# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Taylor

**Respondent:** Lloyds Pharmacy

**Heard at:** Manchester on the first day and then Liverpool

**On:** 28 February 2022, 1, 2, 3 and 4 March 2022

**Before:** Employment Judge Aspinall
Ms L Heath
Dr H Vahramian

**Representation**
Claimant: In person, supported by her sister
Respondent: Ms Rezaie

**JUDGMENT** having been sent to the parties on 13 April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Background to the proceedings

1. By a claim form dated 8 July 2020 the claimant brought a complaint of race discrimination and a claim for other payments due to her.

2. The respondent defended the claim which came to a case management hearing before Employment Judge Benson on 5 March 2021. The claimant's claim was clarified to be a complaint of race discrimination by harassment under section 26 Equality Act 2010. The other payments complaint was confirmed to relate to remedy. By that date the claimant had been dismissed and the claim was amended to include a complaint of unfair dismissal. The claimant made a further application to amend her claim to include a complaint of victimisation. The respondent filed Amended Grounds of Response. The claimant's victimisation

amendment application was accepted by EJ Dunlop on 20 July 2021.

3. The claimant is white British. Her manager is black African. The claimant had difficulties about her start and finish times at work because she had to take her child to and from school. This caused friction between the claimant and her manager who was pointing out her lateness, and, in a performance review marked the claimant lower than the claimant liked. The claimant brought a grievance and the outcome was a mediation session. During the mediation the manager made a comment that she felt it might be because of the colour of her skin that the claimant didn't follow her instructions. The claimant accused the manager of calling her racist. She went off sick never to return to work.

4. The claimant brought a second grievance about the mediation remark. During the course of the investigation of the second grievance staff raised concerns about the claimant's treatment of the manager. These were separately investigated. The claimant was disciplined for them and a final written warning imposed. Sickness absence management was also underway and the claimant refused to return to work with the manager or to move shops. She called for the manager to be moved. On 10 November 2020 the claimant was dismissed for some other substantial reason being the breakdown in relationship with her manager.

## The Hearing

Format

5. On the first day the parties gathered with the non legal members and Employment Judge Batten at Manchester. It was then apparent that the hard copy bundles were at Liverpool Employment Tribunal and it was preferable to the parties for travel reasons to have the case heard at Liverpool.

6. EJ Batten worked with the parties to prepare a Final List of Issues and made arrangements for the case to move to Liverpool for days 2-5. EJ Batten had not heard any evidence.

## The List of Issues

7. The issues for the Tribunal to determine were as follows:

Unfair Dismissal

What was the reason or principal reason for dismissal?

*The respondent says the reason for the claimant's dismissal was some other substantial reason, namely the breakdown in the relationship between the claimant and the respondent, in particular the claimant's relationship with her line manager.*

(1) Was that a potentially fair reason?

(2) If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

(3) Was dismissal within the range of reasonable responses?

(4) But for the claimant's dismissal, what was the likelihood that the claimant would have been dismissed for incapability (ill-health absence)?

Harassment (section 26 EQA)

(5) Did the incidents and allegations relied upon by the claimant take place or occur as alleged, or at all? Specifically, does the Tribunal prefer the evidence of the claimant or respondent where assertions of face conflict?

(6) The claimant relies upon two incidents of alleged harassment:

(i) That on 17 February 2020, Ms Boachie-Dapaah allegedly claimed that she felt that the claimant had a problem with her due to the colour of her (Ms Boachie-Dapaah's) skin (paragraph 18 Particulars of Claim); and

(ii) that on 17 February 2020, Ms Boachie-Dapaah allegedly said "they come in all shapes and forms" (paragraph 18 Particulars of Claim).

(7) If so, were any or all of the incidents relied upon related to the protected characteristic of race [and/or the claimant's race]?

(8) If so, did the incidents amount to unwanted conduct by the respondent which had the purpose or effect of creating an intimidating, humiliating or degrading environment for the claimant as alleged?

(9) If so, with regard to the perception of the claimant and the circumstances of the alleged incidents of harassment, was it reasonable for the conduct to have that effect?

*The respondent contends that with regard to the perception of the claimant and in the circumstances of a mediation environment, it was not reasonable for the conduct to have such an effect.*

Victimisation (section 27 EQA)

(10) Has the claimant done a protected act? Specifically:

(a) Did the claimant allege that the respondent or another person contravened the EQA in relation to race:

(i) on 18 February 2020, by her second grievance email to the respondent; and/or

(ii) on 4 March 2020, by her email about her second grievance?

(b) If so, was the allegation a false allegation made in bad faith?

(11) Did any of the incidents/claims relied upon by the claimant amount to a "disadvantage" for the purposes of the EQA?

The claimant relies upon 3 alleged acts of victimisation:

(a) That from around 6 July 2020, the claimant was investigated for inappropriate behaviour towards Ms Boachie-Dapaah (paragraph 20(a) of the claimant's Particulars of Claim);

(b) that on 27 August 2020, the claimant was allegedly threatened with a disciplinary for her length of sickness absence (paragraph 20(b) of the Particulars of Claim); and

(c) her dismissal on 10 November 2020.

(12) If so, what was the reason for the alleged detriment? Was this:

(a) because the claimant did a protected act in raising a grievance (the claimant's contention)? or

(b) unconnected with the protected element of the claimant's protected act and a reasonable step for addressing inappropriate behaviour or management practices regarding sickness absences (the respondent's contention)?

Remedy

(13) If the claimant succeeds, in whole or in part, to what remedy is the claimant entitled?

(14) If the claimant is entitled to a financial award of compensation:

(a) What actual financial losses has the claimant suffered?

(b) To what extent, if any, has the claimant complied with her duty to mitigate any financial losses suffered by her?

(c) Has the claimant suffered any non-monetary losses? Specifically, what award should be made, if any, for injury to feelings?

(15) Should any deductions or reductions be applied to any compensation? In considering this issue:

(a) Would it be just and equitable to reduce any award because of any blameworthy culpable conduct by the claimant prior to her termination, and/or which caused or contributed to her dismissal?

(b) Would the claimant have been dismissed in any event, within a short period, for incapability/ill-health absence?

The hearing at Liverpool

8. The case opened at Liverpool before Employment Judge Aspinall and the same non legal members on day two. It was agreed that the case would proceed in a hybrid way with the parties in person but with some of the respondent's witnesses appearing by video link.

Documents

9. The Tribunal had hard copy bundles and an electronic file version of the bundle that ran to 626 pages. The Tribunal also saw witness statements, a cast list and chronology.

Applications

*An amendment issue arose*

10. On day 3 at around 14.10 the claimant asked the respondent's Ms Battersby questions about disability. The Tribunal allowed three questions around the claimant's health and Ms Battersby's awareness of it before intervening at the point at which the claimant asked why Ms Battersby had failed to reasonably adjust for her.

11. The Tribunal asked the claimant to focus on the list of issues and pointed out that there was no disability discrimination complaint in this claim at any time. The claimant said that she was disabled and that she wanted to be able to ask questions about that. The Tribunal explained Rule 2 and the requirement that the parties be on an equal footing as far as possible and that meant each side knowing the case it had to answer. The Tribunal said that the respondent had no notice that the claimant might be raising disability discrimination issues and asked the claimant did she wish to make an application to amend her complaint to include a claim of disability discrimination. She did not. The claimant just wanted the Tribunal to take her health into account when it was considering whether or not the respondent had treated her fairly.

12. The Employment Judge asked that the members and respondent note that the claimant had been offered the opportunity to make an amendment application but had chosen not to do so and had said that her case was not about disability. The cross examination resumed.

13. On day 4, at around 12 noon the claimant was cross-examining Ms Banks and took her to the occupational health referral form at page 440 of the bundle.

The claimant asked why Ms Banks had not ticked the box at question 7 which required the occupational health adviser to answer "Would the medical condition be likely to be classified as a Disability under the Equality Act?" The Tribunal intervened before the witness could answer and reminded the claimant about the list of issues and the discussion the previous day about there being no disability discrimination complaint here. The Tribunal asked did the claimant want to amend her complaint. The claimant said that she wanted clarification from the witness about why the box had not been ticked when the claimant had been affected by the way she had been treated and was made disabled by it. The claimant then said that she had been *advised* by the Judge the previous day not to make an amendment application. The respondent's representative then interjected to say that was not what her note said. Her note of the day 3 amendment issue recorded that the Employment Judge had provided information but had not advised. The claimant had been given an opportunity to make an amendment application but had chosen not to do so. The members were asked to check their notes and the Employment Judge checked hers. Everyone agreed that Ms Reziae's note accurately recorded what had been said on Day 3. The claimant was asked directly was she now saying that she was treated badly because of a disability and she replied that yes she was and said at 12.03 "*Yes I do want to include arguments about disability discrimination in my claim."*

14. The Tribunal explained to the claimant that if the claimant wished to have disability discrimination considered as part of her claim she would need to make an urgent application to amend her claim. That would necessitate an adjournment. The claimant would need to prepare a document showing how she wished the additional claim to be added. She would need to insert new text into the Claim Form stating the basis on which she said she was disabled and setting out the acts that she alleged to be acts of disability discrimination. She would need to give that document setting out what she wanted to complain about and why she was making this application now, and had not made it sooner, to the tribunal and to the respondent.

15. The Tribunal explained that the factors to be taken into account in determining an amendment application were set out in a well-known case called **Selkent** and included (i) the nature of the application, in this case it would be an application to amend to include a complaint of disability discrimination and (ii) the timing and the manner of the application, in this case the application would be made during the final hearing, a long time after the claim form and even longer time after the events complained of and (iii) any time issues arising for example whether or not the complaints were brought within the time limits for bringing discrimination complaints and if not whether or not it would be just and equitable to extend time to allow the claimant to bring the complaints late.

16. The Tribunal also explained that it would have regard to the broader context and that might include the potential merits of the complaints the subject of the amendment application and, in this case, the fact that the application was being made after the claimant had concluded her evidence. That was not necessarily fatal as the claimant might be recalled, but the lateness of the application would certainly be an important factor in this case. The Tribunal would undertake a balancing exercise to consider prejudice to the parties in allowing or disallowing

the amendment application. That would mean looking at the relative hardship and injustice, that is to say who would be worse off if the amendment application was allowed or disallowed. The Tribunal would take into account the effect of the application on the trial that was underway including the potential costs implications for the parties, listing issues and whether or not it would be possible to resume the hearing after the amendment application had been determined or not, so that for example it could be a relevant consideration as to whether or not there could *ever* be a fair hearing in this case at all following an adjournment at this point in proceedings.

17. The Employment Judge then asked the parties and members to record the point in proceedings at which this issue had arisen. It arose just after noon on day four in a five-day case when the claimant had finished giving evidence and the respondent's first witness, the dismissing officer Ms Battersby had concluded her evidence, the respondent's second witness Ms Harriet Boachie-Dapaah had finished giving her evidence and the respondent's third witness had just begun giving her evidence. The timetable had been agreed on the basis that the respondent's evidence would be concluded by the end of day four. This was now not likely to be achievable as there were two further witnesses yet to be called.

18. The Employment Judge then asked Ms Rezaie was she happy with the information and guidance provided to the claimant litigant in person in relation to a potential application to amend. Ms Rezaie confirmed that she was content that the Employment Judge had succinctly and accurately summarised the process around an amendment application and the relevant law and tests to be applied. Ms Rezaie added that the respondent would object to any amendment application and commented that on day one at Manchester Employment Judge Batten had confirmed with the claimant that the complaints in the list of issues were her only complaints. The respondent said that the claimant had had opportunity to make an amendment application at that stage but had chosen not to do so.

19. The Tribunal proposed that there be a significant break at that point to allow the claimant to consider her position.

20. It was 12.14 and the Employment Judge and members agreed that the claimant should have until lunch and through lunch from 1-2 to fully and carefully consider her position. She had twice on consecutive days wanted to cross examine on disability discrimination. The Employment Tribunal takes all forms of discrimination very seriously and would want the claimant to have access to justice if she says she has been discriminated against because of a disability. Further, the Tribunal records the importance and public interest in certainty in legal decision making and would not want the parties to feel the decision in the case, whatever that might be, was not final because the claimant had not had chance to amend her claim to include disability discrimination. The claimant was not to feel pressured into continuing if the case was not how she wanted to bring it. It was important that both sides could have confidence and certainty in the outcome. The claimant was reminded of the existence of sources of legal advice including ELIPS and the availability of ACAS in the provision of information though not advice.

21. The claimant came back after lunch and said she did not want to make an

amendment application. She said her case was not about disability it was about race and she wanted the case to be concluded this week.

*Claimant suggestion she had been stopped in her tracks*

22. On Day 5 during the claimant's cross examination of Mr Deveaney the claimant suggested to the witness that she had been dismissed because she had already gone to ACAS. Ms Rezaie objected to this point saying that this was not the claimant's case and that this reason for dismissal had not been put to Ms Battersby the dismissing officer. The claimant then made an allegation that she had been "stopped in her tracks" by Ms Rezaie from responding to a question in her own cross-examination the way she had wanted to on this point.

23. The Employment Judge required that the hearing was paused whilst the Tribunal members' notes were checked. The notes revealed that the claimant had not put her having gone to ACAS as a reason for dismissal to Ms Battersby.

24. The suggestion that she had been "stopped in her tracks" by Ms Rezaie was concerning and the notes would be checked on that point. The Employment Judge, each panel member and the parties were each to check their notes to find where the claimant had been "stopped in her tracks". Neither the recollection of the Tribunal nor the notes revealed anything to suggest any point in cross examination at which respondent's counsel had prevented the claimant from saying something she had wanted to say. On the contrary, there were examples of Ms Rezaie assisting the litigant in person to find relevant documents, focus on the list and put her case as stated in the list.

25. The claimant said that she had wanted to talk about page 435 and that it was her case that they dismissed her because she had gone to ACAS. The Tribunal looked at page 435. It was an email informing Mr Deveaney before he made the decision to discipline the claimant that she had been to ACAS. Ms Rezaie objected to the claimant changing the shape of her case now when the List of Issues had been agreed on day one.

26. The Tribunal decided that the claimant as a litigant in person would be allowed a little latitude. The Employment Judge said that it is important that no one should feel that they have been stopped from saying something they want to say in court. The respondent might take comfort in the knowledge that the Tribunal would apply the law as set out in the agreed list of issues but that the claimant, who is not a lawyer, would be allowed to refer the Tribunal to page 435 and put it to Mr Deveaney.

27. Mr Deveaney was clear that the knowledge that the claimant had gone to ACAS had no bearing on his decision making. He had been trying to get the claimant to engage and get her back to work even after he knew she had been to ACAS. He had very much wanted to mediate and get the claimant back in. It was her refusal to engage with him in Teams meetings and then refusal to follow management instructions to attend investigatory meetings that led to his decision to use a disciplinary process.

28. The claimant's allegation that she had been "stopped in her tracks" by Ms Rezaie was wholly without foundation.

Oral Evidence

29. We heard evidence from the claimant who gave detailed responses. The claimant steadfastly refused to accept that she had been late for work. When it was put to her that staff members other than Ms Boachie-Dapaah, for example MM, had noticed that the claimant was late for work the claimant expressed a view that the contents of MM's statement had been "*put in to her head*" by Ms Boachie-Dapaah. When asked why she did not follow instruction from Ms Boachie-Dapaah rather than accept that she did not the claimant responded, "*I did not intentionally ignore her".* On occasions the claimant changed her position under cross examination initially saying that Ms Boachie-Dapaah had not seen the claimant's previous performance document (ACD) before their meeting in December 2019 and then shifting her position through a long non relevant response about failures in the disclosure process to finally accept that Ms Boachie-Dapaah had seen the ACD prior to the meeting but did not have it to hand during the meeting. The claimant had to be guided to try to answer the question clearly. The claimant persisted in saying she had no issue with Ms Boachie-Dapaah until her manager accused her of being racist in February 2020, in the face of evidence, including the claimant's own grievance from December 2019, to the contrary.

30. The Tribunal heard from Ms Harriet Boachie-Dapaah. Ms Boachie-Dapaah was careful to be accurate in her evidence sometimes checking against her witness statement and the documents and was measured in her responses. The Tribunal found her to be a credible and consistent witness as to the claimant's performance and attendance and as to the content of the 17 February 2020 meeting.

31. Ms Rebecca Banks the area manager gave her evidence in a straightforward and helpful way. The Tribunal found her to be a credible witness as to the content of the 17 February 2020 meeting.

32. Mr Peter John Devaney, the Regional Manager, was frank in his evidence in that he said he had hoped he could resolve the conflict the claimant perceived there to be, both before and after he knew she had gone to ACAS, and get her back to work in branch. He admitted that his view changed following the claimant's refusal to engage in meetings or telephone calls to seek to address issues and get her back to work and that he then concluded that the only way that the matter could be resolved would be to address her conduct in refusing to accept instruction from Ms Boachie-Dapaah.

33. Ms Hannah Battersby, Regional Manager for a different region, conducted the claimant's disciplinary hearing. She gave her evidence in a straightforward way and was clear and consistent in her evidence at tribunal with the reasoning in her letter of dismissal, as to the reason for dismissal.

34. Ms Yvonne Turner, Head of Division for North of England, heard the claimant's appeal against her dismissal. She gave her evidence in a

straightforward way. Ms Turner was convincing on her evidence as to the efforts she made, at the late stage of appeal, to consider reinstatement and to seek to explore that with the claimant. Like Mr Deveaney she had wanted to get the claimant back to work.

## The Facts

Background to Employment

35. The claimant started work as a dispenser for the respondent on 22 February 2018 (the respondent says 23 February 2018). The role was 8.30 – 6 Monday, Tuesday, Thursday and Friday. The claimant was a qualified dispenser and was also required to work in the shop.

The claimant's timekeeping

36. The starting time for the role was 8.30am but it was agreed that the claimant could start at 9am. In 2019 it was apparent that this was problematic for the claimant who was often late. Ms Boachie-Dapaah spoke to the claimant on a number of occasions about her lateness. At first the claimant rang ahead if she was going to be late but soon she was late so often that she was no longer ringing ahead.

37. The claimant regularly came in after 9.15 and wasn't at her workstation until 5-10 minutes after that. She made a request to have her start time adjusted to 9.15. This was agreed informally.

38. The other members of staff noticed that the claimant wasn't arriving on time ready to work at 9.15 but would come in and use the bathroom and then be ready some minutes later. Ms Boachie-Dapaah spoke to everyone about being ready to work at their workstation on time.

39. By September 2019 the claimant's lateness was such a frequent occurrence that Ms Boachie-Dapaah started to keep a log of the claimant's arrival time and the time she was ready to start work. The log showed that the claimant regularly arrived after 9.15 and regularly was not ready to work until later. The claimant sometimes needed to use the bathroom and sometimes went in the bathroom to change into uniform before starting her shift. The claimant did not always accept instruction from Ms Boachie-Dapaah. She would sometimes ignore what she had been told to do, for example she might have been told to leave a task partially completed and take her break. She would insist on finishing her task and taking her break later. This had an impact on Ms Boachie-Dapaah's ability to manage break times for other staff and to manage staffing to meet customer demand.

40. There was friction between the claimant and Ms Boachie-Dapaah in autumn 2019. The claimant spoke to MM the supervisor and the three of them had a chat in the kitchen about it. Ms Bochie-Dapaah confirmed she had no issues with the claimant. The claimant said she felt Ms Boachie-Dapaah wasn't communicating with her and she felt ignored. MM suggested they each keep a diary of any concerns.

41. In October 2019 the claimant needed to change her leaving time on Mondays and Tuesdays. She asked MM if she could leave early and make up the time on Wednesdays. She spoke to MM about this when Ms Boachie-Dapaah was away on leave. The request was approved so that it was agreed that the claimant could go at 5 on Mondays and Tuesdays. There was no agreement about making up the lost hours. That took the claimant down to 29 hours.

42. On 5 November 2019 the claimant asked Ms Boachie-Dapaah if she could shorten her lunch hour to reclaim the lost two hours so as to keep her hours and pay at 31 per week. If she dropped below 30 it affected her tax credits. Ms Boachie-Dapaah said this was not possible as she needed to retain flexibility for the needs of other staff. The claimant was not happy about that so Ms Boachie-Dapaah advised her to contact Cluster Manager Mrs Banks and gave her Mrs Banks' number.

43. The claimant went to Mrs Banks who told her to sort it out within branch. This was because the normal procedure for making a formal request was in branch, if an informal request had not been granted. The claimant went back to Ms Boachie-Dapaah who explained the change had been approved on the system for a 5pm finish and that possibly the claimant could start earlier, at 8.30 to get more hours but other than that any further change would need to be in a formal flexible working request.

<u>The claimant resisting instruction from HBD</u>

44. During November 2019 Ms Boachie-Dapaah became increasingly aware of the claimant not accepting her instructions at work in relation, for example, to completing stock counts, attending to waiting customers or generally multi-tasking. Ms Boachie-Dapaah noticed that the claimant was resistant to her instructions but would do things, sometimes the same thing, if asked by anyone else in the branch. Ms Boachie-Dapaah was the only Black British member of staff in the branch.

45. The claimant held a voluntary role as Safer Care Champion. An incident arose in which a medicine was dispensed in error. The patient returned to the pharmacy and the error was corrected, with apologies. The claimant felt that the error ought to have been notified to her as Safer Care Champion by Ms Boachie-Dapaah. It wasn't formally notified to her because this was a busy pharmacy and the incident had arisen when the claimant was not on shift. This was a small pharmacy and the claimant came to hear about the incident soon after it happened. The claimant took offence at not having been formally notified by Ms Boachie-Dapaah and stood down from her Safer Care Champion role.

<u>18 November 2019 flexible working request</u>

46. The claimant wanted to claw back hours and so Ms Boachie-Dapaah gave the claimant three working pattern options. The claimant did not want any of those options. The claimant made a formal flexible working request to Mrs Banks in writing on 18 November 2019 and met with Mrs Banks on 28 November 2019 to resolve it.

47. Mrs Banks had spoken to Ms Boachie-Dapaah and found a solution for the

claimant that was not ideal for the branch but could be workable.

5 December 2019

48. On 5 December 2019 the claimant's formal flexible working request was approved and she received a letter setting out her hours as follows:

Monday 9.15 to 5.15
Tuesday 9.15 to 5.15
Wednesday 9.30 to 12
Thursday 9.15 – 5pm
Friday 9.15 – 5pm

49. The request was different from what had previously been requested, it had had to accommodate needs of other staff members, but the claimant got the working hours she wanted.

10 December 2019

50. The claimant had her performance review meeting with Ms Boachie-Dapaah. This was called Annual Contribution Discussion (ACD). Prior to the meeting the claimant should have completed a self assessment rating but had not done so. At the ACD Ms Boachie-Dapaah worked with the claimant to give ratings for each of the categories. Ms Boachie-Dapaah marked the claimant down from a previous "good" rating to "inconsistent" overall. She gave reasons for her performance assessment in each category. Ms Boachie-Dapaah also raised timekeeping as an issue for the claimant; the claimant was still arriving a few minutes after 9.15 then went to the bathroom and changed and so was late at her work station, the claimant often came back from lunch late and the claimant's timekeeping had been noticed by other colleagues so that when Ms Boachie-Dapaah spoke to them about their timekeeping they alluded to the claimant and nothing being done about her poor timekeeping. The claimant would not accept feedback about her timekeeping and said that others come in and make a cup of tea and that Ms Boachie-Dapaah doesn't say they are late. The claimant would not accept that she had been late.

51. Ms Boachie-Dapaah also raised that the claimant would clean the shop floor sometimes or come into dispensary to put orders away when she had other duties to be getting on with. The claimant protested about the rating of inconsistent and challenged Ms Boachie-Dapaah saying that she couldn't give that rating when she didn't have the previous ACD with its targets to hand. Ms Boachie-Dapaah maintained her position that the claimant was rated inconsistent and gave reasons for each of the ratings and examples of what the claimant would need to do to score higher. The claimant walked out of the meeting before it was finished saying that Ms Boachie-Dapaah was singling her out. Ms Boachie-Dapaah had to complete the form, recording the goals that had been discussed, alone. The claimant refused to sign the form. The claimant complained to Cluster Manager Rebecca Banks that she did not like how the review had been conducted.

52. On 11 December 2019 the claimant noticed that Kate had come in late and

then Dawn asked everyone if they wanted a cup of tea. The claimant pointed this out asking Ms Boachie-Dapaah shouldn't Dawn be at her workstation. Ms Boachie-Dapaah said that she knew what the claimant was doing (the implication being that she knew the claimant was being sarcastic about timekeeping of others) in raising this. Kate then came to the claimant and said thanks to you we can't have cups of tea now.

The 12 December 2019 grievance

53. The claimant lodged a grievance with Mrs Banks. The claimant complained about Ms Boachie-Dapaah's treatment of her in the following respects:

(1) Ms Boachie-Dapaah's initial *refusal of flexible working*;

(2) Ms Boachie-Dapaah's *inappropriate and unprofessional manner* in the ACD. The claimant felt Ms Boachie-Dapaah was holding the flexible working request against the claimant and using the ACD to mark her down because she had made a flexible working request.

54. The grievance letter which was over two pages long said, about Ms Boachie-Dapaah having brought up timekeeping in the ACD, *This is highly disputed as I know I have not been late.*

55. The claimant alleged she was being bullied by Ms Boachie-Dapaah. The letter concluded *I am worrying about what I am going to walk into in work next, all I would like is to be treated equally and fairly.* It alleged a breach of her human rights in not being allowed to use the toilet on arrival at work.

December first grievance investigation

56. George Carter, another cluster manager, was appointed to investigate the grievance.

57. The first Ms Boachie-Dapaah knew of the grievance was when George Carter attended the branch to interview the staff on 2 January 2020. GC interviewed:

a. Marie Morris, who said *Catherine takes the Michael, she starts at 9.15 but only comes in around 9.15 to 9.20…it is not fair that she comes in late all the time...*

b. Michelle Moody, who said *there is issues around Catherine and her attitude. I think Harriet is very professional and approachable. There was one morning when Catherine was late and Harriet said about her being late and Catherine said "what's your point?"…Catherine does'nt speak to Harriet very professional. She speaks to her with an attitude. She is always late.*

c. Dawn Chimupeni who gave an example of trying to show the claimant how to do something but the claimant refused to do it and Dawn said *I told Harriet and she said that Catherine has to do what I say but I said*

*that Catherine wasn't teachable. Catherine is supposed to come in at 9.15 but she goes to the toilet and doesn't come on to the shop floor or dispensary until 9.20- 9.25. A customer told me to watch my back with Catherine as everywhere she goes she sues people.*

d. The claimant who set out the issues from her grievance letter and raised an issue about a pay differential with her being on £8.37 per hour and others on £8.46. The claimant concluded saying she was being bullied by Ms Boachie-Dapaah and that MM was not being impartial anymore.

e. Ms Boachie-Dapaah who said that she got on with everyone except the claimant. She said *She has no respect for me, she seems sensitive and I have to be careful how I speak to her. She always ask how I am because I am quiet. If I ask her to do something she rolls her eyes and has an attitude with me. I have raised the issue of her lateness but she doesn't feel there's a problem with it.* Mr Carter asked if there was a reason why Ms Boachie-Dapaah had a record of the claimant's attendance times and no one else's and she replied *Because she's the only one who is consistently late.*

f. Kate McKeown who said *I get on with Catherine but she is disrespectful towards her manager and she can be rude when asked to do something. She can refuse to do what's asked.*

14 January 2019 grievance outcome

58. Mr Carter wrote to the claimant in response to her grievance. He addressed each of her areas of concern which he labelled as ACD Review, Time Keeping, Rate of Pay and Confidentiality.

59. On ACD Review he found no connection between the review and the flexible working request and he did not uphold the allegation. On timekeeping he said *you are the only colleague who is consistently late.* He found there was no breach of the claimant's human rights in being required to start work on time and that the claimant had not been instructed as she alleged not to use the toilet. He made it clear that the claimant must arrive at work in time and if she needed to use the toilet or change she should do that before her contracted start time. He said *I hope you improve your timekeeping, if not formal action under our disciplinary procedures may be necessary.* The pay and confidentiality issues were not upheld.

60. Mr Carter concluded that he had found no wrongdoing by Ms Boachie-Dapaah and that the claimant was not being bullied or treated unfairly. He notified the claimant of the right to appeal, which she did.

Grievance outcome appeal

61. The claimant appealed the grievance outcome saying that she was left with no option but to appeal as she had been prewarned that she might face disciplinary procedure regarding lateness if things do not change. The claimant strongly denied that she was late but said that she did use the toilet on arrival at work as she has IBS and water infections. The claimant said that she has been bullied and treated

unfairly by Ms Boachie-Dapaah whose actions have been excessive especially *when it comes to me being classed as late because I've used the toilet.* The claimant said she would like to *move forward and carry on with my employment.* There had been no suggestion by anyone other than the claimant that she wouldn't carry on with employment.

62. The Regional Manager Peter Walker was appointed to hear the appeal. The claimant attended an appeal meeting at Warrington.

7 February 2020 appeal meeting Peter Walker and Mujahid Al-Amin

63. Mr Walker listened to the claimant and concluded that there were no grounds to uphold the appeal but he made a recommendation that a mediation session be conducted to repair any relationship issues between the claimant and the line manager and create a clean start. The Cluster Manager was to arrange this. The claimant was told by Mr Walker that she should *go into work get your head down and get on with your job.*

64. The letter setting out the outcome of the appeal was not sent until 19 February 2020 and wrongly stated the meeting date as having been 13 February 2020.

65. An Employee Relations colleague asked Ms Banks to conduct the mediation that Peter Walker had recommended. Ms Banks decided to do this quickly and informally without notice so as not to allow time for escalation of any issues between the claimant and Ms Boachie-Dapaah.

17 February 2020 the mediation discussion

66. On 17 February 2020 Ms Banks came to the branch and asked the claimant and Ms Boachie-Dapaah to join her in consultation room. Neither of them had any prior notice of the fact or content of this meeting. Ms Banks told them that this was a mediation meeting following the claimant's grievance. She said the purpose was to repair issues and facilitate a better working relationship.

67. Ms Banks attempted to have the claimant and Ms Boachie-Dapaah each talk about the difficulties in their working relationship and how they felt. The claimant went first and said that she felt Ms Boachie-Dapaah did not communicate with her and that Ms Boachie-Dapaah gave her too many tasks to do.

68. Ms Boachie-Dapaah said that the claimant treated her very differently than other colleagues at work, for example the claimant would not take direction from her at work such as ignoring instructions to take her break or challenging decisions as to who took a break when. Ms Boachie-Dapaah said words to the effect that the claimant accepted instruction from MM but not from her and that she did not understand why. The claimant did not dispute that was the case but had no reason as to why that was the case. MM invited speculation as to why that might be. Ms Boachie-Dapaah said she felt it might be because of the colour of her skin.

69. The claimant responded angrily, shouting "how dare you call me a racist". Ms Boachie-Dapaah said words to the effect that that was how she felt, that the

claimant did what MM asked but not what she asked. The claimant shouted and said "how dare you call me a racist" and said that she had a mixed race daughter.

70. The claimant did not answer as to why she did not accept instruction from Ms Boachie-Dapaah and she did not dispute that she did not accept instruction. The claimant began to cry and said that she had been called a racist and that this was slander and defamation of her character. She demanded that Ms Boachie-Dapaah explain why she thought the claimant was a racist.

71. There was a break whilst Ms Banks took advice then the mediation meeting was resumed. The claimant persisted in wanting to know why she had been called a racist. Ms Boachie-Dapaah said that was not what she had said. Ms Boachie-Dapaah cited two incidents. The first was that the claimant had asked a black male who regularly came into the shop if he was married. Ms Boachie-Dapaah said the claimant was trying to match make between her and the male and had only done this because they were both black. Ms Boachie-Dapaah gave another example of racism in her child's school and said that there are all different kinds of racism.

72. The claimant persisted in saying that she had been called a racist so that the mediation could not continue. The claimant left the mediation meeting saying *I can't believe this* and *this is not the last you have heard*.

73. Ms Banks spoke to each of them separately. Ms Boachie-Dapaah agreed to continue to be professional. The claimant said she was upset and could not continue to work. Ms Banks said that if she left she would not be paid for the rest of the shift. The claimant went off shift, subsequently reported sick and never returned to work.

74. Ms Banks then interviewed Ms Boachie-Dapaah about the allegation that the claimant treated her differently than white colleagues at work.

<u>The 18 February 2020 grievance</u>

75. The claimant rang in to the branch to say she would not be coming to work but did not say why. She sent a grievance to Peter Walker. It recited *During the mediation…Harriet accused me of having an issue with her due to the colour of her skin. To which I responded I am not a racist and Harriet said they come in all shapes and forms. I have found these allegations to be very insulting and hurtful and it is a slanderous remark and deformation of my character. I have full intentions of looking into this matter further and due to this situation I do not feel well enough to attend work as the distress it has caused me cannot be explained. I would like you to take the appropriate action to settle this accusation.*

76. On 19 February 2020 Ms Banks called the claimant. The claimant had a sick note for two weeks. Ms Banks referred the claimant to the employee assistance programme (EAP).

77. On 4 March 2020 the claimant sent an email to the employmee relations department (ER) to chase up progress on her second grievance.

78. The email repeated the contents of the 18 February grievance email and

added *I would like to stress this is a formal complaint against my manager Harriet Boachie-Dapaah as I feel it is a racial discrimination issue.*

79. Ruby Dinh was appointed to investigate the second grievance. She attended the branch on 10 March 2020 and interviewed the staff. She spoke to

a. Michelle Mooney who reported having witnessed an incident in which the claimant when asked to take her lunch break by Ms Boachie-Dapaah asked "why" and when Ms Boachie-Dapaah asked if the claimant had plans the claimant said "I don't have to tell you" MM said she could not believe the tone and way the claimant spoke to Ms Boachie-Dapaah. MM said *Catherine treats Harriet differently. If Harriet asks Catherine to do something Catherine always says why and there is always confrontation from Catherine. It's got to the point where everyone is scared of asking Catherine to do anything. It must be hard for Harriet to be professional to Catherine who is disrespectful.*

b. Rebecca Banks who had conducted the mediation. Ms Banks recounted the content of the mediation meeting and confirmed that Ms Boachie-Dapaah had not used the word racist, it was the claimant who had.

c. The claimant who repeated the content of her first and second grievances and the content of the mediation meeting. The claimant did not say at this interview that Ms Boachie-Dapaah had used the word racist. She accepted that it was she who had used that word. She said that she now has a wall that she will struggle to get past.

d. Ms Boachie-Dapaah who said that the claimant did not follow her instructions, that the claimant had accused her of calling her a racist. Ms Boachie-Dapaah gave examples of the claimant ignoring or challenging her instructions. Ms Boachie-Dapaah restated her view that she cannot think of any other reason as to why the claimant won't listen to her and finds it so difficult to work with her other than that she is a different colour from her colleagues. Ms Boachie-Dapaah spoke about the impact of the accusation and incident on her own health.

80. On 12 March 2020 Ruby Dinh reported that she had found no evidence of racism from Ms Boachie-Dapaah to the claimant but that there were concerns about the claimant treating her manager differently from other staff in branch which she felt warranted further investigation.

81. On 17 March 2020 the claimant was told there would be a delay in investigating her grievance. There was general disruption to workloads as the respondent addressed the COVID 19 pandemic arrangements. Workload increased and staff attendance decreased so there was great pressure on those staff attending work.

82. On 2 April 2020 the claimant rang the branch to again report ongoing sickness absence and on 3 April 2020 provided a sick note for another month. This was now during the COVID-19 pandemic first lock down at a time when the pharmacy was under extreme pressure.

83. On 8 April 2020 the claimant waited outside the pharmacy in the car whilst her sister collected her payslip.

Ruby Dinh's investigation findings

84. On 24 April 2020 Ms Dinh reported her investigation findings to the respondent's ER department. The investigation concluded that Ms Boachie-Dapaah had not said what the claimant alleged she had said. Ms Boachie-Dapaah had not said "*they come in all shapes and forms"*

85. The investigation also concluded that there would be a sanction on Ms Boachie-Dapaah for the way she raised her concern about the claimant treating her differently and her allusion to skin colour as a possible reason for this during a mediation meeting. Ms Boachie-Dapaah was to have a "record of conversation" on her record to show she had been spoken to about the issue as an area where improvement was needed. Ms Boachie-Dapaah accepted that this should have been raised with her line manager and not raised in a mediation meeting. She accepted the record of conversation and underwent training in team management.

86. The conclusion of the investigation was there was strong evidence that the claimant treated Ms Boachie-Dapaah differently and some evidence to suggest the claimant had been bullying Ms Boachie-Dapaah. Ms Dinh concluded that there needed to be a separate investigation into bullying by the claimant of Ms Boachie-Dapaah.

87. An outcome letter dated 29 April 2020 was sent to the claimant. It upheld the point that it was inappropriate for Ms Boachie-Dapaah to have raised the colour of her skin as a reason for the claimant's different treatment of her as there was no evidence of this. It did not uphold the point that the claimant was treated unfairly by Ms Boachie-Dapaah. It went on to say that the investigation also established that there were allegations that the claimant had treated Ms Boachie-Dapaah differently in that she (i) would not follow instructions (ii) was disrespectful to her (iii) bullied her and (iv) was not told off by Ms Boachie-Dapaah who would not have tolerated this disrespectful behaviour from others.

88. The grievance was partially upheld but the claimant's behaviour was to be addressed under the Disciplinary Procedure in that there would now be a further investigation.

Appeal against outcome of second grievance

89. On 6 May 2020 the claimant appealed the outcome. There was a long letter of allegation. She queried why it had been necessary to interview staff at the branch when the grievance had related to the 17 February 2020 meeting only. The claimant asked for further clarification of the bullying allegations. She said that the decision to investigate and "*threatening me with disciplinary action"* is victimisation in connection to my complaint of discrimination.

11 May 2020 welfare meeting

90. Ms Banks conducted a welfare review meeting over the telephone with the

claimant. The claimant told Ms Banks she was recording the call and would not discuss her medical position. The claimant remained absent from work. The claimant refused to discuss her health saying it was between her and her doctor. Ms Banks asked had the claimant thought about a return to work whether at another store or phased return to her own. The claimant's reply was *so now you are telling me I have to go to another store?* The claimant said the situation, meaning the relationship with Ms Boachie-Dapaah, was *slandering her name* and that she would not be comfortable going back to work with her or at another branch. Ms Banks tried to get the claimant to think about what a return might look like and what she could do to help get the claimant back to work. The claimant was resistant to the discussion. Ms Banks came away from the call believing that the claimant did not want to return to work at all.

91. That same day, 11 May 2020, the claimant contacted ACAS and entered early conciliation.

Second grievance appeal hearing

92. The second grievance appeal hearing took place by telephone on 15 May 2020. The manager was Mr Singh, Regional Manager and there was a note taker present. There was broad discussion with the claimant raising issues from the first grievance and second grievance. The claimant said she felt she was being victimized in being investigated for disciplinary herself because she brought a grievance when Ms Boachie-Dapaah called her a racist. Mr Singh attempted to explain that the matters were not related. He was addressing the grievance appeal. Disciplinary issues against the claimant arising out of Ruby Dinh's investigation were yet to be investigated. The claimant repeated that she had suffered slanderous remarks and defamation of her character. She said that false allegations were being made against her. She protested *Harriet is still in the workplace carrying on like normal with a structured day and normal pay and I have been penalised and now it is affecting me financially as well as emotional distress because I put in a complaint about a racism issue.*

93. The claimant emailed Mr Singh after the meeting on 20 May with 9 amendment points she wished to make. Mr Singh spoke to other colleagues, for example to find out why the whole team had been investigated by Ruby Dinh, following the claimant's complaint. Mr Singh was satisfied that the investigation had been broad to include all team members because the claimant's grievance was not just about the mediation incident but had arisen because of problems with communication between herself and Ms Boachie-Dapaah generally. Mr Singh recommended that there be a formal investigation into the claimant's treatment of Ms Boachie-Dapaah.

The second grievance appeal outcome

94. The appeal outcome letter was dated 4 June 2020. Mr Singh concluded:

a. Ms Dinh was right to interview the whole team as the claimant's concerns raised in her grievance were broader than just the mediation meeting itself.

b. There was delay in reaching a grievance outcome but this was due to the impact of the COVID pandemic.

c. That Ms Boachie-Dapaah had not said *they come in all shapes and forms.*

d. That the witnesses attested that the claimant had not been bullied or intimidated but in fact had been treated more favourably than other staff and that there were concerns regarding her bullying and intimidating behaviour towards Ms Boachie-Dapaah and that they needed to be investigated

8 June 2020 Mr Deveaney's investigation

95. Mr Deveaney, the Regional Manager, was appointed to investigate whether or not there was a disciplinary case to answer. It was agreed he would have a broad remit to thoroughly review all of the issues raised by the claimant. The second grievance outcome (Ruby Dinh) and the grievance appeal outcome (Mr Singh) had each raised issues about the possibility of a disciplinary case to answer by the claimant. He would look to see if there was a case to answer.

96. Mr Deveaney reviewed all of the employee relations documentation in the claimant's case including; the first grievance, the notes of the interviews of the first grievance meetings with George Carter, the outcome letter, the appeal of the first grievance, notes of the first grievance appeal hearing held by Peter Walker, the notes of the mediation meeting made by Rebecca Banks, the notes of Ms Banks investigation meeting with Ms Boachie-Dapaah on 17 February 2020, the appeal outcome letter from Peter Walker, the fit notes, the second grievance, the second grievance investigation notes, Ruby Dinh's second grievance findings, notes of further investigations carried out by Ruby Dinh, Ruby Dinh's outcome letter including the further investigation findings and referral to disciplinary. He also saw the notes from the second grievance appeal hearing with Mr Singh and the second grievance appeal outcome.

97. He was also aware that on 21 April 2020 the claimant had filed a complaint against Ms Boachie-Dapaah in her capacity as customer regarding her aunt's medication. It seemed that the prescription had not been ready when the claimant's sister called to collect it and the branch offered to do it but it would take about twenty minutes and the sister refused to wait. It was the claimant who filed the complaint though she was not the patient nor the collector. Mr Deveaney saw this intervention in the complaint as relevant to what he came to see as the claimant's agenda against Ms Boachie-Dapaah.

98. He was concerned about delay by the respondent – but COVID had played a part. He found Ms Boachie-Dapaah's comment had been inflammatory and not been helpful in a mediation. He found Ms Boachie-Dapaah's initial refusal of flexible working (later approved by Ms Banks) had not helped the working relationship between them. He believed the relationship between the claimant and her manager had broken down and he agreed that it was appropriate to have imposed a record of conversation on Ms Boachie-Dapaah.

99. He wanted to support the claimant to return to work and felt that the issues had escalated out of proportion. He wanted to offer a fresh start to attempts at mediation. He felt that formal disciplinary action would not be helpful. He wanted to have a values based conversation with the claimant and offer her support for a return to work with Ms Boachie-Dapaah and discuss sickness absence and a return to work date. He wanted to do this all by a Teams meeting. The respondent was conducting all of its meetings by Teams because of the coronavirus pandemic.

12 June Stage 1 Sickness Absence Review

100. On 8 June 2020 the respondent had written to the claimant to say she had been off sick for 4 months and that there needed to be a Stage 1 First Sickness Absence meeting. This was to take place over the phone and cover

a. Reason for absence
b. Likely length of absence
c. Whether further medical advice needed
d. measures to improve health and attendance
e. agree a way forward, action and timescales for review

101. On 9 June the claimant achieved her ACAS Certificate. Around this time the respondent, including Mr Deveaney, became aware that the claimant had been to ACAS and that conciliation had failed.

Occupational Health Referral

102. The First Stage Absence review took place on 12 June 2020 and the claimant restated her position as at 11 May 2020. She was not well and would not feel comfortable returning to work with Ms Boachie-Dapaah and would not work from another branch. The claimant was referred to occupational health

103. The claimant had a telephone consultation with an occupational health adviser on 23 June 2020. The subsequent report described a strained relationship between the claimant and her line manager. It provided that she was not currently fit for work but detailed her conditions and recommended a return to work within 8 – 12 weeks depending upon her symptoms, response to treatment and resolution of her concerns. It recommended a stress risk assessment, a phased return and talking therapy. It also recommended flexible working on return to manage the symptoms of IBS and fibromyalgia that the claimant had reported during any flare ups.

Mr Deveaney's introductory call

104. On 29 June Mr Deveaney called the claimant to introduce himself as Regional Manager and pave the way for the conversation he hoped to have with the claimant and the mediation he hoped to bring about between her and Ms Boachie-Dapaah. He explained he would start with a one to one investigation meeting with the claimant on Teams. The claimant refused to have a Teams meeting and said she would only accept a telephone discussion.

105. Mr Deveaney tried to arrange a face to face meeting instead but this was not possible for pandemic related reasons. The claimant refused to join a Teams meeting, the only reason given was that she was not comfortable using internet links.

106. On 8 July 2020, unbeknown to the respondent, the claimant commenced proceedings in the Employment Tribunal for race discrimination and other money due to her.

107. Mr Deveaney arranged a telephone meeting on 16 July 2020 and the claimant was informed that she was being instructed to attend and this was a reasonable instruction so failure to attend could lead to formal action.

108. On 15 July 2020 the claimant informed the respondent that she had earache and was unwell and in any event was not comfortable joining a Teams telephone meeting. She did not say she had already brought a tribunal complaint. The claimant did not dial in to the meeting. Mr Deveaney opened and conducted a meeting on 16 July 2020 in the claimant's absence. He provided notes of the meeting he had conducted in her absence and gave her a deadline by which to respond if she disagreed with the notes.

109. The claimant did not respond. Mr Deveaney concluded that the claimant was opting out of company processes without good cause and deliberately choosing not to engage with his efforts to get her back to work. He had come to the view that the claimant had a problem with Ms Boachie-Dapaah and that she had refused to accept the outcome of the grievances despite significant investigations and the involvement of various managers. Mr Deveaney felt that failing to engage and refusing to attend the investigatory interview "tipped the scale" in that it made him realise that a values based conversation was not going to work here and he concluded that there should be disciplinary action to address the claimant's conduct towards her manager, as evidenced by the statements that had come out of the Ruby Dinh investigation and by his own experience of the claimant refusing to accept instruction to attend a meeting.

110. Mr Deveaney wrote to ER stating that he concluded that there was a disciplinary case to answer on the following:

a. The claimant's behaviour in the working environment as established in the various investigations due to her grievances

b. The claimant's behaviour as shown in her language used in emails and correspondence, demanding and aggressive

c. The claimant's unwillingness to attend phone meetings to try and resolve the current situation

111. He said that before the matter proceeded to a disciplinary he felt it appropriate to establish a dialogue with the claimant at a welfare meeting to establish how he could help support her back to work.

<u>Mr Deveaney's 3 August letter and the "not balanced" allegation</u>

112. Mr Deveaney wrote to the claimant on 3 August 2020. He concluded that a disciplinary process would follow because of the claimant's behaviour towards her line manager and adherence to ICARE values. He detailed four points as follows:

a. Point 1 inability to accept feedback and clear management direction;

b. Point 2 Use of language in emails which is hostile and not in line with ICARE values;

c. Point 3 demanding investigations and when completed if the outcome was not what you wanted you were not balanced and continued to challenge…. a personal vendetta against Harriet, not conforming to ICARE values;

d. Point 4 refusing to obey the reasonable management instruction to attend the investigation meeting on 16 July 2020;

but set out that the disciplinary action would be put on hold whilst the claimant was off sick.

25 August 2020 Stage 2 Sickness Absence Review meeting postponed

113. On 21 August the respondent invited the claimant to attend a second stage meeting to discuss the occupational health report that had been obtained. The letter warned that if there is no indication that the claimant is able to return to work in the foreseeable future the stage two meeting may proceed to a stage three hearing and that a possible outcome of a stage three hearing, if there is still no indication of a return to work, might be termination of employment. The claimant was unable to attend on 25 August 2020 so the second stage meeting was rescheduled to 4 September 2020.

4 September 2020 Stage 2 Sickness Absence Review

114. The meeting took place by telephone with Ms Banks. The claimant raised body aches, sweats, IBS cramps and ear infection as her current health concerns. Ms Banks asked what was the reason for absence and the claimant said stress at work. Ms Banks raised the prospect of flexible working supporting a return to work. The claimant resisted suggestions that later start times would help her. She raised the letter she had had from Mr Deveaney saying it stated "*I'm not balanced"*. She added that he had clearly been made aware that she was taking anti-depressants and that his comment was very upsetting. She said *John has a personal opinion of me and is questioning my ability. I feel I am being judged by John."*

115. Ms Banks asked had the claimant used the EAP scheme to access talking therapy in line with the OH recommendation. She had not. Ms Banks asked about what a return to work would look like and the claimant said she had not given it any thought. Ms Banks suggested 50% over a four week period. The claimant did not feel ready to return.

116. On 25 September Ms Banks wrote inviting the claimant to a stage 3 review on 6 October 2020. The letter summarised that the claimant had been absent eight

months, had not started talking therapy despite OH recommending it and does not feel able to return to work. The letter repeated the warning given at stage two that a possible outcome might be termination of employment on capability grounds.

5 October 2020 the claimant makes a complaint

117. On 5 October, two months after the letter but the day before the stage 3 Sickness Review meeting, the claimant complained to ER about the wording in John Deveaney's letter of 3 August 2020. The claimant said she wanted to make an official complain about wording which she found to be *defamatory*, *very personal, insulting and offensive.* She said *I hope you take my complaint seriously and deal with it appropriately as it has caused me great distress at an already difficult time.* The claimant said that Mr Deveaney's reference to her not being balanced is a reflection of her state of mind due the fact that she had informed her employer she was on anti-depressants.

6 October 2020 Stage 3 Sickness Review

118. Ms Banks again conducted the review by telephone. In each review Ms Banks focused on offering support and trying to discuss terms for a return to work. The claimant resisted discussion and persisted in saying that she could not return to work with Ms Boachie-Dapaah and would not work at any other branch. Ms Banks knew of a potential vacancy at Huyton branch and had this in mind but did not raise it with the claimant as the claimant had been so vocal and insistent in her position that she would not move from Speke branch.

119. The claimant's position was (i) she had unresolved concerns about having been called a racist (ii) she would not feel safe working with Ms Boachie-Dapaah as she would be in danger of being called a racist again and (iii) she would not move branch. The claimant brought up her complaint against Mr Deveaney saying that "not balanced" means your mental state and that Mr Deveaney was questioning her mental state because she was on anti-depressants. Ms Banks assured her that the complaint would be addressed and tried to refocus the meeting on a return to work. Ms Banks said that she wanted to agree a return to work date. She offered to be the claimant's companion at a return to work meeting with Ms Boachie-Dapaah and John Deveaney to help the claimant face the things that she says were causing her stress. The claimant refused. She said *Why can't Harriet move to another store?* Ms Banks explained the impact of the claimant's absence on the store, the need to get her back to work, the steps that could be put in place to support her in her own store and the claimant refused to consider returning whilst Ms Boachie-Dapaah was there.

120. Ms Banks view was that (i) the grievances had been addressed and the claimant had not been called a racist and (ii) there was no reason for the claimant to feel unsafe and (iii) the claimant was refusing to consider redeployment and said she did not want to discuss a return to work and a store move was not helpful to her. The claimant's sick leave had come to the point where Ms Banks was ready to consider an ill health capability related dismissal but there was an outstanding disciplinary issue. It had been put on hold whilst the claimant was unwell. Ms Banks asked the claimant was she ready for the disciplinary process to resume.

The claimant did not accept that she should be subjected to disciplinary process at all but wanted matters resolving so agreed it could proceed on the basis that she would not be dismissed for ill health until it was resolved.

121. Ms Banks would have dismissed the claimant for ill health capability reasons on 6 October 2020, there being no prospect of a return to work, if the claimant had not been subject to disciplinary proceedings at that time.

122. On 21 October 2020 the claimant was sent a letter inviting her to a disciplinary hearing on 28 October 2020. The meeting was to be held online. The letter set out the allegations to be answered, they were the 3 August 2020 letter allegations,

a. Point 1 inability to accept feedback and clear management direction

b. Point 2 Use of language in emails which is hostile and not in line with ICARE values

c. Point 3 demanding investigations and when completed if the outcome was not what you wanted you were not balanced and continued to challenge…. a personal vendetta against Harriet, not conforming to ICARE values

d. Point 4 refusing to obey the reasonable management instruction to attend the investigation meeting on 16 July 2020.

and the letter went on to say:

> *"We need to formally discuss your continuing refusal to work with your manager despite us resolving your initial grievance, your continuing refusal being documented throughout the sickness absence process including the sickness review on 6 October 2020. It is alleged that your behaviour towards your manager , continuing refusal to accept the outcome given to your grievance of 18 February 2020 by the business and to work with your line manager in future has led to an irretrievable breakdown in the working relationship and as a result of this meeting you may be dismissed for some other substantial reason."*

123. The claimant was provided with copies of relevant documentation and advised of her right to be accompanied at the meeting.

<u>28 October meeting</u>

124. Ms Battersby was the decision making officer. At the hearing the claimant was given an opportunity to respond to each of the allegations. She disputed them all and spoke again about having been called a racist. Ms Battersby said *the outcome has been given in the grievance and appeal, it feels like that still hasn't been let go, that outcome is final, this meeting today is to move on from that process. Which brings me to my next question. I need to ask you one more time would you be willing to work with Harriet again?* The claimant said she would not feel safe working with Ms Boachie-Dapaah. The claimant said *Ms Boachie-Dapaah*

*admitted herself she believes I am a racist and she has used several different things to prove I'm a racist but then you're saying she's done no wrong.* The claimant repeated her allegation that Mr Deveaney had said she was not balanced and that that referred to her mental health. She confirmed she disagreed with all of the witness statement evidence. She said *you're being led to believe I am the negative energy in that working environment*. She again raised the lack of ICARE values from her colleagues. The claimant would not feel safe working with Ms Boachie-Dapaah and would not move from Speke branch.

125. Ms Battersby went away to investigate further Mr Deveaney's use of the phrase "not balanced". She subsequently concluded that this was not related to mental health but to the claimant refusing to accept reasoned outcomes.

10 November 2020 dismissal letter

126. Ms Battersby wrote to the claimant with the outcome of the disciplinary hearing on 10 November 2020. She addressed each of the four allegations and concluded

a. The claimant had failed to follow Ms Boachie-Dapaah's instructions. The allegation was upheld.

b. A lack of evidence meant that the tone of communication allegations was not upheld.

c. The claimant had not used the procedures in good faith but had done so to further her personal issue with Ms Boachie-Dapaah.

d. The claimant failed to follow the reasonable management instruction to attend Mr Deveaney's meeting.

127. The sanction for those allegations was the imposition of a final written warning. Ms Battersby went on to consider the collateral allegation;

> *"It is alleged that your behaviour towards your manager , continuing refusal to accept the outcome given to your grievance of 18 February 2020 by the business and to work with your line manager in future has led to an irretrievable breakdown in the working relationship and as a result of this meeting you may be dismissed for some other substantial reason."*

She concluded that this was proven. She noted that despite mediation the claimant's resentment of Ms Boachie-Dapaah continues. The claimant could not accept the outcome of the grievances or appeals. Her resentment and the breakdown in the relationship because of it would put the business at risk, communication and teamwork being essential components of safe pharmacy practice. Ms Battersby had considered redeployment but said *you were unequivocal in stating that you would not be prepared to move location*. Ms Battersby terminated the claimant's employment on the ground of some other substantial reason.

128. The claimant was paid four week's pay in lieu of notice and informed of her

right to appeal.

129. On 17 November 2020 the claimant appealed against her dismissal. The appeal letter was three pages long. The grounds of appeal can be summarized as

(i) The claimant disputes that there has been a breakdown in relationship stating that she has only ever raised concerns regarding communication / as she was deemed as late for using the toilet

(ii) The second allegation was not upheld so there was no appeal

(iii) The claimant appeals on the basis that there is a lack of evidence of the claimant having used procedures in bad faith / personal issue with Harriet rather than a genuine attempt to resolve issues. Claimant says all she has ever done is follow the policy regarding complaints.

(iv) The claimant says she did not fail to follow a management instruction regarding attending John Deveaney's meetings as she had earache and did not feel comfortable using zoom.

(v) The claimant raised again John Deveaney's "not balanced" comment. She restated that this was an allusion to her mental health.

(vi) The claimant said *I have never stated I would not work with Harriet, I have raised concern that I would not feel safe* she now said for the first time that the reason for not feeling safe was due to Harriet's lack of communication with her (not the fear of being called racist).

(vii) The claimant called for evidence of her resentment towards Harriet.

(viii) The claimant both disputed that there is a risk to public health and stated that it was she who had first raised communication problems between herself and Harriet and yet had been required to work with Harriet for a further 18 months. (this was a reference to the issue in autumn 2019, in fact the claimant only then worked with Harriet until 17 February 2020)

(ix) The claimant also said she did not agree the minutes of the disciplinary hearing.

<u>Appeal meeting</u>

130. An appeal meeting was arranged to take place on 26 November 2020. The claimant was informed of her right to be accompanied.

131. The appeal was conducted by Ms Yvonne Turner, Head of Division. Ms Turner went through each of the disciplinary allegations with the claimant and the relationship breakdown issue. The claimant raised her IBS and the unfairness of the timing issues around her lateness and use of toilet. She repeated an allegation that the statements had all been put together, that it was a group thing *they all sound the same*. She made an implicit allegation that they had colluded against

her. The claimant said she had never refused to work with Harriet. She would not accept that saying she would feel unsafe working with her was the same as refusing to work with her. The claimant said *Up until the skin comment I have never had an issue with Harriet ever.*

132. Ms Turner asked the claimant if she were reinstated could she alter her behaviour toward Harriet and the claimant replied *I don't have an issue, Harriet's belief of me is the issue* and asked *why is nobody acknowledging the fact that she has had an issue ?* the claimant persisted saying it was Harriet who had an issue with her as Harriet had an issue with the claimant going to the toilet but no issue with others. Ms Turner repeated that these matters had been investigated and that the claimant would not accept the outcome. They talked about the impact of the breakdown on the public.

Appeal outcome letter

133. The appeal outcome was sent to the claimant on 17 December 2020. Ms Turner upheld Ms Battersby's decision that the relationship had irretrievably broken down and that the claimant's employment should be terminated on the grounds of some other substantial reason. She had tried to find a way back for the claimant but had concluded that there was no realistic prospect of the claimant being able to work with her manager again without a repetition of this incident or another similar incident and she noted how hugely disruptive it had been to the business. Ms Turner had considered mediation but noted that it had been tried and failed. Ms Turner reminded the claimant of the witness statements. Ms Turner addressed the issue of Mr Deveaney having used the phrase not balanced. She said *I concur with his assessment; you have demonstrated at the grievance, grievance appeal, disciplinary process and disciplinary appeal an inability to take a balanced or objective view of your behaviour*, *our expectations of you as an employee, the views and evidence of witnesses working with you and feedback given. Your inability to inform me of how your behaviour would change so that you could continue to work with your line manager demonstrates an individual who is unable to take a balanced view of themselves…*

134. Ms Turner concluded that the claimant had no reasonable grounds on which to form her view that she would be unsafe working with Ms Boachie-Dapaah other than resentment.

135. The appeal upheld the decision to dismiss.

136. In March 2021, four months after her dismissal the claimant made a complaint about Ms Boachie-Dapaah to the respondent. She said Ms Boachie-Dapaah and Marie were staring at her in a way she found very intimidating and uncomfortable when she was in a car outside the branch and they were standing at the door. She alleged that there was no social distancing between her former colleagues in breach of pandemic requirements. She asked for this to be looked into.

**Relevant Law**

137. The law on unfair dismissal is contained in the Employment Rights Act 1996.

Section 98 provides:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."**

Section S98(1)(b) sets out the potentially fair reason for dismissal of *some other substantial reason.* The question arises what is substantial?

138. If the employer has a genuine belief in a fair reason for dismissal that may make the reason substantial, as shown by the decision in *Harper v National Coal Board [1980] IRLR 260*. The employee was dismissed because he was an epileptic and during fits occasionally attacked other employees. The EAT upheld the tribunal's finding that the dismissal was fair by reason of capability, but said that it could also constitute a fair dismissal for some other substantial reason. Lord McDonald commented:

> "Obviously an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no person of ordinary sense would entertain. But if the employer can show that he had a fair reason in his mind at the time when he decided on dismissal and that he genuinely believed it to be fair this would bring the case within the category of another substantial reason. Where the belief is one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason even where modern sophisticated opinion can be adduced to suggest that it has no scientific foundation (*Saunders v Scottish National Camps Association Ltd [1980] IRLR 174*)."

139. In Treganawan v Robert Knee and Co Ltd [1975[ IRLR 247 a personality clash was found to be a substantial reason because the atmosphere was tense and unbearable and was seriously affecting the company's business. In Perkin v St George's Healthcare 2005 EWCA Civ 1124 a relationship issue that affected the operation of the business was also found to be a substantial reason.

140. The employer must establish the reason for dismissal. The Tribunal should exercise caution that the employer is not using some other substantial reason to conceal the real reason. Once the reason is established the Tribunal goes on to consider if it is sufficient to justify dismissal.

141. If a potentially fair reason sufficient to justify dismissal within section 98(i)(b) is shown, the general test of fairness in section 98(4) will apply. Section 98 reads as follows:

> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…**
>
> **(c) …**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered…"**

142. In considering the reasonableness of the decision to dismiss for some other substantial reason the Tribunal must have regard to the size and administrative resources of the employer. It will be particularly relevant to look at the size and administrative resources of the employer where the issue is whether alternative employment should have been offered.

143. But an employer having prima facie grounds to dismiss will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action.

144. However, the Court of Appeal in *Taylor v OCS Group Ltd* [2006] EWCA Civ 702, [2006] ICR 1602, [2006] IRLR 613 has stressed that tribunals should not consider procedural fairness separately from other issues arising. They should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. The Court of Appeal said the following dicta of Donaldson LJ in *Union of Construction, Allied Trades and Technicians v Brain [1981] IRLR 224* was worth repetition:

> "Whether someone acted reasonably is always a pure question of fact. Where parliament has directed a tribunal to have regard to equity – and that, of course, means common fairness and not a particular branch of the law – and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane."

145. The reasonableness of the decision to dismiss must also be considered in terms of the response of dismissal falling within the range of responses to the

misconduct in question by a reasonable employer. The reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

146. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: A v B [2003] IRLR 405.

147. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

Equality Act 2010

148. The protected characteristic of race is defined by section 9(1) as including colour, nationality or ethnic origins.

149. The definition of harassment appears in section 26 Equality Act 2010:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of:**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (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."**

Victimisation

150. The definition of victimisation appears in section 27 Equality Act 2010:

> **"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."**

151. A protected act includes:

**(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 another person has contravened the Act.**

152. At sub paragraph (3) Section 27 provides:

**"Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made in bad faith.**

Burden of Proof

153. The Equality Act 2010 provides for a shifting burden of proof. Section 136 says:

"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

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

154. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

155. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

156. If in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

## Applying the Law to the Facts

157. The subheadings are from the agreed List of Issues.

Unfair Dismissal

What was the reason or principal reason for dismissal?

*The respondent says the reason for the claimant's dismissal was some other substantial reason, namely the breakdown in the relationship between the claimant and the respondent, in particular the claimant's relationship with her line manager.*

158. Ms Battersby was the decision making officer on dismissal. The Tribunal accepts her oral evidence that the reason for dismissal was the breakdown in the relationship between the claimant and her line manager. Ms Battersby concluded that the first four allegations (the second was not proven) did not amount to gross misconduct and imposed a final written warning for those issues. The Tribunal was satisfied that Mrs Battersby looked at each allegation separately and weighed it separately to reach a conclusion on whether or not it was proven. This showed clarity in her thinking about the reason for dismissal.

Was that a potentially fair reason?

159. Applying section 98(1)(b) Employment Rights Act 1996 says that some other substantial reason can be a potentially fair reason.

160. The Tribunal considered whether or not the reason was substantial, and not just whimsical or capricious. The Tribunal found that Mrs Battersby had a genuine belief in substantial nature of this reason because she spoke with the claimant at the disciplinary hearing about the relationship with Ms Boachie-Dapaah and she told the claimant that she wasn't letting go of the grievance outcomes.

161. Mrs Battersby said to the claimant at the disciplinary hearing *the outcome has been given in the grievance and appeal, it feels like that still hasn't been let go, that outcome is final, this meeting today is to move on from that process. Which brings me to my next question. I need to ask you one more time would you be willing to work with Harriet again?* This exchange showed the Tribunal that Ms Battersby, even at the disciplinary hearing was trying to find a way not to have to move to dismissal but to get the claimant back to work. The answer she got was that the claimant would not move branch and would not feel safe working with Ms Boachie-Dapaah.

162. Ms Battersby had listened to the claimant recite historic events, blame Ms Boachie-Dapaah for communication problems between them and refuse to work with her saying that she would feel unsafe. The Tribunal accepted her evidence that a breakdown in communication in a pharmacy has the potential to affect service and safety and the respondent's regulatory compliance issues.

163. The Tribunal finds that the respondent genuinely believed, on the good grounds of the claimant's persistence in raising historic issues, and refusal to work with her manager or move branch, that there was a breakdown in the relationship between the claimant and her manager. The Tribunal finds that the breakdown was

a substantial issue and Ms Battersby's decision to dismiss amounted to a dismissal for some other substantial reason within the law.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

164. In considering whether the reason was sufficient to justify dismissal Ms Battersby and Ms Turner had regard to the claimant's role and the context of the small pharmacy and the requirements of the pharmacy for safe practice in line with its regulatory obligations.

165. Ms Battersby and Ms Turner concluded that there was no option other than to terminate employment in the situation where, despite their efforts, (and those of Ms Banks and Mr Deveaney) the claimant would not return to her branch with Ms Boachie-Dapaah there and would not be redeployed.

166. If the claimant were to go back to work at Speke with Ms Boachie-Dapaah there would be friction and communication issues in that relationship. Ms Battersby had read the witness statements from the Ruby Dinh investigation. She could see that there were tensions in that branch. The safe dispensing of medications requires teamwork and good communication and that could not be guaranteed.

167. Further, Ms Battersby considered the respondent's duty to the claimant who was saying that she felt unsafe, in the sense that she could be accused of being racist again. Ms Battersby told the claimant that she could not guarantee that the claimant would not be alone with Ms Boachie-Dapaah at any point. There was also a duty to Ms Boachie-Dapaah. The claimant had failed to follow her instructions and would not let go of the allegation that Ms Boachie-Dapaah had accused her of being racist.

168. The Tribunal finds that the respondent was reasonable in treating the breakdown in the relationship, in the circumstances of the claimant's instransigence on redeployment and working with her manager at Speke, as a sufficient reason to justify dismissal.

Was dismissal within the range of reasonable responses?

169. At dismissal Mrs Battersby considered the four allegations to be insufficient to amount to gross misconduct and did not dismiss for them. She found the collateral allegation about the breakdown in the relationship to be sufficient to justify dismissal. This showed the Tribunal that Mrs Battersby considered each allegation on its own merits and considered, and indeed applied, outcomes other than dismissal.

170. The Tribunal had regard, in the round, to the resources and context of the respondent. Firstly, redeployment. Although the respondent had many other branches Ms Battersby and Ms Banks in the course of the welfare and sickness review process did not put a specific offer to the claimant.

171. Ms Banks had in mind a possible opportunity at Huyton branch but thought

it futile to raise it as the claimant was so insistent she would not leave Speke. Ms Battersby did not raise a specific alternative and the Tribunal make no criticism of her either on the redeployment point because she was faced with a claimant who was adamant that she would not move branch.

172. The claimant's resentment towards her manager went back to the Safer Care Champion role issue and the claimant being managed about her timekeeping and the flexible working request in autumn 2019 and the performance review issue in December 2019. The claimant was resentful, and this was fuelling her refusal to consider alternate branches.

173. The Tribunal's evidence for stating that the claimant was resentful and wanted to get her manager out is (i) the claimant had said on 15 May 2020 to Mrs Banks in the welfare discussion *Harriet is still in the workplace carrying on like normal with a structured day and normal pay and I have been penalized and now it is affecting me financially as well as emotional distress* and (ii) the claimant had said at the sickness meeting on 6 October 2020 *why can't Harriet move to another store.*

174. The respondent was therefore faced with someone who would not even consider a move. Redeployment was not an option.

175. Secondly, a return to Speke with safeguards in place was considered. The respondent's hands were tied because the claimant insisted that she was "unsafe" to work with Ms Boachie-Dapaah. This was something that was explored in welfare and sickness review meetings and at the disciplinary and appeal stages. Each manager, Ms Banks, Ms Battersby and Ms Turner asked the claimant why she felt unsafe. The claimant's initial response was because she could be accused of being racist again. Her reason later changed and she said at appeal that the reason she felt unsafe was because of communication issues between her and Ms Boachie-Dapaah.

176. Ms Battersby explored the not feeling safe issue and the claimant would not change her position. Ms Battersby tried to have the claimant see that it equated to saying she would not work with Ms Boachie-Dapaah. The claimant would not accept that the two were the same thing. Ms Turner did the same and again the claimant would not accept that the two were the same thing. The claimant was refusing to accept what was plain.

177. The claimant said, in evidence at tribunal and during the disciplinary and welfare processes, that she had not had an issue with Ms Boachie-Dapaah prior to the mediation remark on 17 February 2020. The claimant had an issue with Ms Boachie-Dapaah about the Safer Care Champion Role prior to December 2019, she had an issue about communication so that there was an informal chat in the kitchen to resolve it in autumn 2019, she had an issue about flexible working in the autumn of 2019, she had an issue about being questioned about being late, she had an issue about accepting instruction and she had an issue about being marked "inconsistent" instead of "good" in her performance review in December 2019. The claimant had sufficient issues that she brought a grievance in December 2019. The claimant had even said that her human rights were being infringed because

she wasn't allowed to go to the toilet on arrival in work. There was no evidence that she had been stopped from using the toilet at any time. The Tribunal finds the claimant's statement that she had no issue with Ms Boachie-Dapaah before the mediation remark is plainly untrue.

178. Ms Battersby concluded that there were no safeguards that could be put in place at Speke to enable the claimant and Ms Boachie-Dapaah to work together.

179. Thirdly, Ms Battersby considered the risk to the business if they worked together, the importance of teamworking and communication in meeting regulatory requirements for safe dispensing and the background context of the claimant refusing to let go of her allegation.

180. The claimant had raised the issue of Ms Boachie-Dapaah being moved. Ms Battersby did not consider that. A record of conversation had been imposed on Ms Boachie-Dapaah for having raised the colour of her skin suggestion in a mediation context. Failing to consider moving Ms Boachie-Dapaah was not something that the Tribunal thought made the decision to dismiss unfair or made it fall outside the range of reasonable responses.

181. The claimant had had the involvement of 7 managers, at 12 different meetings, (13 if appeal is included) over 11 months. (12 if appeal is included). Her grievances and appeals had been considered. Significant organisational resource had been expended on the claimant's issues at a time when the organisation was under pressure due to the pandemic.

182. Prior to her dismissal the Tribunal finds that the claimant was informed of the allegations that she was to face. She was invited to participate in an investigatory meeting and then instructed to attend an investigatory meeting and refused to do so. She was given an opportunity to make written representations at the investigatory stage and did not do so. The disciplinary action was put on hold pending sickness review outcomes and was only resumed with the claimant's consent. The claimant had a letter setting out the allegations she was to face, the four and then the collateral allegation about the breakdown in relationship. The claimant was informed as to how the respondent was classifying those allegations and that they might result in termination of employment. The claimant was given advance notice of the meetings and informed of her right to be accompanied at those meetings.

183. At both the disciplinary and appeal meetings there was full rounded discussion of the allegations and the claimant was given scope to talk again about historic issues. The Tribunal read the notes of those meetings and heard the oral evidence of Ms Battersby and Ms Turner. The claimant was informed of the outcome of the disciplinary hearing in writing and given full reasoning and information about her right to appeal. The claimant appealed and was given notice of the appeal meeting and informed of her right to be accompanied. The claimant was given full reasoning for the outcome of the appeal. The Tribunal finds that there was no breach of the ACAS Code on Discipline and Grievance.

184. The claimant was fairly dismissed for some other substantial reason being the breakdown in relationship between herself and her manager.

But for the claimant's dismissal, what was the likelihood that the claimant would have been dismissed for incapability (ill-health absence)?

185. The Tribunal was convinced by the evidence of Ms Banks that she would have moved to incapacity termination on 6 October 2020 had the claimant not been in disciplinary proceedings. She would have done this because the OH report in June had anticipated a return to work within 8 -12 weeks and that time had elapsed. The claimant was not even willing to discuss a return to work date. The claimant had not followed the recommendation of the OH report to take up talking therapy available to her through the respondent's EAP.

186. The respondent had offered a phased return of 50% over four weeks and to revisit flexible working hours in relation to the claimant's medical conditions and had tried on numerous occasions to engage the claimant in discussion about a possible return to work. With no date in sight and no prospect of the claimant's agreeing to be redeployed or work with Ms Boachie-Dapaah, Ms Banks would have terminated employment on 6 October 2020 for incapacity related reasons. There was therefore a certainty, 100% likelihood, that the claimant would have been dismissed on 6 October 2020.

Harassment (section 26 EQA)

Did the incidents and allegations relied upon by the claimant take place or occur as alleged, or at all? Specifically, does the Tribunal prefer the evidence of the claimant or respondent where assertions conflict?

187. The claimant relies upon two incidents of alleged harassment:

(iii) That on 17 February 2020, Ms Boachie-Dapaah allegedly claimed that she felt that the claimant had a problem with her due to the colour of her (Ms Boachie-Dapaah's) skin (paragraph 18 Particulars of Claim); and

(iv) that on 17 February 2020, Ms Boachie-Dapaah allegedly said "they come in all shapes and forms" (paragraph 18 Particulars of Claim).

188. The Tribunal finds that the first incident occurred but not in the way that was characterised by the claimant. The Tribunal has set out its factual findings above.

189. The Tribunal finds that the second incident did not occur. Its factual findings are above. The remark by Ms Boachie-Dapaah was that there are different kinds of racism. She did not say *they* meaning, by implication, racists. The claimant mischaracterized this remark to further her agenda against Ms Boachie-Dapaah by alleging that Ms Boachie-Dapaah had called her a racist. The Tribunal is satisfied of that because it accepts Ms Boachie-Dapaah's evidence, not contested by the claimant, that she gave examples of different forms of racism. The remark

was corroborated by Ms Banks in evidence who agreed that Ms Boachie-Dapaah had said there were different forms of racism.

If so, were any or all of the incidents relied upon related to the protected characteristic of race [and/or the claimant's race]?

190. Yes, the reference to skin colour is an allusion to race. Ms Boachie-Dapaah was positing that skin colour *might* be a reason why the claimant would not accept her instruction. Ms Boachie-Dapaah was speculating and inviting the claimant to think about whether or not Ms Boachie-Dapaah's skin colour and race was a factor for the claimant. The language of section 26 is *unwanted conduct related to a relevant protected characteristic*. It does not need to be the protected characteristic of the claimant. The remark was related to race and the difference in race between the claimant and Ms Boachie-Dapaah.

If so, did the incidents amount to unwanted conduct by the respondent which had the purpose or effect of creating an intimidating, humiliating or degrading environment for the claimant as alleged?

191. The claimant did not want to be asked whether or not race was the reason she did not accept instruction. The conduct was unwanted.

192. Did it have the purpose of creating an intimidating, humiliating or degrading environment for the claimant as alleged ? The Tribunal finds that Ms Boachie-Dapaah did not intend any offence at all to the claimant. The Tribunal accepts the evidence of Ms Boachie-Dapaah that she was wanting to improve the relationship with the claimant and to understand why the claimant would not follow her instruction but would follow the same instructions from MM.

193. Turning then to effect, in applying Section 26 (1)(b) the Tribunal must have regard to the perception of the claimant, the other circumstances of the case and whether or not it was reasonable for the conduct to have that effect. Section 26(4) requires the Tribunal to take the claimant's subjective perception into account in considering the effect the unwanted conduct had on her. The claimant says she found it degrading. She said that it was slanderous and defamation of her character. The Tribunal rejects the claimant's evidence on this point. She was not credible as to the effect of the remark on her because she did not at any point during that mediation, during her employment, since termination of her employment or in evidence attempt to refute the suggestion that she might be motivated by the colour of her manager's skin. Her response to it at the time was legalistic; she weaponized what had been said and she left the meeting saying that would not be the last the respondent would hear about it. The Tribunal finds that the effect of the remark was that the claimant opportunistically felt here was something she could use against her manager.

194. If this Tribunal is wrong about the conduct not having the effect of creating an intimidating, humiliating or degrading environment for the claimant then it would be necessary to consider if it was reasonable for the conduct to have that effect on the claimant.

If so, (or in the alternative, in this case) with regard to the perception of the claimant and the circumstances of the alleged incidents of harassment, was it reasonable for the conduct to have that effect?

195. The Tribunal finds it was not reasonable for the claimant to find the remark intimidating, humiliating or degrading. The context was a mediation setting in which Ms Boachie-Dapaah and the claimant had been asked to say how they felt. Ms Boachie-Dapaah made no accusation of racism, she said how she felt and by implication speculated as to what might be the reason for the claimant not accepting her instruction and invited the claimant to respond. Ms Boachie-Dapaah substantiated her feeling with her evidence that the claimant accepted instruction from MM, a white supervisor, but not her. She wanted to know why that was so that they could move forward.

196. The claimant could have said, *no not at all Harriet, you know me, I am surprised you could even think that of me. Of course it is not about your skin colour, it is because, for example, I feel you have been scrutinizing me in a way you don't for the others, keeping a log of my timekeeping, not sorting out my hours without me having to make a formal request, marking me down on the ACD. It is not about skin colour but about you not talking to me, changing towards me, not telling me about the dispensing error that mattered to me because of my Safer Care Champion role, it is about us not getting on and me feeling you are hard on me, harder than the others.*

197. The Tribunal has speculated in the paragraph above and extrapolated from the claimant's evidence and the content of the first grievance what might have been the reasons for her not accepting instruction from Ms Boachie-Dapaah other than skin colour, (though the claimant did not admit that she did not accept instruction). The Tribunal has done this to assist the claimant to see that her response was not reasonable.

198. In the context of a mediation, in a small pharmacy where the staff needed to work together and communicate well, and in a climate of societal conversation around acknowledging conscious and unconscious biases, and given that the claimant described herself as the mother of a mixed race child, her response, if she had found it intimidating, humiliating or degrading (which the Tribunal finds she did not) was excessive. She chose to weaponise the remark because she already had numerous issues (and a previous grievance, the outcome of which she did not like) with her manager.

199. For the reasons above, because the remark did not have the purpose or effect specified in the statute and in the alternative, if it did, because the claimant's response was unreasonable, the claimant's claim for harassment on the protected characteristic of her race fails.

Victimisation (section 27 EQA)

Has the claimant done a protected act? Specifically:

Did the claimant allege that the respondent or another person contravened the EQA in relation to race:

on 18 February 2020, by her second grievance email to the respondent;

200. The Tribunal accepts the claimant's submission that the 18 February 2020 email was sufficient to amount to a protected act. The email contained the following statement *Harriet accused me of having an issue with her due to the colour of her skin. To which I responded I am not a racist.*

201. Section 27 (2) Equality Act 2010 sets out the matters that amount to a protected act. They include at Section 27(2)(c) doing any other thing for the purposes of or in connection with the Act and at Section 27(2)(d) making an allegation (whether or not express) that a person has contravened the Act.

202. The Tribunal finds that the email of 18 February 2020 falls within both section 27 (2)(c) and (d).

203. The respondent argued in closing submission that the email did not amount to the making of an allegation of a contravention of the Act under 27(2)(d). The Tribunal rejects that submission. When the claimant says that Ms Boachie-Dapaah said the claimant had an issue with her due to the colour of her skin, it is implicit that the issue relates to race. There is a difference in their skin colour and it is implicit in what the claimant alleged (though never voiced expressly) that Ms Boachie-Dapaah would not have felt that a black woman might not be following her instructions because of the colour of Ms Boachie-Dapaah's skin.

204. The Tribunal does not need to go so far as to find that the issue the claimant raised was raised expressly, was well founded or might succeed, it is enough to qualify as a protected act as stated in the 18 February 2020 grievance.

Has the claimant done a protected act? Specifically:

Did the claimant allege that the respondent or another person contravened the EQA in relation to race:

On 4 March 2020, by her email about her second grievance?

205. The second alleged protected act was the 4 March email. That email refers to *a racial discrimination issue*. It is more direct and explicit in its allegation than the 18 February 2020 email. It amounts to a protected act under Section 27(2) (c) and (d) above for the same reasons as set out above.

If so, was the allegation a false allegation made in bad faith?

206. Section 27(3) provides that giving false evidence or information or making a false allegation, is not a protected act if the evidence or information is given or the allegation is made in bad faith.

207. The Tribunal finds that the grievance allegation on 18 February 2020 and followed up on 4 March 2020 was made in bad faith. This is not a conclusion that

has been reached lightly. There were two and a half days deliberation time in this case and great care was taken to look at the chronology of events, the actions and statements of the claimant at the relevant times. The Tribunal finds the allegation was made to detract from the claimant's own conduct. The claimant had been warned on 14 January 2020 as part of the first grievance outcome by Mr Walker *I hope you improve your timekeeping, if not formal action under our disciplinary procedures may be necessary* and *you need to take some time to reflect on your ACD and make the recommended improvements.* The claimant was refusing to accept instruction from her line manager and the claimant had ongoing resentment towards her manager.

208. The resentment was because Ms Boachie-Dapaah had (a) not told the claimant the Safer Care Champion incident information (b) challenged her about her timekeeping (c) kept a log of her arrival times (d) not initially acceded to the request for flexible working (e) marked her inconsistent (not good) at performance review and (f) because her grievance about those things had not gone her way but had resulted in Peter Walker telling her to *get back into work, get your head down and do your job* and (g) had led to the mediation. The claimant had not let go of the issues from the first grievance in February 2020 and had still not let go of them throughout the disciplinary process and even at appeal and at tribunal.

209. The 18 February 2020 allegation and 4 March 2020 chase up was made in bad faith because the claimant mischaracterized what Ms Boachie-Dapaah had said, she seized on the remark. The Tribunal notes that it was the not the first time that the claimant had mischaracterized conduct or remarks of Ms Boachie-Dapaah to her own ends. The claimant had left the ACD meeting in December 2019 when she did not get the rating she wanted. She turned that into an allegation of inappropriate and unprofessional conduct by Ms Boachie-Dapaah that was found to be unsubstantiated. The claimant had alleged a breach of her human rights in being prevented from using the toilet, that was found to be unsubstantiated.

Did any of the incidents/claims relied upon by the claimant amount to a "disadvantage" for the purposes of the EQA?

The claimant relies upon 3 alleged acts of victimisation:

That from around 6 July 2020, the claimant was investigated for inappropriate behaviour towards Ms Boachie-Dapaah (paragraph 20(a) of the claimant's Particulars of Claim);

211. The Tribunal finds that to be investigated for inappropriate behaviour is a neutral act but could amount to a detriment. An impartial manager was appointed to carry out the investigation, he had not previously been involved in the case. There is reasoning below to address why the act of victimisation cannot succeed in any event.

That on 27 August 2020, the claimant was allegedly threatened with a disciplinary for her length of sickness absence (paragraph 20(b) of the Particulars of Claim); and

212. The letter was a standard template letter the content of which had not been altered in the claimant's case. The application of the sickness absence process to the claimant was not a detriment, it was standard procedure in any case of sickness absence that had reached that duration. If the Tribunal is wrong about that and the sickness absence letter content is a detriment then there is reasoning below to address why the act of victimisation cannot succeed in any event.

Her dismissal on 10 November 2020.

213. A jurisdictional issue arose as to the inclusion of the claimant's dismissal as an act of victimisation detriment. The claimant was dismissed by a letter dated 10 November 2020. Her primary limitation deadline for her complaints, of unfair dismissal and discrimination arising out of her dismissal was 9 February 2021. She had already commenced proceedings on 8 July 2020. At a case management hearing on 5 March 2021 her complaint was amended to include unfair dismissal. The claim was further amended by Employment Judge Dunlop to allow the claimant to complain of victimisation on 26 July 2021. The out of time point of the dismissal as an act of victimisation was held over to be determined at this final hearing.

214. The Tribunal heard submissions from the respondent. It argued that the complaint was out of time and that the respondent who would have to defend a further act of victimisation, would be prejudiced by an extention of time. The claimant contended that it was the same evidence on dismissal that was being considered for unfair dismissal as would be considered for victimisation. The Tribunal in considering an extension of time within section 123 Equality Act 2010 so as to allow the claimant to have her dismissal considered as an act of victimisation looked at whether it would be just and equitable to extend time.

215. It considered the reasons for the claimant not having brought the complaint sooner and considered the relative prejudice to the parties including the potential impact of the cap on injury to feelings for unfair dismissal losses being lifted if the claimant succeeded in establishing her dismissal as an act of discrimination. The Tribunal also considered that the claimant had protested about her dismissal from the outset of her claim but was a litigant in person and had not put the correct legal label on the complaint at the time. The facts and chronology of the dismissal were already under consideration in unfair dismissal law. It was just and equitable to allow the extension. The Tribunal went on, below, to determine whether or not dismissal was an act of discrimination.

what was the reason for the alleged detriment?

Was the claimant investigated because the claimant did a protected act in raising a grievance (the claimant's contention)? Or was the investigation unconnected with the protected element of the claimant's protected act and a reasonable step for addressing inappropriate behaviour or management practices regarding sickness absences (the respondent's contention)

216. The Tribunal finds no connection between the protected act and the disciplinary investigation. Section 27 requires the Tribunal to consider was the

claimant investigated *because* she had done the protected act of raising a grievance and the Tribunal found that she was not. The investigation happened because of what the staff said in the investigatory interviews. Ms Dinh made the initial decision to recommend disciplinary investigation against the claimant because of the things the staff said they are recited above. The claimant appealed against Ms Dinh's findings and Mr Singh upheld the decision to move to a disciplinary investigation.

217. For the Tribunal to find that the claimant suffered the detriment of disciplinary investigation *because* she had brought her grievance against Ms Boachie-Dapaah would require us to find that Ms Dinh, Mr Singh and Mr Deveaney were all either coincidentally, independently motivated to victimize her or colluding together to investigate her because she had brought a grievance and there was no evidence of either of these scenarios at all. The content of the statements given to Ruby Dinh was disclosed to the claimant and on the face of them revealed potential disciplinary issues against the claimant. Mr Singh saw those statements and he upheld the decision to move to a disciplinary investigation. The Tribunal accepted the evidence from Mr Deveaney that at the outset of his involvement in the case he did not think the disciplinary process would be helpful. He wanted to deal with this by way of mediation and get the claimant back to work. His position did not change on that even after he knew the claimant had gone to ACAS. Surely, if he were punishing the claimant by investigating (leading to disciplining) her because of her complaint (either independently or with Ms Dinh and Mr Singh) that would have been a trigger to increase the punishment, but he did not. His actions at the time were entirely consistent with what he said his motivation had been in evidence at tribunal. He wanted to fix this. He tried to arrange meetings with her but the claimant would not engage. It was only when she refused to attend his investigatory interview (unbeknown to him she had already lodged her claim form) that he changed his mind and concluded that disciplinary would have to be the way he proceeded.

<u>Was the claimant threatened with a disciplinary for her length of sickness absence (paragraph 20(b) of the Particulars of Claim) because of her protected act or was the letter unconnected with the protected element of the claimant's protected act and a reasonable step for addressing inappropriate behaviour or management practices regarding sickness absences (the respondent's contention)</u>

218. The sickness absence letter was a standard template letter. It properly set out the possible consequences at that relevant stage of the sickness absence review process. Ms Banks was managing the sickness absence. She was not a decision maker in the decision to investigate the claimant following the Ruby Dinh investigation, not involved in the Ruby Dinh investigation, not involved in Mr Singh's assessment or Mr Deveaney's decision making. There was no threat of disciplinary action because of the claimant having brought a grievance. It was because she had been off sick.

<u>Was the claimant dismissed because of her protected act or was the dismissal unconnected with the protected element of the claimant's protected act</u>

219. Mrs Battersby was the dismissing officer. She dismissed, as set out in the reasoning on unfair dismissal above, because the claimant's relationship with her line manager had irretrievably broken down and the claimant was refusing to work with manager or be redeployed. The decision to dismiss was not because the claimant had brought her grievance.

220. Ms Banks would have dismissed for incapacity related reasons on 6 October 2020 if the claimant had not been dismissed for some other substantial, non discriminatory, reason. The claimant was, in the event, dismissed on 10 November 2020 and paid a month's pay in lieu of notice.

## Conclusion

221. For the reasons above the claimant's complaints all fail.

_____

Employment Judge Aspinall

Date: 8 June 2022

REASONS SENT TO THE PARTIES ON

15 June 2022

FOR EMPLOYMENT TRIBUNALS