," however, he thought the rule regarding the storage of coats was acceptable and so did not uphold the claimant's grievance.

Inappropriate comments

63.3. GC noted that JC admitted that he had made an inappropriate comment to a pregnant employee and that he had apologised to her. GC concluded that the issue had been dealt with to the satisfaction of the employee and rejected the grievance.

The claimant's knee

63.4. GC concluded that it was acceptable for JC to ask for medical evidence for any medical issue which affected an individual's ability to fulfil their duties, so as to enable adjustments to be made to support her, and so rejected the grievance. He did not address the claimant's allegation that JC had suggested several times that he did not believe that there was anything wrong with her knee.

64. With the exception of an incident in which JC accepted that he had shouted and sworn and the claimant and banged his hands on the table in exasperation, GC rejected all other elements of the claimant's grievance.

The outcome letter to JC

65. On 14 December 2018 GC wrote to JC to inform him of the outcome of the grievance investigation. He advised that elements of the allegations had been upheld and addressed those in the body of the letter. The first was entitled "inappropriate language/aggression." This addressed the incident in which JC had lost his temper and sworn aggressively at the claimant in the presence of LC. The second incident of inappropriate language which GC addressed was the language used in connection with the 'Lighthearded Awards Ceremony.'

66. The second area in which GC indicated he had upheld the grievance was entitled 'inappropriate comments.' No examples were given, but GC observed that JC could use comments which were inappropriate, demotivational or cause offence. The letter did not identify what he had said or to whom.

67. The letter noted that JC had fallen short of his status as a 'role model' in his position as a senior manager. No sanction was applied, but JC was required to participate in mediation with the claimant. The letter did not reference GC's finding that JC had inappropriately touched the claimant whether on the basis of a group hug or otherwise.

68. In his evidence, GC conceded that he had accepted JC's account of the contact with the claimant (the group hug) as being accurate and had rejected the claimant's account. He was unable to explain why he preferred JC's account in the circumstances in which neither account was, in his view, corroborated. Similarly, he did not explain why the claimant's account was not worthy of belief

such that it might be sufficient of itself to uphold the allegations. He accepted that the claimant's complaint in relation to coats inherently referenced her sex, given her concern about accessing sanitary products, but said (a) he had not recognised that at the time of the investigation (although he could not explain why) and (b) did not think that those circumstances could amount to sex discrimination or harassment related to sex. He agreed that in accepting JC's description of the comment "sneaky" as a laugh and a joke, whilst rejecting the claimant's view that it was unwanted, he had again accepted JC's uncorroborated description and preferred his account to the claimant's. Again, he offered no explanation for that. Similarly, he could offer no explanation as to why the outcome letter to JC did not make any reference to inappropriate contact with the claimant. In short, he was unable to provide any or any coherent or cogent explanation for the approach he took to the policy he applied, the claimant's evidence, the outcome or the letter to JC.

The grievance appeal

69. On the 18 December 2018, following the claimant's request for copies of the grievance interviews, AW sent the claimant LC's interview minutes, sections of which, including that detailing LC's later evidence concerning JC's comments to him that the claimant would never be promoted to Cat 4 or Cat 6, and that she would leave through the back door, were redacted. The explanation offered was that that evidence was presented after the interview and had not been 'cross-examined.'

70. On 19 December 2018, the claimant appealed against the grievance outcome. In a detailed eight-page letter, the claimant made the following points of relevance:

    70.1. The outcome had unreasonably failed to uphold her complaint in relation to the holding of her face. The claimant cited the harassment policy, and complained that given unwanted contact had been admitted, and that it was her perspective which was important, she failed to understand why the allegation had not been upheld and regarded the sanction as unsuitable.

    70.2. The outcome had unreasonably failed to uphold her complaint regarding JC's comment that she was sneaky. The claimant stated that whilst she was happy to contribute to a colleague's fundraising for the NSPCC, she did not wish to pay to be able to "comfortably access sanitary products without being visible to the entire office", stating that doing so caused her "humiliation and embarrassment." In circumstances, she argued that given GC had found that the comments could have been taken in the wrong way, it was incumbent on him to uphold her grievance in that respect.

    70.3. The claimant disclosed that she had recorded her meeting with JC on 27 November 2018 (because of her concerns following his outburst during the meeting on 27 September 2018).

    70.4. Lastly, the claimant detailed incidents when JC had ignored her since the investigation was instigated. They were 6, 7, 10, 13 and 17

December 2018. She added "At the time of writing JC has not spoken a single word to me since the grievance was raised with him on 4th December and I feel has actively avoided communicating with me…" That allegation covered the period from 4th to 18th December 2018 (when the letter was written).

The grievance appeal investigation

71. The grievance appeal was allocated to Mrs Kirtsy-Anne McIntyre, a Senior Consultant – Employment Law, who was employed as one of two employees who formed the respondent's Head Office Employment Law team; ("KM"). She is a qualified solicitor with 11 years' post qualification experience.

72. As was the practice of the Employment Law Team, KM invited the claimant to attend a meeting to discuss her appeal at the respondent's Head Office in London.

73. During correspondence to arrange a date and time for the meeting, the claimant wrote first on 28 December 2018 that she was scheduled for an operation after 28 January and would not be available until the 25 February, and, on 12 January 2019, that she was having surgery on her knee on 4th February 2019 and would not be able to attend a meeting until 25 February, in accordance with her doctor's advice; in addition she was absent on annual leave until 25 January 2019. The appeal was therefore delayed from 17 January 2019 until 30 January 2019. In evidence, KM accepted that the details the claimant had given concerning her knee condition were sufficient to put her on notice that the condition might amount to a disability, depending upon how long the claimant had had the condition, but that she made no enquiry in that regard.

74. The claimant did not, however, state that travelling to London would put her at a disadvantage or that her knee condition amounted to a disability. The claimant did not challenge the proposal that she should travel to London because raising the grievance and taking it to appeal was 'a terrifying thing to do' and she did not think it would be looked on favourably if she made a request. She felt that she had clearly referenced the difficulties caused by her knee condition and thought that if the respondent were willing to make adjustments it would suggest them. Furthermore, she did not appreciate that the meeting could have been conducted by video until she read of the option in KM's statement in these proceedings. We accepted her evidence to that effect as being a true account.

75. In the event the respondent provided the claimant with a pool car for her travel.

76. The claimant met with KM on 30 January 2019. KM accepted that at the time of the interview she understood that the claimant's complaint in respect of JC's conduct and Centre Parks was all the one of harassment related to sex. She did not, however, turn her mind as to whether it was appropriate to continue considering the claimant's complaints under the grievance process, whether they should be pursued through the harassment policy; equally the claimant did not allege that the GC's outcomes should be overturned on that basis.

77. During the meeting, the claimant made the following relevant points:

Centre Parcs – face holding

77.1. First, she argued that JC had admitted matters which constituted sexual harassment as defined in the harassment policy. Secondly, she challenged GC's conclusions on the basis (a) that he had failed to take the claimant's evidence that JC held her face into account and it appeared he had done so because he said no one else saw it; (b) it was wrong simply to uphold the lesser conduct of touching her arm solely on the basis that JC had admitted that conduct; (c) GC had taken into account an irrelevant matter for which there was no evidence – that he did not believe there was any malice in the action; (d) GC failed to take into account JS response that he could not recall whether the event happened.

77.2. Secondly, she described the event itself, stating that JC had had many drinks, and whilst she had something to drink, she clearly remembered what happened. KM suggested that even if no one saw the incident, someone may have heard the claimant's comment, and that she would check.

Sneaky comment and requirement to use coat hooks

77.3. The claimant explained that she did not want to have to take her bag to the loo whenever she wished to use a sanitary product; that there had been incidents of people putting on others coats so she did not want to put sanitary products in her coat unless she was wearing it.

Other matters

77.4. The claimant repeated that JC was not talking to her unless the matter was operational and required him to do so.

77.5. Secondly, the claimant raised the fact that only LC's interview had been disclosed to her, and that there had been redactions. KM agreed to review the unredacted version to understand whether it was relevant to the allegations.

78. On 1 February 2019 the claimant attended mediation with JC.

79. On 27 February 2019, KM interviewed GC.

80. KM asked GC what the relevance was that the incident at Centre Parcs had occurred in a social rather than a work environment, and that no-one else found the behaviour inappropriate. GC confirmed the location had not affected his decision (which begged the question why he had mentioned it) and said that if "everyone else [thought] the behaviour was okay, then it may not be inappropriate."

81. KM directly asked GC what enquiry he had made to ascertain whether JC had held the claimant's face. He replied that he had "asked everyone and they had said that hadn't seen this." That was untrue; none of the witnesses were asked whether they had seen JC hold the claimant's face.

82. In relation to the sneaky comment, GC suggested that the claimant "needs to take it [the rule to pay a fine] in the same [way] as everyone else has, as office bonding" and that the rule to pay a fine was "a laugh and a joke." He did not engage with the claimant's arguments relating to sexual harassment concerning the effect of the rule.

83. KM interviewed JC on 28 February 2019. During that interview, the following relevant exchanges occurred:

    83.1. JC said he could not remember whether he had a d the claimant's face, adding "we had had a few drinks." In relation to the alleged group, he suggested "I may be put my arms over her shoulder and she said she would knock me over."

The grievance appeal outcome.

84. KM did not conduct any further investigation, and it was not until 5 March 2019 that she wrote the claimant providing an outcome in relation to the grievance appeal. The outcome letter made the following relevant findings:

    Incident at Centre Parcs

    84.1. KM had spoken to JC to clarify his recollection, as he had no recollection of touching the claimant's face, KM could not say either way whether the incident had occurred as the claimant alleged, and therefore upheld GC's conclusion in that regard.

    84.2. Whilst the claimant's complaint was upheld on the basis that JC had admitted putting his arm around the claimant, given that that was not part of the claimant's allegation, KM could see no basis on which the claimant's complaint could have been upheld.

    84.3. KM had spoken to JC, his account was that the incident had occurred when everyone was dancing putting their arms around each other, and he did the same to the claimant, however when she made it plain that that action was unwanted, he ceased. KM was therefore satisfied that the incident had been appropriately addressed.

    84.4. KM shared GC's view that the social context of the incident could be relevant, and was in this instance given that there was a distinction to be drawn between putting an arm around a colleague in the office doing so in a social environment when everyone was dancing putting their arms around each other.

    84.5. It appeared therefore KM accepted JC's account of the incident as being accurate and truthful one, and by implication, that she had rejected the claimant's account. Certainly, KM rejected that aspect of the claimant's appeal.

    Coats

    84.6. KM accepted that it was appropriate to have a rule requiring coats be hung on hooks. Insofar as GC had concluded that JC's comment

that the claimant was sneaky "could have been taken in the wrong way", in circumstances with the claimant alleged that it amounted to harassment, in KM's opinion, having regard to the reasonableness of the claimant's perception, on the basis that JC intended comment to be light-hearted, and the process of fines was intended to be good-humoured, she did not regard the comment as harassment.

84.7. She did not address the claimant's concerns as to the practice of hanging coats on hooks in the circumstances where the claimant needed access to sanitary products.

84.8. She rejected the claimant's appeal.

85. Insofar as the claimant had complained of victimisation by JC, KM noted that she had suggested that the claimant should raise concerns during the mediation meeting. She did not therefore propose to take any action in relation to the allegation.

86. KM did not conduct any further enquiry to ascertain whether anyone had seen JC holding the claimant's face, whether there had been dancing as JC alleged, or whether anyone had overheard the claimant's remarks (the latter enquiry of which she had promised the claimant she would make). She did not engage with the claimant's criticism of GC's rationale, but rather ignored it or adopted it in her own conclusion. She fluctuated between reviewing GC's decision, conducting her own investigation, and making the decision afresh herself.

87. During cross-examination, KM accepted that she had accepted JC's account that contact had occurred whilst dancing in the manner he suggested, and whilst she did not disbelieve the claimant's account, as the claimant had not disputed JC's account, she had accepted his. KM was wrong to say that JC had not disputed JC's account, it was abundantly clear that she did not accept that the incident had occurred as he suggested. The claimant had given a clear account which was not consistent with JC's, had appealed GC's decision which had adopted JC's account on the basis that JC's account was inconsistent, and there was no corroboratory evidence, and re-iterated the contradictions in JC's account and her clear recollection of the events that formed her account in her meeting with KM.

<u>The claimant's resignation and the presentation of the claim</u>

88. Shortly after receiving the grievance appeal outcome letter, the claimant resigned on 8 March 2019. Her employment ended on 24 March 2019.

89. The claimant commenced Early Conciliation on 1 July 2019, a certificate was issued on 12 July 2019, and the claimant presented her claim to the Tribunal on the same day.

The Relevant Law

90. The claimant brings five claims under the Equality Act 2010. The first for direct discrimination (s.13 Equality Act 2010 ("EQA")), the second that the respondent treated her unfavourably because of something arising from his disability (s.15

EQA), the third that the respondent failed to make reasonable adjustments (contrary to s.20 EQA 2010), and fourthly that she was harassed (contrary to section 26 EQA 2010), and lastly that she was subjected to a detriment because she had done a protected act (victimisation contrary to section 27 EQA 2010).

91. The relevant law is contained in sections 39 and 13, 15, 20, 23, 26 and 27 EQA 2010 which provide respectively (in so far as is relevant) as follows:

39 – Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(d) by subjecting B to any other detriment.

13. Direct discrimination

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

s.15 Discrimination arising from disability

(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.

s. 20 Duty to make adjustments

(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.
(4) The second requirement is a requirement, where a physical feature 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.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

23. Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

s.26 Harassment

(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) A also harasses B if—
- (a) A engages in unwanted conduct of a sexual nature, and (b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
- (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
- (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

27 Victimisation

(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.

Section 13

92. The basic question in every direct discrimination case is why the complainant was subjected to less favourable treatment (Amnesty International v Ahmed [2009] IRLR 884, per Underhill P, para. 32).

93. Once it is established that the treatment is because of a protected characteristic, unlawful discrimination is established and the respondent's motive or intention is irrelevant (Nagarajan v London Regional Transport [1999] IRLR 572 HL).

94. The protected characteristic does not need to be the only reason for the less favourable treatment, or even the main reason, so long as it was an 'effective cause' of the treatment: O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372, EAT.

The reverse burden of proof

95. The statutory tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

> (2) If there are facts on 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.

96. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal has to determine the "reason why" the claimant was treated as s/he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

97. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of (or related to if the claim is under s.26) the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

98. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

99. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that

the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

100. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

101. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e. that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. 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 act of discrimination (see Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

102. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr Justice Elias identified that 'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

103. It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

Detriment and unfavourable treatment (s.15)

104. The test of a detriment within the meaning of section 39 EQA 2010 is whether the treatment is "of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" (per Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337, para 35).

105. The Equality and Human Rights Commission's Code of Practice (2011) observes at 5.7

> "For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage "

And at 4.9

> "'Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection, or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable, and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently."

106. The same approach must be adopted in relation to unfavourable treatment within the meaning of section 15 (see Williams v Trustees of Swansea University Pension & Assurance Scheme and anor per Langstaff J in CA (paras 28-29) of the word "unfavourably", which formulation was approved in the Supreme Court (at para 27):

> "… it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person … The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life."

107. In City of York Council v Grosset [2018] EWCA Civ 1105, the Court of Appeal (per Sales LJ) held (at paragraphs 36 and 37) that s.15(1)(a) of the Equality Act 2010 should be interpreted as setting the following two-part test for courts and tribunals to apply:

107.1. did the alleged discriminator treat the claimant unfavourably because of an identified “something”?

107.2. if so, did that “something” arise in consequence of the claimant’s disability? This is an objective test, and it is therefore irrelevant whether the alleged discriminator did not know that the “something” arose in consequence of the claimant’s disability. Also, there does not have to be an immediate causative link between the “something” and the claimant’s disability; a relatively wide approach should be taken to the issue of causation.

108. In Pnaiser v NHS England and anor [2016] IRLR 170, EAT, Simler P summarised the proper approach to establishing causation under s.15, as follows:

108.1. first, the tribunal has to identify whether the claimant was treated unfavourably and by whom;

108.2. it then has to determine what caused that treatment, focussing on the reason in the mind of the alleged discriminator. An examination of the conscious or subconscious thought processes of the alleged discriminator is likely to be required. The ‘something arising in consequence of disability’ need not be the main or sole reason for the unfavourable treatment, 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 (see also Charlesworth v Dransfields Engineering Services Ltd EAT 0197/16, EAT per Simler P);

108.3. the tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. It will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability, and "the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact" (para. 31(e)).

Failure to make reasonable adjustments

109. A tribunal must consider: (1) the Provision, Criterion or Practice ("PCP") applied by or on behalf of the employer, or the relevant physical feature of the premises occupied by the employer, (2) the identity of non-disabled comparators (where appropriate), and (3) the nature and extent of the substantial disadvantage suffered by the claimant (Environment Agency v Rowan [2008] ICR 218, EAT.)

110. The burden of proving the PCP, the substantial disadvantage and the steps necessary to remove them rests on the claimant (see HM Prison Service v Johnson [2007] IRLR 951, confirmed in Project Management Institute v Latiff [2007] 579). What a claimant must do is raise the issue as to whether a specific adjustment should have been made, not prove a prima facie case of breach (see Jennings v Barts and the London NHS Trust EAT 0056/12) and the adjustment can be identified, in exceptional circumstances, during the hearing (PMI v Latiff). The Tribunal must, therefore, identify with some particularity the step which an employment should take to remove the disadvantage (HM Prison Service v Johnson)

Provisions, Criterions and Practices

111. The purpose of the PCP is to identify what it is about the employer's operation that causes disadvantage to the employee: General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, EAT.

112. In most cases where an employee contends that an employer failed to make reasonable adjustments to a PCP, the employee will be contending that the relevant PCP was applied to him or her. Technically, however, it is not a requirement of the EqA 2010 that the PCP be applied to the disabled employee, as long as the PCP is applied to some employees and that places the disabled employee at a substantial disadvantage when compared with persons who are not disabled: Roberts v North West Ambulance Service [2012] ICR D14, [2012] EqLR 196, EAT.

113. A policy, criterion or practice must have an air of repetition about it, and cannot be a one off (see Nottingham City Transport Ltd v Harvey EAT 0032/12, confirmed in Fox v British Airways plc EAT 0315/14), unless there is an

indication that it will be repeated (Ishola v Transport for London [2020] EWCA Civ 112, CA.).

114. If the substantial disadvantage complained of is not because of the disability, then the duty to make reasonable adjustments will not arise: Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley UKEAT/0417/11, [2012] EqLR 634.

115. Tribunals should "set out what it was about the disability of the [claimant] which gave rise to the problems or effects which put him at the substantial disadvantage identified": Chief Constable of West Midlands Police v Gardner EAT 0174/11, para. 53.

The steps to remove the disadvantage

116. The word 'steps' must not be construed unduly restrictively, as the Court of Appeal made clear in Griffiths v Secretary of State for Work and Pensions [2017] ICR 160, CA. 'In my judgment, there is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of S.20(3). Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken.'

117. A statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission. Courts are obliged to take it into consideration whenever it is relevant: section 15(4). Chapter 6 is concerned with the duty to make reasonable adjustments. Paragraph 6.2 states:

> "The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers … unfavourably and means taking additional steps to which non-disabled workers … are not entitled."

118. Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps" and paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage. So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness: see the observations of Lewison LJ in Paulley v First Group plc [2014] EWCA Civ 1573; [2015] 1 WLR 3384, paras 44-45.

119. Tribunals are not under a duty to address every factor set out in the Code, but would be wise to address directly those factors that they find to be relevant: Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341, EAT.

120. An employer cannot make an objective assessment of the reasonableness of proposed adjustments/steps unless it appreciates the nature and extent of the substantial disadvantage imposed on the employee by the PCP, physical feature or lack of access to an auxiliary aid, and an adjustment to a work practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage — Lamb v Business Academy Bexley EAT 0226/15.

121. The duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA.

122. There is no duty to consult in relation to the adjustment that should be made, but it will potentially jeopardise an employer's position if it does not consult (see Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT):

> 'any employer would be wise to consult with a disabled employee in order to be better informed and fully acquainted of all the factors which may be relevant to a determination of what adjustment should reasonably be made in the circumstances. If the employer fails to do that, then he is placing himself seriously at risk of not taking appropriate steps because of his own ignorance. He cannot then pray that ignorance in aid if it is alleged that he ought to have taken certain steps and he has failed to do so.'

123. A proposed adjustment will not amount to a 'reasonable' adjustment if it has "no prospect" of removing the substantial disadvantage: Romec v Rudham [2007] All ER (D) 04 (Sep), EAT per HHJ McMullen; however, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be "a prospect" (as opposed to "a good prospect" or "a real prospect") of the adjustment removing the disadvantage (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

124. A step which, on its own, may be ineffective might nevertheless be one of several adjustments which, when taken together, could remove or reduce the disadvantage experienced by the disabled person: e.g. Shaw and Co Solicitors v Atkins EAT 0224/08.

Harassment

125. The words 'related to' in S.26(1)(a) have a broad meaning; conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it, what is required is some connection even if not directly causal between the conduct and the protected characteristic — Hartley v Foreign and Commonwealth Office Services 2016 ICR D17, EAT.

126. The context in which unwanted conduct takes place is an important factor in determining whether it is related to a relevant protected characteristic— particularly in cases where the conduct cannot be described as 'inherently' racist, homophobic, etc. (see Warby v Wunda Group plc EAT 0434/11). It is not enough however that the conduct complained occurs 'in the circumstances of' a disability, it must be related to it.

127. Some key concepts set out in Dhaliwal and Grant v Land Registry [2011] ICR 1390 are as follows:

127.1. when assessing the effect of a remark, the context is always highly material. Context will also be relevant to deciding whether the response of the alleged victim is reasonable (Grant, para. 13);

127.2. tribunals must not "cheapen the significance" of the meaning of the words used in the statute (i.e. intimidating, hostile, degrading, etc.). They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. Being "upset" is far from attracting the epithets required to constitute harassment (Grant, para. 47);

127.3. it is not enough for an individual to feel uncomfortable for them to be said to have had their dignity violated, or the necessary environment created (Grant, para. 51);

127.4. if a tribunal finds that a claimant was unreasonably prone to take offence, then, even if he did genuinely feel his dignity to have been violated, there will be no harassment (Dhaliwal, para. 15).

Victimisation

128. There is no need for a complainant to allege that things have been done which would be a breach of the Equality Act (see Waters v Metropolitan Police Comr [1997] IRLR 589, per Waite LJ:

'The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in s 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of s 6(2)(b).'

129. Similarly, there is no requirement for a complaint to identify expressly that the allegation is of discrimination in relation to one of the protected characteristics (see Durrani v London Borough of Ealing UKEAT/0454/2012 (10 April 2013, unreported) per Langstaff J:

> "22.I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies."
>
> 23. The Tribunal here thus expressly recognised that the word "discrimination" was used not in the general sense familiar to Employment Tribunals of being subject to detrimental action upon the basis of a protected personal characteristic, but that of being subject to detrimental action which was simply unfair.…
>
> 27. This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act.

All is likely to depend on the circumstances, which may make it plain that although he does not use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground."

Time limits

Conduct extending over a period

130. Section 123(3)(a) EqA 2010 provides that "conduct extending over a period is to be treated as done at the end of the period."

131. An 'act extending over a period' (also known as a 'continuing act') may arise not solely from a policy, rule, scheme, regime or practice but also from 'an ongoing situation or continuing state of affairs' (Hendricks v The Commissioner of Police for the Metropolis [2003] IRLR 96, CA, paras 51-52 per Mummery LJ, approved by the Court of Appeal in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA).

132. In Coutts & Co plc v Cure [2005] ICR 1098, EAT, the Employment Appeal Tribunal (HHJ McMullen QC presiding), setting out categories into which the factual circumstances of alleged discrimination may fall, found (albeit obiter) that there are two types of situation in which alleged discrimination may constitute an 'act extending over a period':

132.1. where there is a discriminatory rule or policy, by reference to which decisions are made from time to time; and

132.2. where there have been a series of discriminatory acts, whether or not set against a background of a discriminatory policy.

133. In the former case, an act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant (Barclays Bank plc v Kapur [1989] IRLR 387).

134. In the latter case, the main issue for the Tribunal tends to be whether it is possible to identify some fact or feature linking the series of acts such that they may properly be regarded as amounting to a single continuing state of affairs rather than a series of unconnected or isolated acts (Hendricks). A single person being responsible for discriminatory acts is a relevant factor in deciding whether an act has extended over a period: Aziz v FDA [2010] EWCA Civ 304, CA.

135. Therefore, whether the acts complained of are linked so as to amount to a "continuing act" is essentially a question of fact for the tribunal to determine.

Discussion and Conclusions

136.

Direct disability discrimination (Equality Act 2010 section 13)

3.2.2 Mr Clark informed the Claimant that to gain career progression that she would have to work in stores

137. As indicated in our findings above, GC did not inform the claimant that she would have to work in stores, rather he wrote in the grievance outcome letter that he "believed that there was great value in all members of the support team based in the RDC visiting, and gaining experience of stores." The claimant's allegation fails: the two are distinct statements, the latter does not suggest any restriction or impediment to the claimant's promotional prospects, rather it identifies the benefit of the experience.

138. In our view, GC's remark would not be regarded as detrimental by a reasonable worker applying the test in Shamoon. Critically, however, there was no evidence to suggest that the reason GC made the remark was because of the claimant's disability. We are satisfied that the remark reflected GC's view (which was shared by category 3 managers) of the benefit of such experience, and in consequence that he would have made the same remark to a non-disabled employee.

139. It is worthy of note that the complaint which GC was considering when he expressed the view was that JC had cancelled store-based training which the claimant had been scheduled to attend. The nature of the claimant's complaint therefore suggests that she also saw the potential benefit of gaining an understanding of the store team's work.

3.2.3 In November 2018, Mr Clark failed to halt the RPAC recruitment exercise whilst the Claimant's grievance was being investigated

140. GC did not halt the RPAC recruitment process. In our judgment the failure to do so would be regarded by a reasonable worker as a detriment.

141. However, as recorded in our findings above, the reason for that decision was twofold: first, the claimant did not request that the process should be stopped. Secondly, GC had been involved in the recruitment process and his experience was that category 6 employees were rarely, if ever, promoted to category 4 posts; he could not recall an example of that happening when asked during his evidence. Neither of those reasons were connected to the claimant's disability in any way. The claimant adduced no evidence to demonstrate that it was. Her argument that JC sought to block her promotion because of her disability is not a mindset which she suggested GC possessed, nor could we properly find that GC adopted it or was otherwise influenced by it during the investigation without some coherent evidential basis to support the argument, and there was none.

142. Whilst best practice might dictate that the recruitment process was paused whilst the claimant's grievance was investigated, we did not believe it was appropriate to draw an inference that the reason that it was not was the claimant's disability. First because we accepted GC's evidence that he sought to satisfy himself that the process was reasonably conducted (by reviewing the applications and CVs) and was persuaded that it was because

the person appointed was an internal transfer at category 4. Secondly, because we accepted his evidence that a promotion of a category 6 employee to category 4 was very rare.

3.2.6 The respondent failed properly to investigate the Claimant's grievance:

3.2.6.1 In the grievance investigation witnesses were asked about their relationship with the Claimant, rather than her relationship with Mr Carter;

143. It is correct that the proportion of the questions asked of the witnesses by GC and AW during the grievance investigation became heavily focused on the interviewees' relationships with the claimant, rather than JC's relationship with and attitude towards the claimant. In the context of a grievance, a reasonable worker could regard that as a detriment.

144. However, the reason for that approach was because the claimant's grievance had alleged that JC had a fundamentally negative opinion of her (which could not be substantiated) and had subjected her to "unreasonable criticism," undermined her, and blocked her promotion. When questioned about those matters during the investigation, JC suggested that the claimant did not fit into the department and did not communicate well within it, suggesting that three employees had approached him with similar concerns. He argued that that had caused him to give her justified negative feedback, partly because LC did not do so. As stated, that was the cause of the questions asked by GC, not the claimant's disability.

145. The claimant suggested for the first time in answers to cross-examination that the chronic pain she suffered could cause her to be short and irritable, and that the negative view held by some employees that she was abrupt and rude was attributable to that condition. In so far as the claimant sought in her arguments to suggest that the connection was sufficient for us to infer a connection between her disability and the reason for the focus of the questions asked by GC, we reject it. Whilst it is possible that the claimant's condition may have cause her to be abrupt or irritable, there is nothing to suggest that GC was aware of it or that it influenced him or his approach in any way.

146. The allegation is not therefore well founded and is dismissed.

3.2.6.2 The grievance outcome was focused on opinions rather than facts, [the evidence collected focused on her disability and great weight was placed on her need to have many 1:1s and that it created an atmosphere in the office and the need for the claimant to provide medical evidence when she walked with a limp and wore a knee brace.] and 3.2.6.3 The outcome did not address the points raised;

147. The distinction that the claimant seeks to draw between opinions and facts is not a fair or appropriate one. The negative views of her co-workers was evidence which GC was entitled to consider and take into account in assessing whether the claimant's allegation that JC had unfounded negative view of her, and had subjected her to unfair criticism. That was not a

detriment, and it was not done because she had a disability. GC would have acted in such a way whether the complainant had a disability or not.

148. The claimant's complaint was accurate in so far as it alleged that the investigation afforded considerable focus on the evidence of her co-workers who were critical of her 1:1s with LC and of her regularly discussions and 'whispered conversations' with him; and secondly that her co-workers were criticising her for matters which to a significant extent arose from her disability (although it should be noted that not all of their criticism related to those matters, but rather included the way she spoke to them and to her managers). Again, however, GC was entitled to take that evidence into account when trying to assess whether JC's explanation of the poor atmosphere at work and his need to challenge the claimant was true; but he did not need to make an express finding in the grievance outcome relating to it as the grievance did not contain a complaint that the co-workers' attitude to her 1:1s was discriminatory. If GC's equality and diversity training were more effective, he would have recognized that the criticisms of the claimant made by her coworkers merited action to prevent future discriminatory incidents or thoughts.

149. The claimant's complaint that the grievance outcome did not address the points she raised is accurate in so far as it is right that GC failed to engage with her complaint that JC had "indicated several times that he doesn't feel that there is anything wrong with my knee." That was a clear complaint, separate to the request for medical evidence, (which we address below) which a reasonable investigation would have explored; it is a common complaint of those with physical disabilities that some do not accept that their conditions are sufficiently serious to merit action. At the very least it should have alerted GC to the possibility that the knee condition might amount to a disability, and he did not consider the effect of the remarks on the claimant, but rather accepted without evaluation JC's comment that she could walk to have a cigarette break, and so by implication there was nothing of significance wrong with her knee. However, the claimant did not expressly complain in the grievance that JC's attitude was discriminatory.

150. GC did address the claimant's complaint that JC had asked her to provide medical evidence to corroborate her account of her knee condition. He found that request was reasonable. The Vulnerable Person Team Manager Risk Assessment Operational Procedure permits requests for medical evidence from an employee in relation to a condition to assist with managing that condition, but usually that request would be made by a Team Manager and would be in the context of obtaining OH advice, rather than challenging the existence or extent of a condition itself.

151. We concluded from GC's evidence that had a non-disabled person complained that JC had requested that they provide evidence to establish a knee injury, GC's approach to the issue during an investigation would have been the same – he would have asked JC to explain why the request was made and would have concluded that such a request was a reasonable one in the context of the policy. That is of course a different issue to whether

the request for medical evidence was itself discriminatory because of the claimant's disability, but that was not the claimant's complaint.

152. These allegations are therefore not well founded and are dismissed.

3.2.6.4 The respondent failed to interview people;

153. In evidence the claimant argued that the respondent had failed to interview people in her team so as to provide a balanced picture of her performance at work, namely Justin and Iris Martins; in addition, she argued that her team should have been interviewed to provide balance to the allegations made by JC and those he named in relation to her communication.

154. The failure to interview appropriate witnesses could of course be a detriment. The issue is whether the witnesses interviewed were appropriate to the allegations.

155. The claimant did not, however, expressly identify any employees as being relevant and necessary witnesses, save for Mr McConnell, who was a member of the claimant's team. The respondent knew or ought reasonably to have known that Iris was a relevant witness as she was at the Centre Parcs away day. However, there was no need to interview the claimant's team as suggests: the true nature of the complaints in her grievance was that JC and excluded her, made inappropriate and offensive jokes, instigated unwanted physical contact, intimidated her, unreasonably criticised her, and blocked promotion and given her an excessive workload. It was not therefore necessary to interview the claimant's team to investigate those allegations. The claimant's argument is that because, in response to her complaints, JC identified various co-workers whom he said had raised concerns about the claimant's communication and manner with him, her own team should have been interviewed to test the accuracy of the accounts of the colleagues he named. However, that was not the issue for the grievance; the issue was whether JC had acted as alleged and, in so far as he provided an explanation for admitted conduct, whether than explanation was valid. Speaking to the witnesses JC named was relevant to that latter aspect, but it was unnecessary to determine whether the witnesses' perceptions of the claimant were accurate. This was not a public enquiry.

156. Nevertheless, the key witnesses whom the claimant suggested might have observed JC's behaviour were interviewed. Oddly, GC made the decision to conduct interviews over specific days, and elected not to interview those, who like Justin, were on annual leave or sick, when the interviews were schedule. At the time GC suggested the dates for interview, he was unaware of which employees would be available. Whilst that approach is an arbitrary and poor practice, the reason that the witnesses the claimant alleged should have been interviewed were not was because of that decision, which was unrelated to the claimant's disability. In so far as the claimant argued that GC knowingly made the decision so as to avoid finding evidence to support her complaints of discrimination, so that we could infer the reason was related to the disability, there was no evidence to support that argument and we rejected it.

157. On balance, therefore, the allegation is not well founded and is rejected.

3.2.7 The respondent failed to provide her with all information obtained in the investigation and witness statements were not released in an unredacted form;

158. It is correct that the respondent did not provide the claimant with all of the statements it obtained during the grievance investigation, and that LC's statement was heavily redacted when it was released to her. That could clearly be a detriment. However, the reason that the statements were not released was not because of the claimant's disability, but rather because it was not the respondent's practice to provide such statements without the consent of the witness to their release. The respondent's Anti- Harassment Policy specifically provides that "appropriate confidentiality" will be maintained in relation to witness interviews. The claimant adduced no evidence which persuaded us on balance that that was not the reason for the respondent's actions here.

159. The allegation is therefore not well founded and is dismissed.

3.2.8 The Respondent failed to follow the correct grievance process;

160. The claimant's complaint is that the respondent failed to treat her grievance as a complaint of harassment and therefore failed to follow the Grandfather principle that the investigation should be conducted by the disciplinary superior of the subject of the complaint. That principle precluded GC from investigating and deciding the complaint against JC. Failure to follow the policy is clearly a detriment and the policy no doubts seeks to avoid the scenario which occurred here (the investigation of one manager by his line manager) because of the detrimental impact.

161. The claimant's complaint was, as we have found, a complaint of harassment. It follows that the respondent did fail to follow the correct process. However, the critical question is why the respondent failed in that regard. This allegation necessary requires the claimant to prove some facts from which we could infer that the reason was her disability. She has not discharged that burden. Here, for the reasons we have set out below, we have concluded that there was a different reason for the failure which was unconnected to her disability.

162. This allegation is therefore not well founded and is dismissed.

3.2.10 The grievance appeal was delayed;

163. The respondent accepted that there was delay in the hearing of the grievance appeal; between 19 December 2018 when the appeal was raised, and 5 March 2019 when the claimant was sent the grievance appeal outcome. Delay is reasonably to be regarded as a detriment.

164. Again, the critical issue is what was the reason for the delay? Was it because of the claimant's disability? The claimant argued the connection lay in the fact that she had raised complaints of disability discrimination and that the link with her disability could be inferred because the respondent did

not wish to make findings about it. We reject that argument: the focus of the grievance was on sexual harassment and bullying behaviour, not on the claimant's disability. Some reference was made to the claimant's knee, but that was one example of the bullying behaviour in a lengthy document.

165. In any event, we accepted the respondent's reason for the delay which was that there were only two individuals in the respondent's Head Office Employment Law Department who were responsible for conducting appeals (Mrs McIntrye and Jo Brewer), and the pressures of that dynamic meant that Mrs McIntyre was delayed in writing up the outcome letter for the appeal. The claimant's disability did not influence that in any way.

166. This allegation is therefore not well founded and is dismissed.

3.2.11 The investigator for the appeal was less senior than that for the grievance as a result they were influenced by the grievance investigator and it was not completed properly.

167. It is correct that Mrs McIntyre is junior to GC. Potentially, that could be a detriment. However, the reason that Mrs McIntyre was appointed to hear the appeal was not because of the claimant's disability but because of the respondent's policy to allocate appeals to the Respondent's Head Office Employment Law Department which consisted of two employees, one of whom, Mrs McIntyre, was junior to GC. The claimant's disability had no influence whatsoever on that decision.

168. The allegation is therefore not well founded and is dismissed.

<u>Direct sex discrimination (Equality Act 2010 section 13)</u>

4.2.1 Failure properly to investigate the Claimant's grievance in that not everyone was spoken to.

169. As we found in relation to 3.2.6.4 above, it is correct that the respondent did not interview all of the potential witnesses to the allegations. However, just as the claimant's disability was not the reason for that approach, so we have concluded that the claimant's sex had no influence whatsoever upon the approach taken by GC. The reason that some witnesses were interviewed, and others were not, was because of GC's decision to conduct interviews on over a series of particular dates, as we have detailed above.

170. The allegation is not well founded and is dismissed.

4.2.2 The grievance outcome did not properly take into account the evidence. [Mr Carter said it was a group hug, but no other witness said this happened. The Claimant said that he held her face. One witness said that Mr Carter was unprofessional. Mr Carter's version was accepted.]

171. The essence of the claimant's argument is straightforward: she gave an account that JC held her face; JC said that there was a group hug and he had touched her arm; neither account was supported by direct evidence, although no one else gave evidence to suggest that there was a group hug. Nevertheless, GC accepted the evidence of JC and rejected the evidence

of the claimant. The reason, she argued, that he did so was twofold: first JC was a man and the claimant a woman; secondly, if GC accepted the claimant's account, he would have to uphold an allegation of harassment against a male senior manager made by a woman, and he was (whether consciously or subconsciously) unwilling to do so. Thus, her sex was more than a material influence on GC's decision in either scenario.

172. The fact that GC accepted JC's uncorroborated account and rejected the claimant's account, in the context of an allegation which was clearly one of sexual harassment, was a matter from which we could conclude in the absence of any explanation for it that the reason for the difference in treatment was the claimant's sex and/or the allegation of sexual harassment made by a woman against a man. In addition, the claimant argued that we should also draw an inference that the reason for the difference in treatment was her sex from the following matters:

172.1. First, the fact that GC's letter to JC of 14 December 2018 which notified him of the outcome of the grievance investigation did not reference the admitted unwanted and inappropriate contact with the claimant but limited itself to references to inappropriate language and comments.

172.2. Secondly, that GC had deliberately disregarded the allegation of sexual harassment in her grievance so as to avoid investigating the allegation in accordance with the Anti-Harassment Policy, which would have precluded his involvement as he was not JC's Disciplinary Superior.

173. In our view, each of those matters was something from which we could reasonably draw an inference (if they were unexplained) because they were consistent with the claimant's argument that GC sought to protect JC against the allegations of sexual harassment through his investigation: the fact that the outcome letter failed to reference even the admitted inappropriate and unwanted touching of the claimant's arm merited an explanation. In relation to the latter allegation, the clear and unavoidable effect of the claimant's complaint that JC had taken her face in his hands, that she had felt uncomfortable and asked him three times to let go, in the context of a complaint that she had been subjected to "unwanted physical contact" could only reasonably have been viewed as a complaint of harassment. It therefore fell to GC to explain why he had not seen the complaint as one of harassment and investigated it under the Anti-Harassment Policy.

174. The burden therefore transferred to the respondent to explain the difference in treatment.

175. Despite the clear identification of the allegation in the list of issues, and despite the respondent having the benefit of professional representation from Gregsons Solicitors and Mr Perry, an experienced specialist counsel, GC's witness statement did not address the allegation or contain any explanation of the process that he had followed, why he had preferred one account to the other, or why he had not regarded the complaint as being

one of harassment. The statement was very brief, consisting of 18 short paragraphs. We raised that omission with Mr Perry on the morning of the third day of the hearing. Mr Perry did not seek to cover the matter in supplementary questions.

176. In his evidence GC accepted that his finding in relation to the contact between JC and the claimant at Centre Parcs was based solely on JC's evidence. When asked, GC was unable to explain why he had accepted JC's evidence which was uncorroborated but rejected the claimant's evidence which was uncorroborated but partially supported by the account of JC committing other inappropriate behaviour relating to sex. Similarly, he was unable to explain why he had not referenced the admitted unwanted conduct in touching the claimant's arm in the outcome letter. We therefore drew an inference that the reason for the difference in treatment was the claimant's sex. When asked to explain why he did not regard the complaint as being one of harassment, GC suggested that the missing element was 'unwanted physical contact.' Given that was precisely the claimant's allegation, and that he had expressly found that there was 'unwanted physical contact' in the outcome letter sent to the claimant (even if not that alleged by the claimant), that explanation was illogical, and we rejected it as not being the true reason. We felt supported in that conclusion given that both AW and KM recognised that there a complaint of harassment within the grievance. There was therefore no sensible or plausible explanation for the approach that GC had taken, and again, we drew an inference that the true reason for the difference in treatment was the claimant's sex.

177. There is force in the claimant's argument that very few questions during GC's investigation were asked about what happened, in so far as she is referring to the allegation that JC took her face in his hands. The claimant's complaint was twofold: first the witnesses were not asked whether they had seen any 'physical contact' or 'touching' between JC and the claimant, but rather whether they noticed any 'tension.' Secondly, that no one was asked whether they had seen or been part of the group hug which JC had suggested was when contact with the claimant had occurred.

178. In circumstances where GC relied upon the absence of evidence of the first category above to explain his conclusion that he could not determine whether there was contact in the way the claimant alleged, and so rejected the allegation of harassment, that shortcoming was something from which we concluded that we could draw an inference that the reason for it was the claimant's sex. That was because it was consistent with the claimant's argument that GC, whether consciously or subconsciously, sought to protect JC from an allegation of harassment. Again therefore, we concluded that the burden had transferred to the respondent to provide an explanation and again there was no explanation offered by GC.

179. In so far as the true thrust of the claimant's complaint in this allegation (limited to the nature of the questioning GC conducted, rather than who was interviewed) is that the conduct of the investigation was designed to protect JC from an allegation of sexual harassment, it seems to us that these complaints are really facets of the same argument we have addressed

above. We are persuaded that the burden transferred to the respondent to show that the claimant's sex had no influence whatsoever on the decisions made in relation to the questions asked, that the respondent failed to discharge that burden as it offered no explanation as to why it did not ask whether people had seen JC touch the claimant's face or physical contact with it, and that the allegation is therefore well founded and succeeds.

180. The respondent therefore failed to discharge the burden placed upon it by section 136 EQA 2010 to demonstrate that the claimant's sex had no influence whatsoever on GC's decisions in the grievance process. This allegation of direct sex discrimination is therefore well founded and succeeds.

4.2.3 The grievance appeal investigation did not speak to witnesses that the Claimant suggested and very few questions were asked about what happened at all. Mr Carter was spoken to again and said he could not recall and gave a different version of events.

4.2.4 The appeal outcome did not properly take into account the evidence gathered, particularly Mr Carter's inconsistent accounts and it supported Mr Clark's original decision.

181. We address these two allegations together given that they are essential two facets of the same point. In order fairly to assess the approach taken by Mrs McIntrye at the appeal, it is first necessary to review the position of the grievance as it was presented to her. As we found in relation to 3.2.6.4 above, it is correct that the respondent did not interview all of the potential witnesses to the allegations.

182. At the point of the appeal, KM recognised that the claimant's complaint was potentially one of sexual harassment. KM's role was to review GC's decision in relation to the allegation in that context. It was therefore incumbent on her to assess whether GC's decision to reject the allegation of harassment was one which he could properly have reached, given the evidence before him or which should properly have been before him had he conducted a reasonable investigation. KM understood that and interviewed JC and GC. In interviewing JC, KM strayed into rehearing the allegation. The answers GC provided to KM in explaining why he believed that the matters detail below were relevant to his conclusion that there was no harassment should all have raised real and significant concerns as to the approach that GC had taken to the allegation. Those matters were:

182.1. the fact that the incident occurred in a social setting,

182.2. that fact that no-one else found the behaviour inappropriate, and

182.3. that fact that JC had only put his arm around the claimant on his account on one occasion.

183. KM correctly and sensibly asked what enquiries GC had made to ascertain the truth of the specific allegation that the claimant had made, namely that JC had held onto her face, and GC suggested that "everyone had said that

they had not seen that." Any reasonable review of the statements would demonstrate that that answer was simply untrue – they were not asked. The basis that GC put forward for his conclusion was therefore unsustainable. In the outcome letter, KM merely recorded

"I have spoken to Graham Clark (GC) regarding this point, GC maintained that he was unable to uphold this aspect of your grievance as JC had denied that he had touched you in this manner and the incident was not witnessed by anyone else. I have spoken to JC myself to understand his recollection regarding the events… And he has maintained that he cannot recall that he touched your face. He explained that there had been alcohol consumed in the evening but that he did not remember such incident. Based on the evidence I am unable to say either way as to whether such an incident occurred, and I can only confirm GC's account in this regard.

184. KM accepted that she did not conduct any further investigation, because she did not believe that it was reasonable or proportionate. Just as GC did, so KM failed to consider whether the claimant's account on its own was sufficiently credible and coherent to demonstrate on the balance of probabilities that the incident had occurred as she alleged. Put simply, in the circumstances where the alleged perpetrator said he had been drinking and could not recall or remember such an incident, and the alleged victim maintained a clear account, which was partly supported by allegations of inappropriate conduct on the part of the perpetrator, it was a necessary part of the enquiry to determine whether the claimant's account was coherent and persuasive of itself, before rejecting it. Insofar as GC had concluded that he should reject it because no one else said they had seen the incident, the reasoning was necessarily unsustainable in light of the questions that were asked. KM conducted no analysis of that aspect of GC's reasoning, or if she did, the outcome letter and her statement were silent as to it.

185. Furthermore, insofar as either GC or KM regarded JC's evidence as being sufficient of itself to prevent them concluding that the incident had occurred as the claimant alleged, the claimant was right to say that they failed to take into account the fact that JC's accounts were inconsistent. In the initial grievance investigation, he stated that there had been a group hug, and the claimant had said to him that if he did that again she would knock him out. When asked directly whether he had put his hands on her face and was asked three times to remove them, he simply said "it didn't happen." In the grievance appeal investigation, he stated that he could not remember if he had touched the claimant's face, adding "we had had a few drinks." Even his account as to the contact which he admitted, the group hug, differed, suggesting that during dancing "I may be put my arm over her shoulder and she said she would knock me over."

186. KM's explanation as to why she did not uphold the account was that she did not feel that she could as there was no one to substantiate it, although she accepted that it was not necessary for an account to be corroborated before it could be upheld. She was unable to explain why the claimant's account of its own would not have been sufficient, if viewed as being credible and coherent. Given that KM accepted JC's account that the contact had

occurred in the group hug, despite the inconsistencies in his account and the fact that the claimant did not accept contact occurred as he suggested, it was incumbent upon the respondent to explain the difference in treatment between her approach to the evidence of JC and the claimant. As KM was unable to do so, we drew the inference that the reason for the difference was the claimant's sex.

187. The allegation of direct sex discrimination in relation to KM's conclusion concerning the claimant's grievance is therefore well-founded and succeeds.

Discrimination arising from disability (Equality Act 2010 section 15)

5.1.4 The grievance outcome was focused on opinions rather than facts, [the evidence collected focused on her disability and great weight was placed on her need to have many 1:1s and that it created an atmosphere in the office and the need to provide medical evidence when she walked with a limp and wore a knee brace]. The outcome did not address the points raised;

5.1.5 In his grievance interview, Mr Carter said that the Claimant should have disclosed her disability in her interview.

188. Whilst the matters that the claimant complains above could, applying the test in Shamoon, be regarded as unfavourable treatment, these claims are not well founded and fail because the unfavourable treatment did not occur because of the claimant's need for medical appointments, and/or sickness absence to manage the pain from her knee, or the pain itself, which are the matters she argues arose from her disability.

189. Rather, the reasons that the interviews focussed on the claimant's 1:2:1s were those in our conclusions on Issue 3.2.6.2 above, (in short JC's suggestion that he had to challenge the claimant because she was perceived as confrontational, direct, and rude by her colleagues and the answers given by those colleagues as to their views of the claimant.) Whilst the view of the claimant's colleagues was indirectly influenced by the claimant's disability because the disability caused the claimant to have the 1:2:1s with LC, neither her disability nor the things she said arose from it formed any part of the conscious or subconscious thought process adopted by GC when speaking to the witnesses. Whilst the causal link between the things arising from a disability and the unfavourable treatment may involve more than one link, here the things arising from the claimant's disability are too far removed, in our judgment, from the course the interviews took.

190. Similarly, whilst JC's comment might be regarded as unfavourable treatment, the reason he made the comment was because of his apparent (and misconceived) disbelief that the claimant's knee condition was not a disability and his view that she should have informed the respondent at her appointment if she had a condition which would have an impact upon her role. He did not form either of those views because of the claimant's sickness absence, medical appointments, or pain. Again, whilst there is a causal link between the comments and the claimant's pain arising from her disability (because the pain led her to ask JC for adjustments, his approach

to such requests led to her grievance, the grievance led to JC's interview and the comment that was made), that chain is simply too long in our view for us to conclude that JC made the comment because of the claimant's pain. It is not a 'but for' test.

191. The allegations are not well founded and are dismissed.

Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

192. The respondent did not accept that it applied a PCP consisting of a policy or practice that grievance and mediation meetings were held in the administration block, 500m from where the claimant worked in Avonmouth, or in London. The primary argument advanced by the respondent was that the fact that the claimant's grievance and mediation meetings were held in the administration block, and her appeal in London, did not amount to a practice, as they lacked the necessary element of repetition, applying Ishola.

193. That argument faced two substantial difficulties: first, KM accepted that it was an unspoken policy or practice to schedule appeals in London, given that was where the Employment Law Department was based, and it was therefore efficient and practical given there were only two members of the team. Secondly, the claimant's grievance interview and that of the twelve the staff interviewed were held in the Avonmouth Administration block between the 4 and 5 December 2018. That certainly connotes 'some form of continuum in the sense that it is the way in which things generally are or will be done' (per Ishola at [38]) and is not an isolated event.

194. We are satisfied therefore that there was a practice, if not a policy, in relation to both the grievance and appeal meetings as the claimant alleges.

195. The respondent had knowledge of the claimant's disability because she had shared the details of it with Mr Lee Clark, who in turn had discussed it with JC. In addition, the claimant wore a knee brace whilst at work, required leave for several medical appointments, and Mr Clark had made a reasonable adjustments to permit the claimant not to conduct date checks, which JC knew of (and about which he took umbrage).

196. The respondent argues that it did not know at either the grievance meeting in December 2018 or the appeal on 30 January 2019 that the claimant was put at the specific disadvantage because she did not complain. However, we are satisfied that the respondent ought reasonably to have known given that the details of the condition were disclosed to Mr Lee Clark, that JC knew that the claimant had been excused date checking because of the need to walk distances, and the claimant had, in her email of 12 January 2019, informed those who were scheduling the appeal that she was having a knee operation on 4th February 2019. There was, we conclude, sufficient information available to the respondent given the knowledge of the knee conditions and the operation, for it to conclude that travelling to London would cause the claimant pain and discomfort, which someone without her disability would not experience.

197. The respondent argues that the PCPs did not put the claimant at a disadvantage when compared to someone without her disability because she was able to walk 500m to smoke between 2 and 4 times a day. That allegation was disputed by the claimant who suggested she would smoke once or twice a day but only when her pain permitted, and she did not need to walk 500m to do so. There was little or no direct evidence to support the respondent's case. We prefer the claimant's evidence on the point. In any event, the respondent's argument is largely misconceived, when the analysis in The Department of Work and Pensions v Griffiths [2015] EWCA Civ 1265, particularly at paragraphs 46-7 and 56, is applied. Here the PCP 'bit harder' on the claimant because of the mobility issues caused by her disability than it did on the able bodied who did not have such disabilities; the latter were not put at any disadvantage when required to walk 500m. Those with disabilities causing pain when moving, and here the claimant, were disadvantaged because whilst walking 500m might not be impossible and might not always cause pain, when the claimant's pain was acute and she was having, as she described it "a bad pain day," there was more than a trivial disadvantage in having to walk some distance to a grievance meeting. Similarly, there was more than a trivial disadvantage in having to drive to London for an appeal meeting. As the claimant described in her evidence, she steeled herself to do so because she believed it was necessary but suffered the repercussions in the pain in her knee thereafter.

198. The claimant suggests that the disadvantage could have been removed by using a supply chain meeting room 20m from her desk in Avonmouth for the grievance meeting, and either conducting the appeal remotely or Mrs McIntyre travelling to Avonmouth to conduct the meeting in the supply chain meeting room. The respondent accepts that each was easily possible. Given the simplicity of the proposed adjustments and that they would have cost the respondent nothing, we have no hesitation in finding that it would have been reasonable for them to have been made. They may not have removed all the disadvantage, but there was certainly more than a chance that they would have a significant prospect of doing so.

199. The claim that the respondent breached the duty to make reasonable adjustments is therefore well founded and succeeds.

Harassment related to disability, (Equality Act 2010 s. 26)

200. The central and significant difficulty for the claimant is in the requirement to demonstrate that any of the alleged unfavourable treatment related to her disability. We remind ourselves that that does not require a causal nexus between the disability and the unwanted conduct alleged, but there must be some connection (applying Hartley), and in search for the connection we must have regard to the context.

201. Here, it seems to us that the following factors provide important context:

201.1. First, the claimant's grievance did not directly allege disability discrimination or identify her knee condition as a disability. The grievance identified that the claimant had a 'bad knee,' wore a knee brace, and was scheduled for orthopaedic surgery.

201.2. Secondly, the claimant's complaint in relation to her knee was one very much smaller complaint amongst the many she levelled at JC. It was a complaint of scepticism in relation to her knee condition in a grievance which focused on harassment and mistreatment generally. Both the claimant and GC spent significantly more time and effort discussing, investigating, and considering other elements of the claimant's complaint.

201.3. Thirdly, GC did not understand that the claimant was complaining that her knee condition was a disability, or more generally that she had suffered detrimental treatment related to that disability.

202. If follows from that that the failures, omissions, or short comings in relation to the grievance investigation and conclusion do not without more relate to disability; the necessary connection is in our view lacking. Moreover, the failures, such as we have found them, were connected to the claimant's allegation of sexual harassment rather than the allegation of disability discrimination. That creates a greater need, in our view, for the claimant to identify coherent and cogent evidence to demonstrate that there was a connection with her disability. We are not satisfied on the facts of this case that she has done so.

203. There is therefore no need for us to analyse whether the conduct complained of was unwanted or whether it created the prohibited environment or undermined the claimant's dignity.

204. The claim of harassment related to disability is not therefore well founded and is dismissed.

Victimisation (Equality Act 2010 s. 27)

10.1 Did the Claimant do a protected act by raising a grievance on 29 November 2018?

205. The claimant asserts that the grievance was a protected act because within it she raised or referenced complaints of sexual harassment, sex discrimination and disability discrimination. The respondent argues that the claimant did not assert facts which were capable of amounting to an act of discrimination, that whilst she complained of unwanted physical contact and intimidation, she did not suggest that they there were connected to any protected characteristic.

206. We can resolve this dispute shortly: the claimant's grievance references 'unfair treatment,' 'inappropriate offensive jokes' and 'unwanted physical contact.' The unwanted physical contact described was JC taking her face in his hands. JC is a man, the claimant a woman. The claimant further complained that JC pressed her on why she was not going swimming and told her it was ridiculous for her to feel uncomfortable. When she discussed those two allegations during the grievance the clear focus of her concerns was that JC was pressurising women to go swimming and the claimant and other women were uncomfortable appearing in swimming costumes in front of their male colleagues. Secondly, she complained that JC had called

Dagmara, a pregnant employee, 'fat.' Again, the inappropriateness she complained of could only be understood as relating to sex.

207. Furthermore, she complained that JC had called her "sneaky" for hanging her coat on her chair and not on the hooks. She expressly identified why she did so,

"I don't want the possibility of someone else putting on my jacket and finding personal items in the pockets, or the humiliation of walking across the room, picking up bag to access sanitary products without the room seeing."

208. That complaint can only be understood as one of harassment related to her sex.

209. When the grievance is read as a whole and viewed in the context of the claimant's explanation of the matters of concern during the grievance interview, it is clear that the complaints of unwanted physical contact and offensive jokes that she sought to raise were complaints of harassment related to sex.

210. We are therefore satisfied that the grievance was a protected act

10.2.1 Between the grievance and the end of her employment, Mr Carter would ignore her, withheld drinks tickets at the Christmas party and would not speak to her for 6 weeks (allegation 73).

211. Ignoring the claimant could clearly constitute a detriment. JC accepted that he had avoided speaking to the claimant, except where it was required operationally, following advice from GC that he should not speak to the claimant during the course of the grievance. He denied that that behaviour had continued once the grievance had completed. He accepted that he had ignored the claimant on the dates listed in the claimant's statement and grievance appeal, but denied it was because she had raised a grievance, he said she kept a record in a little black book and was afraid of what she was writing, thinking it was part of a vendetta tracking his behaviour, and that she would later use the notes against him; he accepted that the claimant continued to use the black book after the grievance had concluded.

212. The claimant alleged that there were at least three occasions after the grievance concluded when she was ignored by JC, and that his behaviour continued at least until 30 January 2019 (the day prior to the mediation). She suggested that while things improved after the grievance concluded he continued to avoid and ignore her, stating that if JC walked into a room she was in and saw her, he would leave immediately; similarly, if she walked into a room in which he was, he would again leave immediately. She accepted that he had talked to her on occasions, but said it was not a 'normal' amount, and she felt ostracised, adding it was at a sufficient level that other members of the team noticed. That evidence was not challenged. She accepted that things improved after mediation.

213. On balance we prefer the claimant's account. We are satisfied that JC continued to ignore and avoid the claimant once the grievance had

concluded and until the mediation had taken place. The claimant's account of JC's conduct was corroborated by LC, who noted that the relationship between the claimant and JC worsened and he did not see JC speak to the claimant after the grievance was submitted.

214. The critical question is whether the reason that JC avoided and ignored the claimant was because of the instruction form GC (the respondent's case) or because of the protected act (the claimant's). It is not necessary for the protected act to be the cause or the main cause of JC's conduct, it is sufficient if the protected act had more than a trivial influence on that conduct.

215. We consider that there were in effect two periods during which JC ignored the claimant: the first began on or about the instigation of the grievance and GC's appointment on 29 November 2018 and ended with the conclusion of grievance process on 14 December 2018 with the grievance outcome. During that period, we are satisfied on balance that the reason that JC ignored and avoided the claimant was because of the instruction from GC that he should not speak to or make contact with the claimant except when operationally necessary.

216. The second period began on approximately 19 December 2018, after the grievance had concluded but when JC discovered that the claimant had recorded a conversation she had had with him (as she included it in her grievance appeal of that date) and that she was keeping notes of their interactions in a book, and continued until 1 February 2019 when mediation occurred. (After that the claimant was absent from 6th to the 25 February 2019 and resigned on 8 March 2019: there was therefore little opportunity for interaction with JC). In the second period as we have defined it, JC continued to avoid the claimant and pointedly left any room which she entered or which he entered in which she was sitting. There was some improvement in the relationship following mediation: the pair were able to talk about operational matters in a more comfortable manner.

217. What then was the reason for Mr Carter's conduct between 19 December and 1 February 2019? The conduct about which the claimant complained had been identified in the list of issues and, beyond that, the claimant had provided specific dates in the grievance appeal letter and in her statement. In cross-examination Mr Carter admitted that he had ignored the claimant on those dates. Had he been asked about that matter when his statement was prepared, one can only presume he would have given the same answer. Yet the fact that he had ignored the claimant and crucially the reason for doing so was not addressed in Mr Carter's statement at all. Mr Carter suggested for the first time in supplemental questions that the reason he avoided the claimant was that the claimant's practice of making notes of her interactions with him in a book reason caused him to fear what she would do.

218. We did not accept that that was the true or complete reason for his conduct in the second period: first, in our view, Mr Carter's failure to address both the admitted conduct and the reason for it in his statement was a matter

from which it was appropriate to draw an inference that the true reason was the protected act, and not that which he advanced for the first time at trial. Secondly, Mr Carter's explanation itself suggested that the protected act was more than a trivial influence on his decision to avoid the claimant: the fact that the claimant had made one complaint and had recorded a conversation which she referenced in her appeal relating to it, led him to conclude that she might make another complaint and was making notes in his book that end.

219. We concluded that in light the inference we had drawn and in circumstances where the conduct complained of (at least in part) was admitted and had occurred after the protected act, the burden of proof had transferred to the respondent to demonstrate that the conduct was on no basis whatsoever influenced by the protected act. In our judgment it failed to discharge that burden.

220. The allegation of victimisation is therefore well founded and succeeds.

Limitation

221. The following complaints have therefore succeeded (we have arranged them in chronological order for ease of reference below):

221.1. A complaint that the respondent failed to make reasonable adjustments in relation to the claimant's grievance investigation interview

on 4 December 2018;

221.2. A complaint of direct sex discrimination in relation to the grievance outcome which was issued on 14 December 2018;

221.3. A complaint that the respondent failed to make reasonable adjustments in relation to the claimant's grievance appeal interview on 30 January 2019;

221.4. A complaint that Mr Carter victimised the claimant in the period 14 December 2018 until 30 January 2019;

221.5. A complaint of direct sex discrimination in relation to the grievance appeal outcome which was issued on 5 March 2019.

222. The claim was presented on 12 July 2019 and would be out of time, but the claimant instigated the early conciliation process on 1 July 2019 and a certificate was issued on 12 July 2019. The complaint of direct sex discrimination relating to the grievance appeal is therefore in time; the remaining claims are out of time unless linked to it for the purposes of section 123 ERA 1996.

223. Do the earlier complaints form conduct extending over a period, which ended with the grievance appeal outcome? In our view, they do. The claimant does not argue that there was a discriminatory policy or rule which was the cause of all of the proven discrimination, and therefore the

complaints must be assessed within the second category in Coutts & Co plc v Cure: as a series of discriminatory acts. The question for us, therefore, is whether it is possible to identify some fact or feature linking the series of acts so that they can properly be regarded as forming a single continuing state of affairs.

224. In our judgment it is possible: the discriminatory approach taken to the claimant's grievance was consistent between the grievance and the grievance appeal and the two formed separate parts of a single process. JC's victimisation of the claimant was directly connected to the grievance because (a) the grievance formed the protected act which had a significant influence on the detrimental treatment and (b) JC's conduct was influenced in part by a matter which the claimant raised in the grievance appeal. Whilst the s.20 complaints are of a separate nature, relying as they do on a different protected characteristic, the PCP which required adjustments was directly connected to the grievance process by the claimant's complaints were investigated.

225. If we have erred in our conclusion in relation to the s.20 claims, we would have found that it was just an equitable to extend time to permit the claims to be brought. That is because the claimant had a good and reasonable explanation for delay which she identified in the claim form itself: she was seeking to resolve matters through the respondent's internal grievance procedure and the acts of discrimination occurred during that procedure. Critically, the delay caused no material prejudice to the respondent: all of the facts relevant to the respondent defence were known to it as a consequence of the grievance investigation and there could therefore be no significant risk of forensic prejudice. The arguments relied upon the respondent were first a technical one as to whether there was sufficient repetition to amount to a PCP, and secondly challenging the claimant's account that she was disadvantaged (which argument was misconceived for the reasons we have stated). In contrast, the claimant would be significantly prejudiced if time were not extended as she would lose the right to pursue valid claims and obtain a declaration in respect of them.

Disposal

226. The parties will require time to reflect upon the reserved Judgment; they will need to consider whether they believe the appropriate course is either first to restore the remaining claims and to list them for a final hearing and then address remedy for these claims and any that succeed in the second final hearing, or to list a remedy hearing for these claims first and then list a final hearing for the stayed claims.

227. Of course, the parties may wish to have without prejudice discussions to dispose of all the claims, and we would encourage them to make without prejudice offers to that end.

228. Consequently, the parties must within 21 days of this Judgment being sent to them write to the Tribunal with their proposals for the disposal of these and the stayed claims.

Employment Judge Midgley

Date 17 May 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
17 May 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE