EMPLOYMENT TRIBUNALS

Claimant: **Ms A Newman**

Respondent: **London Borough of Waltham Forest**

Heard at: **East London Hearing Centre (in a hybrid hearing)**

Before: **Employment Judge John Crosfill**
Members: **Ms M Daniels**
Ms S Jeary

On: **10, 11 12 & 13 August 2021**

Representation

Claimant: **Courtney Step-Marsden of Counsel instructed by Thompsons**

Respondent: **Tom Wilding of Counsel instructed in house Solicitors**

JUDGMENT

1. **The Claimant's claim for unfair dismissal brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.**

2. **The Claimant's claims of discrimination because of something arising in consequence of her disability brought under sections 15, 39 and 120 of the Equality Act 2010 succeeds in respect of the Claimant's dismissal, all other claims are dismissed.**

3. **The Claimant's claim that the Respondent failed to make reasonable adjustments contrary to Sections 20, 21 and 39 of the Equality Act 2010 succeeds in respect of the failure to provide the Claimant with an adapted chair, keyboard and mouse all other claims are dismissed.**

4. The Claimant's claim for accrued but untaken holiday pay whether brought as a claim for breach of contract or under the Working Time Regulations 1998 is dismissed.

REASONS

1. The Claimant started her employment with the Respondent on 30 October 2000 working as a Customer Services Advisor. The Claimant has had difficulties with her spine for some years, a condition which the Respondent accepts amounts to a disability. In September 2018 the Respondent restructured its organisation. The Claimant was offered a role as a Customer and Business Support Officer which required her to work in public libraries rather than the call centre where she had previously worked. Whilst the Claimant objected to this move she ultimately accepted the new role.

2. In her role the Claimant worked at several different libraries. She says that during this period the Respondent failed to make adjustments for her disability and in particular failed to provide her with the special office equipment that she had used at the call centre.

3. In early January 2019 a resident of the borough raised a complaint about the manner in which the Claimant had handled his concerns that his Christmas tree not being collected ('the Christmas tree incident'). The Claimant was disciplined and agreed to a final written warning. On 20 May 2019 the Claimant was working at Walthamstow library. On that day there was an incident between the Claimant and another member of staff. That was investigated by the Respondent as a disciplinary matter. By a letter dated 14 August 2019 the Claimant was summarily dismissed from her employment. She appealed that decision but the appeal was dismissed.

4. The Claimant instigated the early conciliation process with ACAS on 21 October 2019. On 30 November 2019 the Claimant presented her ET1 to the Employment Tribunal. She brought a claim of unfair dismissal and various claims of discrimination relying on the protected characteristics of disability and age (claims relating to age subsequently being withdrawn). She brought additional claims that the Respondent failed to make reasonable adjustments and various claims for wages/holiday pay.

<u>Relevant procedural history and the hearing</u>

5. On 30 June 2020 there was a closed preliminary hearing that took place before Employment Judge Burgher. During that hearing the issues were discussed and clarified. The Claimant withdrew her claims of discrimination relying upon her age group. Directions were made aimed at encouraging the parties to reach agreement on the scope and issues raised in the claims.

6. On 30 April 2021 the Claimant provided further and better particulars of her claim in response to various requests by the Respondent and the order of EJ Burgher made on 30 June 2020 (although much later than he had directed).

7. EJ Burgher had made standard orders that the Claimant provide the Respondent with all relevant medical records relating to her claimed disabilities together with a witness statement setting out the effect of any impairments. Again much later than had been ordered the Claimant complied with this order. By an e-mail sent on 26 March 2021 the Respondent's solicitor accepted that the Claimant met the statutory test of disability in respect of her back condition. The Respondent did not at that stage accept that a further impairment, a depressive disorder, amounted to a disability and it sought additional information and documentation from the Claimant.

8. By 20 July 2021 the parties agreed a list of issues between them. The draft that was supplied is attached to this judgment. At the outset of the hearing we discussed those issues in order to understand the ambit of the case. The Claimant confirmed that she did not seek to rely on her depression as being a disability that resulted in any unlawful conduct. She reserved her position in relation to whether the unlawful conduct she alleged resulted in her suffering from depression.

9. The scope of paragraph 5.2 of the draft list of issues had resulted in some confusion. The Respondent had assumed that the Claimant was complaining about disciplinary action being taken in relation to the incident on 20 May 2019. The Claimant's position was that the complaint concerned the action taken because she had taken sick leave. The further particulars provided by the Claimant on 30 April 2021 had not been carefully proof-read and a reference had been made to the wrong paragraph (13 and not 17). The error was obvious and given that the Respondent was in a position to deal with the claim we decided to deal with the claim as the Claimant invited us to do so. The impugned treatment being that set out at paragraph 17 of her Further and Better Particulars.

10. The scope of the wages claims related to a claim by the Claimant that she had been underpaid for 3.75 days of pay in lieu of holidays accrued but untaken. The dispute between the parties was whether or not a period of leave taken by the Claimant when her mother was unwell should have been deducted from her annual leave entitlement.

11. The Claimant had served a witness statement from her trade union Lyn Martin only days before the hearing. The Respondent did not object to the Tribunal hearing from Lyn Martin and we permitted her to give evidence despite the late service of her witness statement.

12. One of the Respondent's witnesses, Aydid Sipaloglu, was in Spain. We drew attention to the restrictions on receiving evidence from people situated outside the jurisdiction. We indicated that, providing the Respondent could assure us that the evidence could be given without infringing any Spanish constitutional provision we would receive the evidence. Despite the best efforts of the

Respondent this did not prove to be possible. The Respondent asked us to rely on the written witness statement that had been provided.

13. In discussions with the representatives the Employment Judge asked whether it was sensible for the parties to reach agreement on the legal principles to be applied. The Employment Judge offered to send the parties suggested self-directions for their comments. Both Counsel agreed to this. In their closing submissions neither Counsel suggested that the summary of the legal principles that they were sent was an inaccurate statement of the law. Those self directions, with some irrelevant parts omitted, are set out below.

14. At the request of the Respondent the hearing had been converted into a hybrid hearing. The Tribunal, the advocates and the Claimant and Lyn Martin all attended in person. The Respondent's witnesses attended via CVP projected on a large screen in the hearing room.

15. As is usual, following our discussion of the issues the Tribunal took time to read the witness statements and the documents referred to by the witnesses. We were ready to begin hearing the evidence at 14:00 on the first day.

16. We then heard from the following witnesses:

    16.1. Marvely Brown, who is employed by the Respondent as a Customer Service and Business Support Team Manager and who became the Claimant's Line Manager after the re-organisation that was effected in early 2019; and

    16.2. Joanne Tanner, who is employed by the Respondent as a Customer Service & Business Support Team Manager, and the Line Manager of Marvely Brown; and

    16.3. On the second day of the hearing, Angela Eusebe, who is employed by the Respondent as a Customer Service and Business Support Team Leader and the person who was asked to conduct an investigation into the incident between the Claimant and a colleague that occurred on 20 May 2019; and

    16.4. Louise Duffield who was employed by the Respondent as the Director of Customer Service and Business Support and who was the person who decided that the Claimant should be given a final written warning in respect of her conduct relating to the Christmas tree incident and who later took the decision to dismiss the Claimant; and

    16.5. Jane Martin, who was employed as the Divisional Director of Housing Operations and who was the person who heard the Claimant's appeal against her dismissal. We then heard from;

    16.6. The Claimant herself. She gave evidence in the afternoon of the second day of the hearing and during the morning of the third day; and from,

16.7. Lyn Martin who was the Claimant's Trade Union representative.

16.8. Joanne Tanner was recalled to give evidence about meetings she had when staff started working from the libraries. There was insufficient time left to hear the parties submissions on that day.

17. We were provided with the CCTV footage of the events of 20 May 2019. We were able to watch and re-watch that footage.

18. On the fourth day of the hearing we received written submissions from both Counsel. As we have indicated above there was no dispute about the law we needed to apply. The submissions were focused on the application of that law to the facts that the parties invited us to find. We are very grateful for the assistance we received by both Counsel. We shall not set out the entirety of the parties submissions but took them into account in reaching the decisions set out below. We have dealt with the parts of the submissions that seem to us to be the most important within our discussions and conclusions.

19. Unfortunately it was clear that we did not have sufficient time to deliberate and to deliver a judgment. We therefore reserved our decision. The decision has been delayed for a number of reasons unconnected with the case. An apology for this is set out below.

Findings of Fact

20. In this section we set out our findings of fact about the events giving rise to the claims we were invited to decide. We are alive to the fact that our function in respect of the claim of unfair dismissal is not to substitute our view of the evidence for that of the Respondent. However, in the discrimination claims we are entitled to take a different approach. Below, we attempt to distinguish between the two different approaches. Our findings of fact must be read alongside our discussion and conclusions set out below. Where we make additional findings of fact in our discussions and conclusions we shall make that clear.

21. We were invited by both parties to make adverse findings about the credibility of the witnesses. Whilst there were differences between the parties many of these were not perhaps as significant as the parties contended. However, where there was a dispute about any matter we have set out the competing positions and explain why we have preferred one version to the other.

22. We have not dealt with every factual matter raised by the parties but have limited our findings of fact to those necessary to resolve the dispute. Just because we have not mentioned any particular matter does not mean that we did not take it into account when reaching these conclusions.

The Claimant's role

23. As summarised above the Claimant started work with the Respondent on 30 October 2000. She worked as a Customer Service Centre Advisor. In her witness statement the Claimant gave an account of her duties during the initial

part of her employment which was not disputed by the Respondent. She said (with our emphasis added):

> *'I was responsible for taking calls, placing requests, inputting information, assessing and evaluating all calls in dealing with them appropriately and professionally, for Parking Services, licensing, Building Services, Mobility Services, Adult Social Care. I was dealing with all police reports, Registry Office queries and bookings, Births Deaths, Marriages, UK Citizenship and housing. I also dealt with all other information and requests coming in via Customer Services. I also worked for the Complaints Team dealing with MPs and Councilor's complaints. I also worked with in a Council shop giving the information, front facing, to the public …'*

24. We find that there was an emphasis on customer service. The Claimant told us in her oral evidence that she was used to dealing with difficult customers and rarely experienced any difficulty doing so. In their evidence the Respondent's witnesses explained that the service users were regarded as customers and they expected high standards of professionalism from the Customer Services Advisors.

The Claimants ill-health

25. In 2010 the Claimant was involved in a car accident and sustained injuries to her lower back. These injuries required her to move from her three-bedroom house into a bungalow because she could not manage the stairs. She was awarded a blue badge to assist her with parking in 2010. The Claimant was off work for some time.

26. Despite the concession made by the Respondent that the Claimant had a disability by reason of her spinal condition it is necessary for the Tribunal to make findings as to the extent to which the Claimant was disadvantaged in the workplace for the purposes of determining the claims that there had been a failure to make reasonable adjustments. It is also necessary for us to make a finding about whether or not the Claimant's actions on 20 May 2019 and her subsequent dismissal were a consequence of anything arising because of her disability. We were provided with a series of occupational health reports which had been commissioned by the Respondent starting from 2013. We were also provided with the Claimant's GP records from 29 January 2019 through to 5 May 2020. We have also had regard to the disability impact statement provided by the Claimant and the references to her health within her main witness statement.

27. The earliest occupational health report we were provided with his dated 15 February 2013. That report sets out that the Claimant was reporting that she was in pain which was becoming progressively worse. She said at the time she had pain over the lumbar area of her spine radiating down the back of both legs and numbness affecting both thighs as far as her knees together with pins and needles in her feet. She reported that she was taking strong anti-inflammatory medication in addition to powerful analgesia and had been unable to reduce the

dose of either. A further report dated 3 April 2013 informed the Respondent that the Claimant wanted to come back to work. However, the Claimant had reported that she remained in constant pain and had to take pain medication regularly every day. She could mobilise but found standing or sitting or walking for prolonged periods increased her discomfort. There was a recommendation that the Claimant was offered duties which enabled her to adjust her posture frequently, and which would allow her to mobilise during the working day. A further recommendation was made that she had a phased return to work and a workstation assessment as soon as possible. Further reports from 2013 suggest that the Claimant's symptoms would vary and that there was an improvement after having steroid injections. She is reported as being able to cope without medication by October 2013.

28. In 2016 the Claimant took further time off work was once again referred to occupational health. A report dated 6 July 2016 includes the following history:

'Ms Newman informs me that she was involved in a road traffic collision in 2010 and has unfortunately suffered back complaints on and off since then. She had an MRI investigation in 2012 which identified two compressed discs. She has received corticosteroid injections into her back on two previous occasions,2012 and 2014togood effect. Indeed, they offered a relatively normal lifestyle for her for up to 2 years after each injection.

On this occasion, when her back pain began in April 2016 forcing her to take time away from work from 6th May for a 3-week period, she again attended for a corticosteroid injection to her spine but this has little, if any effect, at all. She has been referred to the Holly House Private Hospital in Chigwell, has seen an orthopaedic specialist and is to have a repeat MRI on 26th July. The results of this, no doubt, will indicate the way forward for treatment.

Ms Newman spent some time telling me how supportive her workplace has been and her line manager, in that she has undergone a workstation assessment, has been provided with an individual chair sufficient for her needs, she uses an alternative keyboard and overall she is very happy with the ergonomic adjustments that have been made for her. She also tells me that her disability related sickness absence has been considered by the employer and she is most grateful. It is worth noting that Ms Newman has been a blue badge holder for the past 6 years. That would have been recognised previously as a disabled driver.'

29. After a further period of absence the Claimant was referred to occupational health again in February 2018. By a report dated 14 February 2018 the Respondent was informed that the Claimant had had numerous injections with little benefit and was awaiting a further denervation procedure in March 2018. The report included the following passages:

'She is on no prescription medication currently. I have advised her to discuss pain control medication with her doctors and to look at Pain Clinic and other

pain controlling options such as a TENS machines. She has not found physical therapy helpful for her pain.

With regards today-to-day activities, her sleep is affected by pain and worry. She is able to look after herself but does less household chores and less socialising. She has not done her gardening for a while. She feels she has no limitation on walking but standing is restricted to 10 minutes and sitting for 15 minutes. She has a limit of comfort. She does, however, have to drive her motorcar for longer periods.'

30. A further report dated 1 October 2018 sets out that the Claimant had had the denervation procedure and that that had improved her condition but that she still suffered *'quite severe but variable back pain, difficulties with prolonged sitting and walking and referred pain predominantly to the right leg, but also to the hands and lower arms.'*. It was noted that the Claimant had been given a disabled parking space but also that she had a one-hour drive to work which caused her some difficulties. A recommendation was made that the Claimant be given a riser desk in order to enable her to work in a standing position if she chose. The report pointed out that the biggest problem that the Claimant had was pain on prolonged sitting. A recommendation was made for a further assessment to ensure that the ergonomics of the Claimant desk and chair were correct.

31. In her witness statement the Claimant acknowledges that, at this point in time, the Respondent had supported her every way to help her stay in her job as a Customer Support Advisor.

32. The Claimant's GP records disclosed that she was consulting her GP on a regular basis to manage her low back pain. In an entry made on 4 March 2019 it is recorded that the Claimant was unable to tolerate a change of painkiller and was taking up to 6 tramadol a day. She was referred to a specialist pain clinic by her general practitioner.

33. What we take from this history is that the Claimant had a long history of suffering from back pain. The Respondent had made adjustments to her workplace which assisted her. However even despite those adjustments she continued to have difficulty driving to work and needed to manage her pain between December 2018 and May 2019 by using strong painkillers.

34. We find that the Claimant had been greatly assisted by the provision of a fitted chair and an appropriately assessed workstation. The reports consistently recommend that the Claimant alternate between sitting and standing in order to alleviate any back pain.

<u>The reorganisation</u>

35. On 10 September 2018 the Respondent launched a consultation exercise for a widespread reorganisation. The Claimant was at the time a trade union representative and attended a number of consultation meetings. The entire consultation document was included in the agreed bundle of documents. It is

sufficient to say that new job descriptions were drawn up across a wide range of departments and the employees were invited to apply for those new roles. The Claimant asked to go to either Planning, Building Control, to stay at the call centre or work in the Registry Office. She attended an interview and was offered a role as a Customer and Business Support officer. This was in fact a promotion for the Claimant but required her to work in libraries rather than at the call centre.

36. The Claimant was unhappy about the changes. She expressed her unhappiness during a meeting with the Birth and Deaths Registration Manager on 13 December 2018 when she was informed of the position that she had been offered. She followed that up with an email in which she said

> *'I just want to clarify, the position at the library, I really wasn't aware that I would be working at the library, where I would not be able to sit down and do my work, and would be requested to be on my feet all day, I am DDA, as I have spondylis, and lower back pain, from an accident I had some years ago, and suffer pain when walking over short distances, I had my last Oc Health a few months ago where they have had to reassess, my work area, so I have had new equipment put in place at my work station, I have had quite a few operations over the years, on my back, the latest was early this year, where they cauterised the nerve endings in my spine, I try to keep the condition under control with medication (tramadol) but as you can understand this is not ideal. I am really concerned that this new position would make the problem worse than it is, I didn't mention this at the interview, as I expressed preference for office based work, Planning, Building Control ,Registrars, so I thought I would be seated…'*

37. The Claimant did not receive any response to her e-mail. On 14 January 2019 she wrote to Aydin Sipalogu, the Head of Service – Libraries and Registrars. She repeated the points that she had made in her earlier e-mail and suggested that the post that she had been offered was unsuitable for her because of her disabilities. She said that she would need to be seated for most of the time and could not do the work undertaken by library staff. Aydin Sipalogu responded suggesting that the Claimant book a meeting with Joanne Tanner. We shall return to the issue of that meeting below.

38. During the evidence the Tribunal asked Louise Duffield how the Respondent had dealt with the issue of disabled employees when conducting the restructure. She told the Tribunal that the approach that was taken was to allocate the employees to a post and then look at any reasonable adjustments. It does not appear to have occurred to the Respondent that some posts might have been more suited to disabled workers than others.

<u>The events of 16 January 2019</u>

39. The Claimant stated in her witness statement, and we accept, that on 16 July 2019 she was struggling with her back and the side effects of the Tramadol that

she had taken to control the pain. She was also concerned about her mother who the previous day had got lost whilst out driving and who appeared to be exhibiting symptoms of dementia. When the matter was later investigated the Claimant gave the same account about these matters as she later gave in her witness statement.

40. The Claimant took a call from a local resident who was telephoning to complain that his Christmas tree had not been collected by the Respondent's refuse collectors. The telephone was recorded and there was no dispute about what was said. The Claimant initially advised the resident that he needed to put his tree out beside his garden waste bin. The resident said that he had and that it had not been collected for two weeks. The Claimant then suggested that it might be necessary to make a formal complaint. The Claimant told us, and we accept, that she was unable to access the computer system that would ordinarily have told her when the next refuse collection would be. That led to a discussion about the Respondent moving to digital only services. The resident was unhappy to be told that he would have to access the internet to find when the next refuse collection was. The Claimant told him that he could use a local library but that did not satisfy the resident. At that stage the Claimant told the resident that 'we've just got rid of a hundred staff'. That was a misleading reference to the reorganisation which, whilst it had led to staff being moved from the call centre, had not led to widescale redundancies. The Claimant put the resident on hold whilst she spoke briefly to her manager. When she did so she did not warn the resident that he would be kept waiting. She then told the resident that he could expect a response to an e-mail he had sent in in 5 days. The resident pointed out that that had already passed. Again the Claimant suggested that the resident make a formal complaint. The resident suggested that the situation was ridiculous. The claimant fell silent for around 8 seconds and the resident terminated the call. We record that, whilst the resident was clearly frustrated, he was not rude or abusive.

41. We consider that the Respondent could reasonably have considered that the Claimant's handling of that call was poor and fell below the standards that they could reasonably have expected. In making findings for ourselves we consider that the Claimant did a poor job of dealing with the resident. She was too slow to apologise on behalf of the Respondent, she did not apologise for her own inability to access the system or explain the difficulties she was having. She was very quick to suggest a formal complaint rather than offering a solution. She ought not to have referred to the internal staffing issues and particularly not inaccurately. She should not have put the resident on hold with no explanation or fallen silent at the end of the call. She should have escalated the complaint to a manager if she was unable to offer a solution.

42. The Claimant suggested in her witness statement that she had tried to pass the complaint to her team leader. There is no supporting evidence for that in the transcript and that is not what she said when the matter was investigated. She said that she had made enquiries of her team leaded to ascertain when the resident could expect a response to his e-mail but nothing more.

43. The Claimant was suspended from her ordinary duties on the day of the telephone call. She was sent to work at the town hall. We shall return to that below.

44. On 28 January 2019 the Claimant was sent a letter by Julie Coulson inviting her to a formal disciplinary investigation. She was told that Loise Duffield had asked that Julie Coulson investigate the matter. She was told that in the view of the respondent the matter was serious and could result in her dismissal. She was advised that she could be accompanied by a trade union representative at the investigatory meeting. She was told that she should not discuss the matter with any other employee. On the same day Julie Coulson conducted an interview with the Claimant's manager.

45. The Claimant attended an investigatory meeting on 5 February 2019. She was played a recording of the telephone call with the resident. She immediately accepted that 'it was not one of my best calls' and that she should have taken the resident's name and address and escalated the matter to her manager. She did say that she had been unable to see for herself on the computer system when the next refuse collection should have been. Having accepted that she should have handled the call a lot better the Claimant repeated the fact that she had been taking medication. She described the effects of that as making her *'a bit dopey'*. That prompted Julie Coulson to suggest that that could not excuse the way that she took the call. The Claimant responded *'You cannot think properly and it takes ages to think what you want to say, You lose words'*. On the Claimant's behalf her then trade union representative made forceful representations about the fact that the Claimant had been affected by her medication and suggested that this was a powerful mitigating factor. Julie Coulson asked for a copy of any prescription to be sent to her.

46. Julie Coulson prepared an investigation report. She recommended that the matter proceed to a disciplinary hearing with dismissal as a possible outcome. In dealing with the Claimant's ill-health the conclusion was that despite the fact that the Claimant was unwell she had not told any team leader that she was not fit for her duties.

47. The Claimant was invited to a disciplinary hearing which was to take place on 25 February 2019. The meeting was to be conducted by Louise Duffield. In advance of the meeting the Claimant's trade union representative, Janice Walker, approached Louise Duffield. She proposed that the Claimant be given a final written warning and that the matter could be disposed of on that basis. Loise Duffield agreed to this and 1 March 2019 wrote to the Claimant advising her that she was to be given a final written warning that would remain live for 2 years. In her witness statement the Claimant does not say in terms that she agreed to this but we find that at the time she must have done however reluctantly. We find that this is something that the Claimant later came to regret and she later changed trade unions partially as a response.

<u>The Claimant's time at the town hall.</u>

48. As we indicated above the Respondent's response to the telephone call on 16 January 2019 was to require the Claimant to 'work' at the town hall. The effect of this was that the Claimant was separated from her specially adapted office furniture. In a later grievance meeting the Claimant says that she was expected to order mobility badges but had hardly any work to do. In her evidence before us she repeated that she had nothing to do. We find that the Claimant did not have sufficient work to keep her occupied and was working or sitting at a desk without any special adaptions for her disability.

49. In her witness statement the Claimant said that she had a meeting with Aydin Sipaloglu and Jo Tanner on 21 January 2019. She says that the purpose of that meeting was to discuss her concerns about working in the libraries. Before she adopted her witness statement the Claimant said that her statement contained an error and that the meeting was solely with Aydin Sipaloglu. She says that during this meeting Aydin Sipaloglu said that he had heard that walking was good for bad backs. She says that she found that offensive. That is a matter which she had raised in the same terms during her grievance. Both Aydin Sipaloglu and Jo Tanner say that there was a meeting on 21 January 2019. Both say that the meeting was attended by Lyn Martin. Both say that when the working conditions at the libraries were discussed Lyn Martin commented that she too would like to work in a library. The implicit suggestion being that the meeting ended with an agreement that the change did not present any difficulties for the Claimant.

50. We have found above that Aydin Sipaloglu had suggested a meeting with the Claimant following her e-mail of 14 January 2019. E-mails between Jo Tanner and the Claimant sent on 16 January 2019 show a meeting being arranged for mid-day on 'Monday'. The next Monday was 21 January 2019. The suggestion from Jo Tanner was that she would come to where the Claimant was working which was the town hall. On 17 January 2019 Aydin Sipaloglu sent the Claimant an e-mail suggesting that he had two meetings in his diary on for that day and one for Monday 21 January 2019. The bundle included a record of a chat between Aydin Sipaloglu and the Claimant where the Claimant responds to Aydin Sipaloglu by saying '*can I come now'*. When he is interviewed as part of a grievance process Aydin Sipaloglu refers to a meeting that took place in room 23 at the Town Hall. He does not suggest that Jo Tanner was present during his interview.

51. When Jo Tanner was interviewed on 18 July 2019 as part of the Claimant's grievance process she gives the same account as she gave in her witness statement.

52. Lyn Martin's witness statement, which was served after the statements of Aydin Sipaloglu and Jo Tanner says nothing about any meeting on 21 January 2019. When she gave evidence in chief she was asked a supplementary question about this issue and said that she had attended a meeting with Aydin Sipaloglu and Jo Tanner but on behalf or a different employee. In cross examination she said that she had been aware of the dispute about who had attended the meeting. She said that she had not set out her account because she had not been asked about it.

53. Jo Tanner was recalled to give evidence and to deal with the suggestion that she had been mistaken about the meeting attended by Lyn Martin. She accepted that she had attended a meeting with the employee referred to by Lyn Martin. She said that the meeting that she recalled with the Claimant had taken place at Willow House.

54. As noted by Mr Wilding in his written submissions the issue of who attended the meeting, what was said, and when it took place is not determinative of any issue we have to decide. Both parties say that this point goes to credibility. We are surprised by the failure of Lyn Martin to include her suggestion that Jo Tanner and Aydin Sipaloglu are mistaken about the remark they attribute to her in her witness statement. A real possibility was that it was left out to ambush the Respondent's witnesses. We have weighed up that possibility in reaching our conclusions on that point.

55. We find that the meeting took place only between the Claimant and Aydin Sipaloglu and most probably on 17 January 2019. It follows that we accept that the meeting attended by Lyn Martin concerned another employee. We reach this conclusion because it is consistent with the chat messages between the Claimant and Aydin Sipaloglu on 17 January 2019 whish strongly suggest that the meeting occurred on that day. It is strongly supported by the evidence of Lyn Martin that she was not the Claimant's trade union representative at that time – she was not, as is clear from the disciplinary process. It is consistent with the account given by the Claimant in her grievance. We do not need to make any finding about whether Aydin Sipaloglu said that he had heard that walking is good for bad backs. We would not be surprised if he did as in our view that is a common belief and consistent with some of the advice the Claimant was given in the Respondents OH reports. We do not consider that the fact the parties (including the Claimant in her signed statement) were mistaken about this meeting has any general significance in relation to credibility and certainly not in respect of integrity. These are typical errors when trying to recall events once a dispute has arisen and positions become entrenched.

<u>The further period of absence</u>

56. On 18 February 2019 the Claimant commenced a period of sick leave. She was unfit for work because of the symptoms of her spinal condition. The Claimant remained off work until 1 April 2019.

57. On 18 March 2019 the Claimant spoke to Marvely Brown on the telephone. The Claimant told Marvely Brown that she was not yet well enough to return to work but that the pain she was in was easing. A discussion ensued about whether the Claimant's shift times could be modified to accommodate her disabilities. No conclusion was reached during that telephone call. Marverly Brown wrote to the Claimant on the same day and asked her to consider either starting at 11am to avoid travel at busy times. An alternative of starting at 8.45 was suggested as a consideration. The Claimant later confirmed that she would prefer the earlier shift time as this would allow her to take her medication before starting work (and after driving). Marvely Brown stated in her witness statement that she had found out that the Claimant would give another employee a lift in the

mornings. She says that this might have been a contributing factor in the choice of shift. We are satisfied that the Claimant had found that an early shift would allow her to drive to work and then eat and take pain killers before starting work. Whilst she may well have given another employee a lift to work we do not consider that that undermines her evidence in any material way.

58. On 20 March 2019 the Claimant was invited to attend a Final Formal Sickness hearing by Jo Tanner. The meeting was to be conducted by Louise Duffield and was to take place on 17 April 2019. The meeting was subsequently rearranged for 9 May 2019.

The Claimant's return to work and work at Chingford Library

59. The Claimant returned to work on 1 April 2019. On her first day back, in the absence of Marvely Brown who was on leave, a return to work meeting was conducted by Jo Tanner. Jo Tanner completed a record of the Return to Work meeting. During the day Janet Walker, the Claimant's then Union Representative, sent an e-mail to Jo Tanner informing her that the Claimant was unable to work standing up for prolonged periods. This led to further discussions between the Claimant and Jo tanner. Jo Tanner sent e-mails to the Claimant which set out her understanding of the discussions. Amongst the matters discussed was the Claimant's start time. It was agreed that the Claimant would be able to access the Chingford library before her shift started to facilitate her having something to eat whilst taking her medication. She was told that she could sit or stand depending on her wishes at the time. She was told that there was a 'specialist' chair that she could use and that her old chair could be brought over if she needed it. The Claimant asked for this to be done. The staff restroom and toilet in the Chingford Library were upstairs. A suggestion was made to the Claimant that she should use the public toilet downstairs.

60. By the end of the day on 1 April 2019 the Claimant was tired. At this stage Jo Tanner suggested a phased return to work with reduced hours for the first three weeks.

61. The Claimant complains in her witness statement about a lack of induction at the Chingford Library. We feel she is being unduly critical. It is clear from the contemporary documents that Jo Tanner spent time with the Claimant explaining what her duties would be and how her disabilities might be accommodated.

62. The Claimant has described the public toilet at the Chingford Library as the 'Children's toilet' and suggested that it was unsanitary. Jo Tanner and Marvely Brown both say that whilst the toilet had once been the Children's toilet it had been refurbished and was for general use. We accept their evidence. The Claimant says that on one occasion the toilet had flooded and was out of use. She says that she had to go to a shop across the road to use the toilet. We accept that on one occasion that was the case.

63. On around 11 or 12 April 2019 the Claimant repeated her request that she be brought her specially adapted chair from the call centre. A chair was brought

over but it was not the one that the Claimant had used and was broken. It appears that there was a further attempt by a manager to go and collect the chair but he returned with another chair. The Claimant told us, and we accept, that the second chair that had been delivered, whilst it was an adjustable chair, was not the one that she had originally used and that had been fitted to her. It does not appear that there was any attempt to provide the Claimant with the other aids that she had been given at the call centre.

64. The Claimant had been told that she could stand or sit as she thought fit and should take on tasks that accommodated her disability. The Claimant told us, and we accept, that that did not work as well in practice as her managers had expected. The Claimant has a strong work ethic and felt uncomfortable working alongside others who were undertaking some more physical aspects of the job such as reshelving books. The seats and desks that were available for working sitting down were not allocated to any particular employee. The Claimant did not have access to the adapted chair and computer equipment that she had used in the call centre. Whilst the Claimant could choose between tasks she could not easily switch tasks if for example she had started assisting a customer. The Claimant could not access the staff rest area which was up two flights of stairs and so she took to having her breaks and lunch sitting in her car.

65. On 25 April 2019 the Claimant sent Jo Tanner an e-mail asking what reasonable adjustments were proposed to allow her to access the staff toilets and restroom. The toilet that the Claimant has been asked to use was out of action on this day. This e-mail is short and to the point. We find that is indicative of how the Claimant was feeling at this time. Later that day the Claimant met with Marvely Brown. Marvely Brown acknowledges in her e-mail that the Claimant was unable to access the staff facilities at Chingford because there was no lift. She proposed that the Claimant was moved to the libraries at Hale End and Highams Hill. She told the Claimant that Highams Hill was on one level and Hale End had a list. She proposed that the Claimant started work at 10am.

66. On 26 April 2019 the Claimant met with Jo Tanner to follow up on the discussions with Marvely Brown the previous day. Jo Tanner later sent the Claimant an e-mail recording what was discussed. We find that that e-mail broadly encapsulates the discussions. The Claimant stated that she did not want the role in Hale End/Highams Hill as it would mean a 10 am start which did not fit with her need to take her medication with food after her drive to work. She agreed to work for a couple of days to see how it went.

67. The Claimant raised her concerns about the other staff members thinking she was lazy if she did not do her fair share of the work. Jo Tanner told her not to concern herself about what others thought but to do what she felt able to do. Jo Tanner stated in her e-mail that in her view the library in Chingford could not accommodate the Claimant's needs. Jo Tanner proposed a move to the Walthamstow Library as soon as the lift in that building was repaired and functional. The Claimant expressed her concerns about how busy that library was. On the same day Jo Tanner gave the Claimant notice of the re-arranged Final Formal Sickness Hearing.

68. After these discussions the Claimant continued to work mainly at Chingford Library but on at least one Friday she worked at Hale End. She found that very difficult. She was unable to access the car park and had to walk some distance to enter the building. She found the 10am start difficult because of the problems with her medication.

The Final Formal Sickness Hearing

69. The Claimant attended a meeting conducted by Loise Duffield on 9 May 2019. She was accompanied by Lyn Martin who was by then her trade union representative. We have seen the minutes of that meeting and accept that they are broadly accurate. Jo Tanner was responsible for explaining the management case. At the outset of the meeting she set out the Claimant's absence record from 2017. Jo Tanner stated that the Claimant had 52 days off work in the last 12 months.

70. The minutes of the meeting disclose that the position taken by Lyn Martin on the Claimant's behalf was to criticise the Respondent for the decision of placing the Claimant at the Town Hall without access to any of her especially adapted office equipment. She suggested that had this not been the case then the Claimant would not have needed the time off work. There was a wide-ranging discussion about what had or had not been done for the Claimant at Chingford.

71. On 17 May 2019 Louise Duffield wrote to the Claimant informing her that the outcome of the meeting of 9 May 2019 was that she was given a final written warning.

The Claimant's work at the Walthamstow Library

72. The Claimant was asked to work at the Walthamstow Library from 9 May 2019. At the library the Claimant worked as part of a large team. A large part of her duties involved assisting members of the public in respect of enquiries about the services offered by the Respondent. Whilst the Claimant was familiar with some aspects of the role she needed assistance with others. When she did not know what to do she was expected to, and did, ask her colleagues.

73. The staff facilities at Walthamstow were on an upper level that was served by a lift. To access the lift a staff pass was required. The Claimant was not issued with a pass until her employment was terminated.

74. On 20 May 2019 the Claimant was working in the library when a customer asked for assistance. The events that followed led to the Claimant's dismissal. We were shown CCTV of the events that unfolded on that day. We are conscious that we are dealing with a claim of unfair dismissal where our role is not to decide on whether the Claimant was at fault but to ask what the Respondent might reasonably have concluded. However our role in respect of the claim under the Equality Act 2010 does require us to make our own findings of fact. At this stage it is sufficient to set out the following neutral account of events.

75. The Claimant was serving a customer who had a query about residential parking permits. She had had an explanation of the process in the days before but wanted to check her understanding. She asked a colleague, who we shall refer to as Harry, whether she had correctly completed the task. A female colleague, Natalie, then approached, interjected, and expressed her own view of how the paperwork should be completed. It was common ground that Natalie had touched the Claimant who had said words to the effect of 'don't touch me'. Natalie persisted in offering her advice despite the Claimant's objections. A disagreement ensued in front of the customer. Another colleague who we shall refer to as Susan was present during this incident. The Claimant then walked away in the direction of the lifts. The Claimant then stopped to talk to another female colleague, Julie. At that point Natalie walked up to the other two and there was a further exchange of words. At one stage Natalie made her way towards the lifts before returning to resume the argument. These latter events took place in the public section of the Library.

76. The Claimant was upset and later spoke to Jo Tanner who sent her home having instructed her to work the following day at the Hale End Library.

77. Jo Tanner asked the Claimant, Natalie, Julie and two other colleagues to make statements about what had occurred. Each made a short statement which was sent by e-mail on 20 or 21 May 2019.

78. The Claimant was formally suspended from work on 24 May 2019.

<u>The Investigation</u>

79. Angela Eusebe was asked by Aydin Sipaloglu to undertake an investigation. She viewed the available CCTV on 28 May 2019 and, having done so, asked Julie and the two other colleagues who had been present on 20 May 2019 to attend for an interview. She also wrote to the Claimant and invited her to an interview which was arranged to fit around pre-arranged leave.

80. Angela Eusebe did not interview Natalie. When she was asked why that was during her evidence she initially stated that she was not asked to investigate any misconduct by Natalie. She did not regard it as any part of her role to investigate who had triggered any argument or triggered any continuation of it. She had confined her investigation to whether the Claimant's conduct fell below the expected professional standards. When the tribunal asked why Natalie had not been spoken to, we were told that Angela Eusebe had learned that Natalie had been dismissed. She did not know the reason for the dismissal. She had been told by HR that it would not have been possible to contact Natalie.

81. The Evidence Angela Eusebe obtained from the witnesses included their original e-mails to Ms Tanner and their comments in the interviews she held with them. We would summarise that evidence as follows:

    81.1. Harry suggested that the Claimant had swiftly got annoyed when Natalie intervened to offer her opinion. He suggested that Natalie had remained calm but the Claimant did not. He said that the Claimant had reacted saying 'don't touch me'. He thought that Natalie had touched

the Claimant on her arm to calm her down. He says that the Claimant swore at least twice before walking away.

81.2. Susan, who had been present both at the desk and again when the Claimant was talking to Julie heard the Claimant say, 'don't touch me'. She did not suggest that the Claimant swore at that point. She recalled the later argument in front of Julie. She says that the Claimant said words to the effect of 'you have a problem with me all day'. She said that the Claimant called Natalie a 'div'.

81.3. Julie recalls the Claimant talking to her initially asking about the proper way to fill in a parking permit form and complaining that Natalie had been rude. She said that both the Claimant and Natalie were arguing. She did not hear either swear. She says that she had to ask Susan to take Natalie away.

82. When the Claimant was interviewed by Angela Eusebe she gave much the same account as she had done in her earlier statement. She gave a little more background suggesting that Natalie had taken against her. She described Natalie interrupting her. She accepted that there had been a disagreement in front of the customer and that she had walked away. She said that in the later confrontation witnessed by Julie Natalie had been the aggressor. She said that she was unable to access the lift as she had no pass. She accepted that she had referred to Natalie as a 'div'. The Claimant explained that she had been under particular pressure on 20 May 2019 as her mother was having an operation and that she herself was unwell. Lyn Martin is recorded as telling Angela Eusebe about the issues that the Claimant had had since being moved from the call centre.

83. Angela Eusebe concluded that on the balance of probabilities the Claimant had been involved in an altercation with Natalie and that that had taken place in a public area. She recommended that the matter proceed to a disciplinary hearing.

84. In her witness statement Angela Eusebe set out what she says the CCTV shows. At paragraph 11(e) of her statement she says:

'At 15:47:24 Natalie …comes around the desk and approaches the Claimant putting her hand on the Claimant's back. This seems to cause the Claimant to instantly move back…'

85. We agree with Angela Eusebe that the CCTV footage does show that Natalie placed her hand on the Claimant's back as she started to intervene in the transaction. This does cause the Claimant to move quickly away. We make it clear that this is a finding of fact relevant only to the claims under the Equality Act 2010.

86. On 16 June 2019 the Claimant brought a wide-ranging grievance about her treatment. She complained about the decision and manner which she had been moved from the call centre to the libraries and about the measures that had been put in place concerning her disability. Her complaint included the

events of 20 May 2019 and the subsequent disciplinary proceedings. The Claimant's grievance (Fairness at Work complaint) was investigated and considered by a manager, Mandy Thompson. It is unnecessary for us to make any specific findings about that grievance process but we shall mention 2 points. We record that the Claimant's grievances were not upheld other than a complaint that she had not been given a staff pass to allow access to the lifts at the Walthamstow Library. One matter that the Claimant complained of was that she had received an abusive text message from her former trade union representative who knew that she was facing a disciplinary investigation. This is not a matter material to anything we have to decide but we would agree with the Claimant that the content of that text message was unkind and unpleasant. The Claimant had not provided the text message to Mandy Thompson by the time she concluded her report.

The Disciplinary Hearing

87. The Claimant was invited to a disciplinary hearing which took place on 7 August 2019. At that hearing Angela Eusebe presented her investigation report. She then called Harry, Susan, and Julie to give evidence. The Claimant and her trade union representative were given an opportunity to ask each witness questions. Louise Duffield also asked some questions. We were provided with comprehensive minutes of the meeting which record the questions and answers that were asked. The three witnesses gave a similar account to what they had said in their statement. Harry maintained his account that the Claimant had sworn. Susan said that the Claimant had not done so. In giving her account of the second stage of the argument Julie agreed that in the argument that she had witnessed Natalie was the aggressor. She maintained her account that both the Claimant and Natalie were shouting in a public part of the library.

88. The Claimant was able to present her account of the events of 20 May 2019. She recounted that she had felt that Natalie did not like her and described events in the days before 20 May 2019. She described Natalie intervening on 20 May 2019 when she was dealing with parking permits. She said that she told Natalie not to touch her as she had a bad back. She denied swearing at this or any stage. She said that during the argument that resumed after she spoke with Julie she had been scared and was unable to take the lift as she did not have a fob/pass. She said that Susan had had to physically hold Natalie back.

89. Louise Duffield asked the Claimant a number of questions. The Claimant accepted that she had referred to Natalie as a 'div'. When asked whether this was appropriate she said that she had been defending herself. When asked whether she was in control of her behaviour the Claimant responded as follows:

'I was in pain that day. I was worried about my mother. I was being moved about across different libraries. I was being penalized for taken [sic] time off work for my back. My husband had recently had a heart attack and I was under so much pressure at the time. I wanted to remain private and get on [sic] my

job the best of my ability. Jo had said to me 'go and sit down' but I don't take liberties and was trying to muck in. I expect to do whatever anybody else is doing. I would do anything I was being asked or expected to do. On that day Natalie was rude and arrogant. Even the customer looked at me and shrugged and even he could see 'you are dealing with it why has this other person interfered?'

90. Louise Duffield asked the Claimant if she thought she had acted professionally. The Claimant said that she had done so to the best of her abilities. Asked whether she would behave in the same way if the situation arose again the Claimant said, *'yes and I would remove myself from the situation as quickly as possible'*.

91. After the hearing Louise Duffield took the decision that the Claimant should be dismissed. She wrote to the Claimant on 14 August 2019 setting out her decision and giving reasons. She stated that she had found that Harry's account of the altercation in front of the customer was accurate. That included a finding that the Claimant had sworn and that whilst Natalie had not needed to get involved the Claimant had escalated the situation by becoming 'argumentative and exaggerated'. She accepted that Natalie had returned to the argument more than once. She concluded that both the Claimant and Natalie has used raised voices in a public area. She said that this amounted to a breach of the code of conduct for the Respondent's employees and brought the Respondent into disrepute.

92. Louise Duffield concluded that the Claimant's actions amounted to 'misconduct'. She took note of the fact that the Claimant had a live final written warning for the Christmas tree incident. She decided that in the light of what she described as 'cumulative misconduct' the Claimant should be dismissed.

<u>The Appeal</u>

93. The Claimant was offered and exercised the right of appeal against her dismissal. Her appeal was heard by Jane Martin, a Divisional Director of Housing Operations on 3 October 2019. The Claimant was accompanied at that appeal meeting by Lyn Martin. Lyn Martin set out the history of the Claimant's difficulties from the Christmas tree incident forwards. She argued that the decision to dismiss the Claimant was unduly harsh given the difficulties faced by the Claimant with her back and in her personal life. She stated in terms that it had been an error for the Claimant to have accepted a final written warning for the Christmas tree incident. However, she did not press the point to any great extent. She attributed the Claimant's behaviour on 20 May 2019 to the past difficulties and her medication. She acknowledged that the Claimant accepted that the Respondent had followed its own procedures.

94. By a letter dated 18 October 2019 Jane Martin dismissed the Claimant's appeal. In short she concluded that Louise Duffield had been entitled to take the decision to dismiss the Claimant as she had already been subject of a final written warning.

95. After the Claimant's dismissal a dispute has arisen as to whether the Claimant has received an overpayment of wages. We deal with that matter below.

Equality Act 2010 claims – general law

Statutory Code of Practice

96. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before parliament and came into force on 6 April 2011. Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

> *The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.*

Burden of proof

97. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

> *'136 Burden of proof*
>
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.'*

98. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ 1648** Lord Justice Underhill reviewed the case law and said:

> *17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions*

in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v Citylink Ltd [2017] EWCA Civ 1913, [2018] ICR 748, and Madarassy remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

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

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

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

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

99. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from

'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

100. The burden of proof provisions need not be applied in a mechanistic manner ***Khan and*** another ***v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said

"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""

101. In respect of claims that there were failures to make reasonable adjustments the burden is on the employee to show that there was some policy, criterion or practice or physical feature that placed her at a substantial disadvantage and that there was some apparently reasonable adjustment that would alleviate the disadvantage. If the employee discharges that burden then to escape liability the employer must show that it would not have been reasonable to expect it to make any adjustments. ***Latif v Project Management Institute*** **[2007] IRLR 579** and ***HM Prison Service v Johnson*** **UKEAT/0420/06**.

Discrimination because of something arising in consequence of disability

102. Section 15 of the Equality Act 2010 says:

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

103. ***Secretary of State for Justice and anor v Dunn*** **EAT 0234/16** the EAT confirmed the position in the Statutory Code of Practice para 5.2, that the four elements that must be made out in order for the claimant to succeed in a S.15 claim are:

103.1. there must be unfavourable treatment

103.2. there must be something that arises in consequence of the claimant's disability

103.3. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

103.4. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

104. The Statutory Code describes what might amount to a detriment in paragraph 5.7. It says:

For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

105. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme and anor*** **2019 ICR 230, SC** the Supreme Court approved the guidance in the Statutory Code with Lord Carnwath, giving the Judgment of the Court saying**:**

……little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which [Counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.

106. In asking whether treatment is unfavourable there is no need to seek a comparison with the treatment of others. The Statutory code says, at paragraph 5.6:

'Both direct and indirect discrimination require a comparative exercise. But in considering discrimination arising from disability, there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.'

107. At paragraphs 5.8 and 5.9 the Statutory Code says this about the requirement to show that there is 'something' that arises as a consequence of disability:

5.8 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

5.9The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.

108. The approach to the question of whether unfavourable treatment is 'because of' 'something arising in consequence' of disability is that set out in ***Pnaiser v NHS England and anor*** **2016 IRLR 170, EAT** where Simler P (as she was) said:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the

disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

109. To demonstrate that unfavourable treatment was ‘because of’ something arising in consequence of disability it is sufficient to show that the ‘something’ was an effective cause and, if it was, it is immaterial that there were other effective causes of the treatment see ***Hall v Chief Constable of West***

Yorkshire Police **2015 IRLR 893, EAT** and ***Charlesworth v Dransfields Engineering Services Ltd*** **EAT 0197/16**

110. An employer cannot be liable under this section for any unfavourable treatment unless they knew or ought to have known that the Claimant was disabled – see sub-section 15(2) above. However, once they know of disability it is irrelevant whether they recognised that the 'something' that caused their act or omission was because of disability, see ***City of York Council v Grosset*** **2018 ICR 1492, CA**.

111. The Statutory Code sets out the requirements of the justification defence – that the treatment is a proportionate means of achieving a legitimate aim. The material paragraphs are 4.26 to 4.32 and will not be reproduced here. The test is the same as in justifying treatment that would otherwise be unlawful direct discrimination. A convenient summary the relevant principles is set out in ***Chief Constable of West Yorkshire & another v Homer*** **[2012] ICR 708** in the opinion of Lady Hale where she said:

"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110.

20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

> *". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:

> *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"*

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the

real needs of the undertaking, against the discriminatory effects of the requirement."

112. Where the unfavourable treatment arises because the employer has failed to make reasonable adjustments, the employer is unlikely to be able to make out the defence of justification. See paragraphs 5.20 – 5.22 of the Statutory Code and see also ***Griffiths v Secretary of State for Work and Pensions*** **2017 ICR 160, CA**

The Section 15 Claims – Discussion and Conclusions

113. The Claimant has brought 3 separate claims under Sections 15 and 39 of the Equality Act. We have explained the misunderstanding that arose about how the second of these claims was put. The claims we needed to determine rely on the following alleged unfavourable treatment:

113.1. giving the Claimant a final written warning in respect of the Christmas tree incident; and

113.2. giving the Claimant a final written warning in relation to her absences from work; and

113.3. dismissing the Claimant.

114. We shall consider each of these matters in turn. To deal with these claims it is necessary for us to make additional findings of fact. We shall make it clear where we have done so.

Final written warning for the Christmas tree incident -paragraph 5.1 of the list of issues

115. It was common ground before us that the Claimant had been given a final written warning. We have considered whether, in circumstances where the warning was given as an agreed outcome, it could properly be said to be a detriment for the purposes of Section 39 of the Equality Act 2010. The test for a detriment is not a high hurdle. An action will amount to a detriment if an employee could reasonably regard it as a disadvantage. A negotiated disciplinary sanction is still a sanction. A final written warning places employment in jeopardy for the future. We find that having such a warning in place would be considered by a reasonable employee to place them at a disadvantage.

116. There was no dispute before us that the Respondent knew that the Claimant had a disability.

117. The first issue for us is whether the final written warning was given because of something arising in consequence of the Claimant's disability. Th list of issues does not include an express description of what that something might be but the Claimant's case was reasonably clear. She says that the 'something' was the manner in which she conducted the call with the customer about the collection of his Christmas tree. She says that that was a

consequence of the pain she was in and the medication she had taken which in turn are a consequence of her disability.

118. It was not in any serious dispute that the Claimant was in pain and required tramadol at the material time to alleviate her condition. What was in dispute was the suggestion that the manner in which she spoke to the resident was a consequence of that. It is necessary for us to make findings of fact about that.

119. We have set out above our findings in respect of the medical evidence. We have found that on 16 January 2019 the Claimant was struggling with her back pain. There was no dispute that the Claimant was prescribed Tramadol at the time. We have recorded that an additional stressor for the Claimant was a concern that her mother might be suffering from dementia. We find that the Claimant was also concerned about the reorganisation and was unhappy with the role that she had been allocated. Accordingly we find that the Claimant had a great deal on her mind on 16 January 2019.

120. Mr Wilding in his written submissions made the point that we had no medical evidence about the side effects of Tramadol. He is right about this. We consider that we are entitled to take judicial notice of the fact that Tramadol is a strong pain killer. We consider that we are also entitled to take notice of the fact that being in pain makes many people irritable.

121. When the events of 16 January 2019 were investigated the Claimant accepted that the manner in which she had conducted the call with the resident was poor. She is recorded as talking about the effects of her medication. She said that the effects of the Tramadol were that she could not think properly and that it made her dopey. We find that this description is accurate.

122. The Claimant has worked in customer services for nearly 30 years. She worked for the Respondent for 19 years. There was no evidence that she had ever been criticised for her skills with customers in the past. She had clearly coped with her medication in the past.

123. We consider that the fact that somebody copes generally with their medication is not determinative of the question of whether medication is a contributing cause of an action when combined with other factors. We have found that there were two other factors (the Claimant's mother's health and the re-organisation) in play on that day. She was also having difficulties with her computer and she says could not get a manager to assist when the call took a turn for the worse.

124. The question for us is whether we are satisfied to the relevant standard that the pain and/or the effects of medication was an operative cause of the Claimant's poor call handling. That was an explanation that she put forward at the time. that is what she says in her witness statement. We accept the some of the points made by Mr Wilding about the accuracy of the Claimant's witness statement and accept that in parts her evidence was exaggerated. We make no across the board finding about her credibility and assess each part of her evidence with care. We are satisfied that the Claimant has given a truthful account of the reasons why her call handling fell below its usual standards on

that day and accept that a contributing factor was the pain and/or side effects of the Tramadol.

125. The Claimant was given a final written warning because of the way she handled the call. We have concluded that she behaved the way she did because of her pain and or the side effects of medication which was something arising in consequence of her disability. Whether the respondent recognised at the time that that was the case is not important - ***City of York Council v Grosset.***

126. Mr Wilding says that whether or not the treatment was because of something arising as a consequence of disability the treatment was unquestionably justified in circumstances where the final written warning was an agreed outcome.

127. The starting point is to identify the legitimate aim that the Respondent relies upon. As we understood the Respondent's case the legitimate aim is ensuring that their customer services advisors perform to the required standards. We would accept that is a legitimate aim. Such a legitimate aim is enforced by the use of performance/disciplinary processes. We consider that those means are rationally connected to the legitimate aim. Unless the Respondent takes steps against those who do not follow the required standards the aim would be undermined.

128. The question for us is whether giving the Claimant a final written warning in these circumstances was proportionate. That involves a balance between the need of the Respondent to achieve its legitimate aim and the potential discriminatory effect on the Claimant. We need to consider whether any lesser measure would have met the legitimate aim.

129. We repeat our findings about the quality of the call on 16 January 2019. We find that the Claimant's call handling skills were inadequate. Of particular importance was the fact that at an early stage she invited the resident to complain in writing rather than seek a resolution and that she inaccurately referred to staff being dismissed when no such explanation was necessary needlessly bringing the resident into an internal dispute. We would accept that this was a matter the Respondent was entitled to regard as a serious lapse, so do we.

130. In the light of the Claimant's long service and previous good performance, had account been taken of the causes of this lapse, giving her a final written warning was in our view a severe sanction. We would accept that some sanction was appropriate.

131. The factor that Mr Wilding says is a trump card is that the Claimant through her trade union representative agreed to the sanction. We do not consider that agreement to a sanction would always be a conclusive factor. A person can agree to discriminatory conduct that would not necessarily make it lawful. That said we would accept that consent is a relevant matter when assessing proportionality.

132. The effect of the potential discrimination on the Claimant was not insignificant as the subsequent events demonstrated. She was at risk of dismissal in the future. However, the immediate effect was less severe than dismissal. The Respondent could reasonably have assumed that the Claimant accepted the need for a final written warning.

133. Taking these matters together we are satisfied that the Respondent has shown that applying a final written warning by consent was a proportionate means of enforcing its legitimate aim of having high standards of service for its residents.

Final Written Warning – Sickness absence- list of issues paragraph 5.2

134. It was common ground before us that the Claimant had been given a final written warning by Louise Duffield on 17 May 2019. Having a final written warning placed the claimant's future employment in jeopardy. We find that that would be a matter of concern to her and that that concern would be entirely reasonable. As such we are satisfied that this treatment could properly be regarded as 'unfavourable' – see ***Williams v Trustees of Swansea University Pension and Assurance Scheme***.

135. It is necessary to make additional findings of fact and we do so in the paragraphs below.

136. The Respondent, in common with many employers has a policy aimed at dealing with absence from work because of ill-health. It appears from the documents that we were provided with that that policy had an informal stage where meetings would be held to discuss absence from work but the outcome would be limited to absence targets being set. If those targets were not met there might be two further formal stages. At the final stage if targets set at the earlier stages had not been met the policy provided for dismissal as a possible outcome.

137. The Claimant had been invited to an informal meeting that took place on 3 November 2017. At that stage the Claimant had 13 days off work over the last 12 months. Only two of these days off related to her back pain. The outcome of that meeting was that the Claimant was set three targets. Not to take more than 8 days of sick leave in a 12-month period, not to have more than 3 periods of absence and not to establish a pattern of absences.

138. By March 2018 the Claimant's Customer Service Team Leader wrote to her (the letter is undated) and informed her that she had failed to meet those targets. The Claimant was invited to a first formal management meeting to discuss her absence. She was told that she was entitled to be accompanied by a trade union representative. This meeting was postponed. A meeting was fixed for 6 June 2019. The Claimant did not attend that meeting. We were not given any explanation for that. At the date of the meeting the Claimant had taken 76 days off work because of health issues in the preceding 12 months. The outcome of that meeting was that the Claimant was given a written warning that was expressed as lasting for 12 months. The same targets as previously imposed were reset together with an additional target that the

Claimant have no more than 4 days absence in the 4 months from the date of the decision (24 July 2018).

139. The Claimant had a day off work with food poisoning on 19 November 2018. She then had 2 days of on 10 and 11 January 2019 with back pain. As we have set out above the Claimant was absent from 18 February to 1 April 2019 with back pain.

140. We need to ask whether the unfavourable treatment was because of something arising in consequence of disability. There is no difficulty with that. The reasons that the Claimant was given a final written warnings did concern her entire absence record but were in part at least prompted by absences cause by back pain itself a symptom of the Claimant's disability. It is not necessary for the Claimant to demonstrate that absences for back pain (the 'something arising') were the only cause of the unfavourable treatment it is sufficient that they were a material cause. We are satisfied that they were.

141. The real dispute between the parties was whether the Respondent could justify the unfavourable treatment by showing that its actions were a proportionate means of achieving a legitimate aim. We are satisfied that the Respondents did have a legitimate aim of ensuring that it provided good quality services to its residents at a reasonable cost. We are satisfied that that corresponded with a 'real need'.

142. We are further satisfied that the implementation of the absence management policy and giving a final written warning after targets were not met was rationally connected to the legitimate aim that was pursued. The policy was a means of encouraging employees to minimise sickness absence as well as putting them on notice of potential consequences of further absences.

143. The key issue is whether or not the imposition of a final written warning in this particular case and at this particular time was proportionate. The Claimant in the meetings that followed and in her evidence and Ms Step-Marsden in her submissions advanced the case that the failures of the respondent to make reasonable adjustments made it disproportionate to impose any sanction on the Claimant. As we have set out above the statutory Code of Practice and ***Griffiths v Secretary of State for Work and Pensions*** do provide support for the proposition that where there has been a failure to make reasonable adjustments which might have avoided the need for the unfavourable treatment the employer may not be able to show that the treatment was proportionate.

144. The Claimant does not suggest that there had been any failure to make reasonable adjustments up to the point that she was asked to move from the call centre to the town hall on 16 January 2019. She does then complain that during her time at the Town Hall she had little or nothing to do and that she did not have access to her specialist equipment and in particular her chair.

145. We have accepted the Claimant's account of her time working at the Town Hall. We would accept that having to sit on a not fitted chair at an ordinary desk would have been difficult for the Claimant. We see no good reason why

if the Claimant was going to be required to move her desk, chair and specialist computer equipment could not have been moved with her. It would have been obvious that if the Claimant was required to do desk-based work she would need the same adjustments that had previously been recommended and implemented. We have upheld the Claimant's reasonable adjustments claim for the reasons set out below. That does leave the question of whether the Claimant's subsequent period of absence was caused by this failure.

146. Whilst we have no direct medical evidence we are prepared to accept the Claimant's evidence that she found that sitting at an ordinary workstation was painful. However, given that the Claimant had little to do she was not prevented from standing as and when she needed to.

147. We find that the Claimant's discomfort during this period contributed to her anxiety about the situation at work but was not the only cause. The Claimant was concerned about working in the libraries. We find that she would have been very concerned about the outcome of the disciplinary proceedings arising from the Christmas Tree incident.

148. Whilst accepting that there was a failure to provide the Claimant with the specialist equipment she needed and that this caused her back to be painful at work we do not consider that we have sufficient evidence to find that had that equipment been provided the Claimant would not have had the time off. We have no doubt the equipment would have helped but that is not enough. The Claimant had absences from work because of back pain when adjustments were in place. In the absence of clear medical evidence we are unable to discern whether the long absence from 18 February 2019 was caused by the failure to provide equipment or by a flare up of backpain that would have occurred had the adjustments been made or not.

149. As is made clear in ***Griffiths v Secretary of State for Work and Pensions*** an employer need not totally disregard disability related absences when deciding whether to take action. The issue is one of proportionality.

150. Consideration of proportionality requires the Tribunal to make an objective assessment of its own. It is necessary to strike a balance between the legitimate aim pursued by the Respondent and the discriminatory effect on the Claimant. We consider that the Respondent could rightly be concerned about high levels of absence. Local Authorities are expected to provide a high standard of service with limited resources. Sickness absence would have a significant effect on the ability to meet that aim. In the Claimant's case she had a very high level of absence indeed over the period we have described above. We acknowledge that over a longer time frame her overall absence rate was better. That said we consider that a rolling 12-month period is sufficiently long for an employer to gauge whether an employee was providing reliable service. At the time the second stage formal absence process was instigated the Claimant had taken 46 days of sick leave of which 23 were disability related.

151. A final written warning does not have an impact on the Claimant anywhere near as high as a dismissal although it is not insignificant. We are satisfied that, balancing the need of the Respondent to ensure that its employees gave

reliable service against the discriminatory effect on the Claimant, the decision to give the Claimant a final written warning was proportionate. The Claimant had taken a very large number of sick days. This is not a question of fault we have no doubt that she was unwell and needed the time off. We would accept that such a large number of days off impacted the Respondent's ability to provide a good service to its residents at a reasonable cost.

The dismissal

152. There was no dispute that being dismissed was capable of amounting to unfavourable treatment. The areas of dispute concerned whether the Claimant had shown that the unfavourable treatment was because of something arising as a consequence of her disabilities and, if she could show that, whether the decision to dismiss hare was a proportionate means of achieving a legitimate aim. We shall deal with those two issues in turn.

153. The manner in which the Claimant put her case was set out in Ms pace-Marsden's written submissions as follows:

'The dismissal was 'something arising from the disability' as on the day of the incident, C was in a lot of pain due to her back, which made her more irritable. Further, because of her disability, C could not move away from the altercation in the way that those without disabilities may have, as she was limited in her viable 'escape' routes.'

154. Mr Wilding sets out the Respondent's case in his written submissions in the following terms:

'There is nothing identified which shows that this treatment was arising out of her disability. She was dismissed due to poor conduct, similarly she was issued a final warning (which she agreed to) as a result of her conduct. Neither piece of unfavourable treatment arose from her disability. Indeed, both arose out of her poor conduct, which was not related to her disability.

It is denied that her medication from her disability caused the treatment. These two incidents were 4 months apart, there were no other instances of her having such flair ups and leading to such poor behaviour as on display. Her GP records are silent on any negative impact of this medication. Nor is there any expert evidence identifying the impact of this medication on people. The Claimant, not for the first time, hides behind the veil of her medication or blames something other than herself for her own actions.'

155. Mr Wilding is correct to say that we had no expert evidence about the effect of medication. In particular there was no evidence that taking medication made the Claimant irritable or more likely to engage in any confrontation. Having heard the Claimant give evidence we do not consider that the Claimant herself was suggesting that it was the medication that caused her to behave as she did on 20 May 2022. The case she put before us was more closely aligned with Ms Pace-Marsden's submissions. What the Claimant was saying was that the events leading up to 20 May 2019, her concerns about her role going forward and her concerns about her mother's health coupled with the fact that

she objected strongly to being touched by Natalie had caused her to react as she had in the initial stages.

156. As we have stated above we were invited to view the CCTV of this incident. In deciding the unfair dismissal claim we have been careful to restrict our role to the question of what a reasonable employer could have found the footage to establish. For the purposes of this claim we are entitled to reach our own conclusions. We find that the CCTV footage establishes that:

156.1. Natalie approached the Claimant from behind when she was talking with her colleague in front of the customer.

156.2. Within a short space of time Natalie touched the Claimant either on the small of the back or on her arm and perhaps both.

156.3. We find that the Claimant immediately turns towards Natalie and the actions of both parties are consistent with there being a disagreement.

156.4. The Claimant leaves the counter and walks away at a fast pace.

156.5. The Claimant then started talking to Julie in an area where members of the public had access. She is seen to refer to paperwork carried by another colleague which all present agreed related to parking permits. Her body language is consistent with her being exasperated but not angry or shouting.

156.6. Natalie then arrives. Shortly after that Julie places herself or remains between Natalie and the Claimant and puts her hands up towards Natalie as if to warn her off.

156.7. Natalie moved towards the lifts but then returns. It appears that her colleague is persuading her to walk away.

157. In her statement made on the day of the incident Natalie accepts that she touched the Claimant on the arm causing the Claimant to say ‘don’t touch me’. Harry says the same although he says that the touch was ‘gentle. In her assessment of the video footage Ms Eusebe says in her witness statement that she believed the video footage to show Natalie putting her right hand on the Claimant’s back causing her to move instantly back. We agree. That is consistent with our own observations of the CCTV evidence.

158. We are satisfied that the Claimant was touched on the back or near her back and that she instantly responded with words to the effect of ‘don’t touch me’. This had a significant impact on the level of the disagreement which to that point had been low level resentment of Natalie’s unnecessary intervention in the transaction.

159. We have had regard to all of the medical evidence and to the evidence of the Claimant herself as well as the CCTV footage. We are satisfied that the Claimant was never entirely free of back pain at this time and that she was especially sensitive to being touched on or near her back because of this. We

find that her response to Natalie when touched by her was significantly exacerbated a consequence of her having back pain.

160. Whilst that conclusion might be sufficient we have considered whether the Claimant's behaviour arose as a consequence of her disability in the sense that she was generally irritable because of her back pain. We find that the Claimant was irritable during this period. We have regard to the fact that prior to the reorganisation the Claimant had no disciplinary issues relating to poor customer service. We had no evidence to suggest that she did not have reasonable working relationships with her colleagues. The medical evidence shows that the Claimant had a long history of severe back pain which by the time of the events we are dealing with required her to take tramadol to keep the pain under control.

161. We find that the Claimant was settled in her role in the call centre and considered that the special measures put in place for her were working. It is clear that she was concerned about being asked to work in libraries. She stressed at the time, in correspondence and in meetings, her concern that the measures that could be put in place in libraries would not meet her needs.

162. After the Christmas tree incident the Claimant was asked to work in the Town Hall without any special measures being in place. The Claimant had other pressures on her at that time (her mother and the impending disciplinary hearing) but we would accept that being expected to work without the measures that had been put in place would have exacerbated the Claimant's concerns. The Claimant was then asked to work at Chingford Library. That building had no lift and the Claimant was unable to access the staff facilities. We have made other findings about that below. Jo Tanner is recorded as accepting that working in that building was unsuitable for the Claimant. We agree. Below we have accepted that the Claimant was not expected to work wholly standing or sitting and that she could select her tasks depending on what was best for her back. However, we also accept the fact that the Claimant felt uncomfortable not undertaking a full range of duties despite being told that this was acceptable.

163. We find no tension between a finding that generally the Claimant's back pain did not lead to poor behaviour and a conclusion that this, when coupled with other matters did lead to poor behaviour. We find that both the back pain and the Claimants concerns about work, whether founded or unfounded, were all matters that arose in consequence of her disabilities and did manifest themselves in a level of intolerance or irritability on 20 May 2019.

164. That second conclusion either separately or together with our earlier finding leads us to find that the Claimant's behaviour on 20 May 2019 was something arising as a consequence of her disabilities. It follows that we have broadly accepted the position urged upon us by Ms Step-Marsden. It is not of any significance that the Respondent did not recognise the connection between the Claimant's behaviour and her disability – see ***City of York Council v Grosset*** but in our view had Louise Duffield stopped to consider the overall picture the connection was obvious.

165. We then turn to the question of whether the Respondent can justify any potentially discriminatory conduct.

166. We would accept that the Respondent had a legitimate aim in preventing the sort of hearted argument that could have been, and was, observed by its residents and customers on 20 May 2019.

167. We would further accept that the means of achieving that aim through disciplinary procedures was logically connected with that aim.

168. The issue for us is whether or not the dismissal of the Claimant was a proportionate means of achieving that aim. We remind ourselves that this is a decision for the Tribunal taking into account all the material circumstances. Below we have found that the dismissal was not unfair. Here we are applying a different statutory test and whilst we have regard to the Respondent's own conclusions we are not bound by them.

169. Mr Wilding in his written submissions placed considerable emphasis on the fact that the Claimant was dismissed not because of a single act of misconduct but because she had already been given a final written warning for the Christmas tree incident and had committed a further act of misconduct. He emphasised that the final written warning had been by consent.

170. We have accepted that final written warning was a proportionate means of achieving a legitimate aim we should perhaps make it clear that our findings reflect that it only just cleared that hurdle. A significant matter for us was that the Claimant had consented to that outcome. Nevertheless we have concluded that the Claimant's behaviour on that occasion arose as a consequence of her disabilities. We have emphasised the difference in impact between a final warning and a dismissal. The consequences of a dismissal are severe for any employee but may be particularly grave for a person with disabilities who will have restricted employment opportunities. In conducting our examination into whether dismissal was a proportionate outcome we have regard to the entirety of the Claimant's conduct together with its causes.

171. We do not seek to minimise the importance of the legitimate aim identified by the Respondent. The Respondent is to be applauded for having high standards between its employees and before customers. We would accept that on 20 May 2019, there was a heated disagreement in a public area. For ourselves we would not accept that the Claimant swore. We do accept that she called Natalie a div but consider that to be towards the lower end of insults.

172. The Respondent did not concern itself to a large degree with whether Natalie's conduct provoked the Claimant. We would accept that ordinarily it would be an overreaction to become upset of angry just because of an unnecessary intervention. When the argument continued in the presence of Julie we find that Natalie was plainly the aggressor who is unwilling to let the matter drop. We would accept the Respondent's point that that whilst the Claimant was unable to use the lift there was scope for her leaving the scene by other routes.

173. The conclusion we would have reached for ourselves is that the Claimant's conduct overall fell below what could reasonably have been expected but that it did not have very serious consequences. We should make it clear that we are referring to her conduct overall including the Christmas tree incident.

174. It does not follow that just because the Claimant had a final warning that any further act of misconduct would necessarily be proportionate although it is clearly a matter we need to take into account. We have to have regards to all of the circumstances. The Claimant had a long track record of satisfactory service before two instances of poor conduct in a short time span (although with high levels of absences) against the background of the Claimant being displaced from a job where she was comfortable and had special measures in place.

175. We were told that the Respondent had elected to allocate roles to the employees displaced from the Call Centre before addressing the question of which role could best accommodate any disabilities. We consider that to have been unwise. It risks placing an employee into a role where it is harder to accommodate any disability. Even if disabilities could be accommodated it risks increasing the worry and concern which often accompany changes of this nature. We find that the issue of disability ought to have been actively considered before roles were allocated.

176. We consider it material to have regard to the failures to make adjustments in assessing the proportionality of the Respondent's decision to dismiss the Claimant insofar as those failures contributed to the situation that arose. We have set out above our findings that the Claimant was more liable to be irritated as a consequence of perceived and real concerns about her treatment at work. We disregard the matters where we have held that the Claimant's criticisms of the Respondent were ill-founded. We have held that there was a failure to make reasonable adjustments for the Claimant's disability. In particular we consider that it was thoughtless to move the Claimant to the Town hall without any adequate consideration of whether her adapted office equipment should travel with her. The Claimant was undoubtably concerned to be facing disciplinary charges but to do so in circumstances where she was physically uncomfortable would have fuelled her concerns about the changes at work. That was followed by a move to Chingford where it was ultimately accepted that the workplace was unsuitable.

177. We have not upheld the unreasonable adjustment claims based on a PCP of being required to move principally because of the way it was formulated. However we agree with the Claimant that placing her at Chingford when she could not access the staff facilities on the first floor was thoughtless. Had that been properly formulated as a claim for reasonable adjustments and presented in time we would have upheld the claim on the basis that it would have been reasonable to have offered the claimant a position elsewhere.

178. When the Claimant was asked to work at Hale End she was not provided with staff parking and had to walk some distance (not the 'miles' referred to in

submissions). Again had some thought been given in advance this difficulty could have been avoided.

179. Finally when the Claimant was sent to Walthamstow she was not provided with a pass/fob for the list. There does not appear to be any good reason for this failure.

180. We find that the matters we have identified above are relevant to the issue of proportionality. In ***City of York Council v Grosset*** the error of judgment by Mr Grossett was caused in part at least by the failures of the school. In this case the Respondent's own failures to take proper account of the Claimant's disabilities during the reorganisation and thereafter contributed to the fact that the Claimant was anxious and worried, in turn causing her to be quicker to respond to Natalie's unwelcome intervention.

181. We considered whether any lesser measure could have met the respondent's legitimate aims. We find that it would have been sufficient in this case to re-impose a final written warning and to have required the Claimant to undertake additional training through a personal improvement plan. These measures would have been sufficient to reinforce the message that high standards were required.

182. Standing back from all of these matters we ask whether dismissal was a proportionate means of achieving the Respondent's legitimate aims. We find that it was not. It follows that the Claimant's claim succeeds.

Reasonable adjustments

183. When dealing with a claim that there has been a failure to make reasonable adjustments the Tribunal are obliged to have regard to the relevant code of practice. For claims brought in the employment sphere the relevant code is the Equality and Human Rights Commission Code of Practice on Employment 2011. Paragraph 6.2 of that code describes the duty to make reasonable adjustments as follows:

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

184. The reference in that paragraph to the right to have 'additional steps' taken reflects the guidance given by Lady Hale in ***Archibald v Fife Council*** **[2004] UKHL 32** which whilst referring to the Disability Discrimination Act 1995 is equally applicable to the Equality Act 2010.

……this legislation is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated

in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. <u>It does not expect each to be treated in the same way</u>. <u>It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.</u>

185. The material parts of Section 20 of the Equality Act read as follows:

Duty to make adjustments

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

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

186. The phrase ‘substantial’ used in sub-section 20(3) is defined in section 212(1) of the EA 2010 and means only ‘more than minor or trivial’.

187. Sub-section 39(5) of the Equality Act 2010 extends the duty to make reasonable adjustments to an employer of employees and job applicants.

188. The proper approach to a reasonable adjustments claim remains that suggested in ***<u>Environment Agency v Rowan</u>*** **[2008] IRLR 20**. A tribunal should have regard to:

188.1. the provision, criterion or practice applied by or on behalf of the employer; or

188.2. the physical feature of premises occupied by the employer;

188.3. the identity of non-disabled comparators (where appropriate); and

188.4. the nature and extent of the substantial disadvantage suffered by the claimant.

189. The code gives guidance about what is meant by reasonable steps at paragraph 6.23 to paragraph 6.29. Those paragraphs read as follows:

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

6.26 [deals with physical alterations of premises].

6.27 If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise. Duty to make reasonable adjustments

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
- *the practicability of the step;*
- *the financial and other costs of making the adjustment and the extent of any disruption caused;*
- *the extent of the employer's financial or other resources;*

• the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

• the type and size of the employer.

6.29 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

190. The requirement to demonstrate a 'practice' does not mean that a single instance or event cannot qualify but that to do so there must be an 'element of repetition' see Nottingham ***City Transport v*** **Harvey UKEAT/0032/12JOJ**. This might be demonstrated by showing that the treatment would be repeated if the same circumstances ever arose again.

191. Whilst the code places emphasis on the desirability of an employer investigating what adjustments might be necessary for a disabled employee, a failure to carry out such investigations will not, in itself, amount to a failure to make reasonable adjustments although that might be the consequence ***Tarbuck v Sainsbury's Supermarkets Ltd*** **2006 IRLR 664, EAT**.

192. An employer will not be under a duty to make reasonable adjustments until it has knowledge of the need to do so. This limitation is found in schedule 8 paragraph 20 of the Equality Act 2010 and the material parts read as follows:

Lack of knowledge of disability, etc.

20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

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

Reasonable Adjustments Discussion and Conclusions

193. The list of issues divides the claims brought under Sections 20/21 of the Equality Act 2010 into claims arising from a PCP applied by the Respondent and claims arising from a physical feature. We shall deal with the claims in the manner in which they are set out in the list of issues which reflects the further particulars provided by the Claimant.

194. In his written submissions Mr Wilding lists the adjustments that were made for the Claimant. We shall make it clear that we accept that many sensible steps were taken aimed at alleviating any disadvantage to the Claimant. We would accept that the Claimant's managers did attempt to make adjustments for her.

However, the fact that some steps were taken does not relieve the Respondent from making other adjustments if required to do so.

195. The first provision Criterion or practice ('PCP') relied upon is to say that the Claimant was required to carry out a full range of duties. The third is an allegation that the Claimant was required to carry books. We have found, and repeat hear that the Claimant was not required to carry out the full range of duties whilst working at the Libraries. She was told in terms that she should not undertake any duties that gave her difficulty with her back.

196. The Claimant did not say in evidence that she was required to carry out a full range of duties. She accepted that she was told that she need not do so. The problem that she had with this instruction was that she found it inconsistent with her values not to do the same as other team members.

197. The PCPs identified by the Claimant were not applied to her. On the contrary she was expressly instructed not to undertake any task that gave rise to a substantial disadvantage. That might have caused her some embarrassment but put the way it has been we do not consider that the claim can possibly succeed.

198. The second PCP that had been identified is being required to work at a standard desk. A fair reading of the further particulars relied upon by the Claimant shows that the Claimant is complaining about being asked to work at a workstation without any of the auxiliary aids that she had been provided with at the Call Centre. As such the claim is probably best understood as falling within Section 20(5) of the Equality Act 2010. We do not see that the Respondent will suffer any prejudice from deal with the claims in this way.

199. Mr Wilding argues that the PCP of working at a 'standard desk' was not applied in the libraries. We would pause to say that that was certainly the case whilst the Claimant was working at the Town Hall. In that period the Claimant was expected to do some office work and was not provided with any specialist equipment. We would accept that the work at the libraries was different. Some of the work was standing and some was sitting. When sitting work was done at a desk. We would accept that the Claimant was instructed to do what she was most comfortable with.

200. The Claimant's position is that she was unable to stand all day and that when she was sitting working on a computer she needed her modified equipment in order to be comfortable.

201. We would agree with the Claimant that in practice unless she was able to stand all day in the libraries she was required to sit at a 'standard desk'. In other words all of her seated work (which practically there would be a considerable proportion of her time) was spent using standard office equipment. We find that this did amount to a PCP. We have found above that the Claimant was never provided with her specialist chair nor her mouse of keyboard.

202. The Claimant was not provided with a riser desk at the libraries. The Respondent says that this was unnecessary as the Claimant was free to stand or sit as she felt fit. We accept that the Claimant was instructed to undertake tasks within her capabilities and to alternate between sitting and standing. We accept that the thrust of the occupational health reports that recommended a riser desk was that this was necessary to guard against prolonged sitting. At the libraries if the Claimant was seated and working she would have needed to break off any task in order to stand. We are prepared to accept that the Respondent's proposal that she could change tasks when necessary was not a complete answer to the Claimant's difficulty with using a standard non riser desk. We accept that using a non riser desk placed the claimant at some disadvantage in comparison to persons without her disability. We needed to ask whether the fact that the Claimant on some occasions might have had to break off from a task in order to stand (which she was permitted to do) placed her at a more then minor or trivial disadvantage. We find that working at a standard desk did place the Claimant at a more than minor or trivial disadvantage. We should make it clear that we consider that given the instructions that the Claimant was given the occasions when she might have to choose between remaining seated or breaking off from a task she had started would be rare.

203. We have concluded that the PCP of providing the Claimant with standard office equipment/not providing the auxiliary aids did place the Claimant at a substantial disadvantage in comparison to people without the same disability as the Claimant. We therefore need to ask whether it would have been reasonable to provide the Claimant with her adapted chair, mouse, and keyboard.

204. The Respondent says, and we accept, that some adjustable chairs were available at all of the locations where the Claimant worked. We would accept that an adjustable chair would have alleviated some of the disadvantage to the Claimant. However, the Respondent had previously obtained the benefit of a report from Occupational Health and, with the assistance of Access to Work, had provided the Claimant with a chair fitted for her particular needs and a specialist keyboard and mouse. We are satisfied that these auxilliary aids made the Claimant more comfortable when working at her computer. We note that the Claimant said that her chair was clearly labelled for her personal use. We take judicial notice of this as a common practice. Having an adjustable chair, used by all means that the disabled person may need to adjust the chair each time they use it. We remind ourselves that the disadvantage need only be 'substantial' – more than minor or trivial – to give rise to a duty to make reasonable adjustments and/or provide an auxiliary aid.

205. It was not suggested by the Respondent that it would have been unreasonable to have provided the Claimant with her chair. It was the Respondent's case that the correct chair was provided. We have found that it was not even though that had been arranged. The Respondent led no evidence to suggest that it would have been unreasonable to provide the Claimant with her adapted keyboard and mouse. We find the burden of proof has shifted to the

Respondent to show that it was not reasonable to provide an apparently reasonable adjustment/auxiliary aid - ***Latif v Project Management Institute*.**

206. We are satisfied that the provision of an adapted and adjusted chair a mouse and keyboard would have reduced the discomfort for the Claimant when she worked sitting down at a desk. We have found that would be necessary for a good proportion of the working day. We do not consider that the cost of providing and installing this equipment placed any great burden on the Respondent. It had already purchased the equipment.

207. We are satisfied that it would have been a reasonable adjustment to have provided the Claimant with these three items of specialist equipment.

208. In respect of the riser desk we have found that the failure to provide this auxiliary aid did place the Claimant at a disadvantage that was more then minor or trivial. However, the occasions where that disadvantage would manifest itself would be rare given the instructions to the Claimant to vary her tasks to accommodate standing and sitting. The circumstances were not the same as in the call centre. Whilst we consider the matter to be finely balanced the Respondent has satisfied us that it would not have been reasonable to provide a riser desk in the libraries. The beneficial effect for the Claimant would be minimal given the fact that she could choose standing tasks as well as working at a desk. Installing and maintaining a riser desk would require a significant rearrangement of furniture and would come at a cost which was not insignificant. Taking these matters together we do not find that the Respondent was in breach of any duty by not providing a riser desk in the libraries.

209. Whilst not identified as an issue by the parties the Tribunal has considered whether the successful claim for reasonable adjustments has been presented within the statutory time limit. The Claimant started working at the Chingford library on 1 April 2019. The material periods where she was not provided with the equipment we find she ought to have been are the period when she was working at the Town Hall and the periods she was working at the libraries between 1 April 2019 to 24 May 2019 after that she was suspended and suffered no disadvantage because of any failure to make adjustments. We find that the Respondent believed that it had provided the chair but gave no thought to the mouse and keyboard. Whilst we consider that the duty to make these adjustments arose at the point the Claimant was required to work at the town hall and then again on 1 April 2019 the statutory time limit at the latest runs from the point when it would have been reasonable for the Respondent to have made a decision. We find that a decision ought to have been made within days given the information available to the Respondents. At the earliest that would be a week after the Claimant began working at the Town Hall 23 January 2019 and at the latest time started running from 8 April 2019. The Claimant did not contact ACAS until 21 October 2019. As that is after the ordinary 3-month time limit expired she cannot benefit from an extension. The Claimant presented her claim on 30 November 2019. The claim was therefore presented at best over 4 months after the primary time limit and 10 months late in respect of the period working at the town hall. We therefore need to

consider whether it would be just and equitable to extend time. The following propositions have emerged from the case law:

209.1. ***Robertson v Bexley Community Centre t/a Leisure Link*** **[2003] IRLR 434, CA** reminds a tribunal that whilst the discretion to extend time is wide the burden is on the Claimant to show why time should be extended and as such an extension is the exception and not the rule.

209.2. In deciding whether or not to extend time a tribunal might usually have regard to the statutory factors set out in Section 33 of the Limitation Act 1980 see ***British Coal Corporation v Keeble and ors*** **[1997] IRLR 336, EAT**. However those factors should not amount to a checklist and will not excuse the Tribunal from considering all relevant matters.

209.3. Whether there is a good reason for the delay or indeed any reason is not determinative but is a material factor ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** **2018 ICR 1194, CA**.

209.4. It will be an error of law for the Tribunal not to consider the relative prejudice to each party ***Pathan v South London Islamic Centre*** **EAT 0312/13**. The prejudice for the Respondent incudes not only any evidential prejudice but the fact that an extension of time will defeat the statutory limitation defence it might otherwise deploy.

210. We have regard to the fact that the failure to make these adjustments became bound up with the other issues including the final disciplinary process. The claimant brough a grievance which touched on these matters and she sought to exhaust the internal appeal process in respect of her dismissal before resorting to litigation. That is not determinative but provides an explanation for why she waited to bring her claim.

211. We do not consider that either party suffered any evidential prejudice. We heard from the relevant witnesses who were able to give a full account of the factual circumstances. The facts were bound up with the other claims that arose from the dismissal.

212. We accept that granting an extension of time will deprive the Respondent of any limitation defence.

213. The prejudice to the Claimant of not giving an extension of time would be that she is deprived of any remedy for the Respondent's unlawful conduct. Whilst the reasonable adjustment claims we have upheld are perhaps less significant than the claim relating to the dismissal it is possible that the Claimant will persuade the tribunal that some separate remedy is appropriate. Taking all of these matters into account we consider that it would be just and equitable to extend time in respect of this claim.

214. The fourth PCP identified by the Claimant was 'working from different work locations'. The Claimant was initially required to work at Chingford Library.

When she raised the suitability of that building it was proposed that she work at Hale End on a trial basis. She worked there only for a few days. She was then moved to Walthamstow once the lift in that building was working. The manner in which the claim appeared to be put was that the Claimant was expected to work at any place the Respondent directed her to work.

215. We would accept that the Respondent had the contractual power to require the Claimant to change her place of work. We would accept that that is capable of amounting to a PCP.

216. The difficulty we have with the way that the Claimant put her case is that it was not the PCP of working where directed that placed the Claimant at any substantial disadvantage. What the Claimant really complains of is that she did not have her specialist office equipment at the Town Hall, Chingford Library had the staff facilities on an upper floor and had no lift and that Hale End did not permit her to arrive early to take her medication after preparing food and had no staff parking. Her complaint about Walthamstow is that she was not given a pass/fob allowing her to access the lifts. We find that it is not the PCP of identified by the Claimant in her claim form and in the list of issues that put her at a substantial disadvantage compared to people without her disability but these features of each place that she was required to work. She has identified separate complaints about the provision of specialist equipment and the issue of the toilets at Chingford which we have dealt with elsewhere. Those overlap with the manner in which this claim was advanced in submissions.

217. In some respects the Claimant's case was presented in a flexible way that bore little resemblance to the further information she had (belatedly) provided. The reasonable adjustment contended for was working from a single workplace. No application to amend the claim was made to deal with these points.

218. Whilst there should be a degree of informality in tribunal proceedings that should not be at the expense of fairness. We consider that it would be unfair to depart from the way the case was pleaded and identified in the list of issues. That relies only on the PCP of requiring the Claimant to move workplaces. We do not find that that PCP of itself disadvantaged the Claimant. On that basis this claim cannot succeed.

219. Lest we are wrong in our approach we shall deal with the question of time limits. To advance any of these claims the Claimant would need to show that it was just and equitable to extend time. The Claimant's last day at work was 24 May 2019 and she did not present her claim for a further 6 months. We have set out the law that needs to be applied above. We have considered the factors we have set out above. An additional factor here would be the vague nature of the claim as pleaded and the fact that the claims advanced in submissions differed from the way they had been understood from the list of issues. Taking that factor into account, even assuming that the Claimant would be deprived of a remedy, we do not consider that it would be just and equitable to extend time for the Claimant to advance such a claim.

220. We then turn to the allegation made by the Claimant that she was placed at a substantial disadvantage by the fact that there was no disabled toilet on the floor that she worked. This is a reference to the situation at Chingford. We have accepted that the usual staff toilets were on the first floor and were not easily accessible to the Claimant. However we have also found that there was a toilet on the ground floor that was, other than on one occasion, available for use by the Claimant.

221. The further particulars suggest that the Claimant required a 'disabled toilet'. There was no evidence before us that the Claimant needed any special adaptions in order to use a toilet. Her complaint was that the toilet on the ground floor was the children's toilet with an additional risk that it would be unsanitary.

222. We have not accepted the factual basis of this claim. We find that the toilet on the ground floor was a public toilet and was maintained to a reasonable standard. We do not find that there was any greater risk of the toilet downstairs being out of use or less clean than the staff toilets upstairs. As such we do not find that the Claimant was placed at any substantial disadvantage by the fact that she could not access the upstairs toilet.

223. If we are wrong about that then the alternative would have been to have designated the public toilet as a staff toilet for the Claimant's use. That would have reduced the toilet facilities for the public as we understand it to having no toilet at all or require a further toilet to be built. Balancing the risk that on some occasions the toilet might be less clean than might be hoped against those disadvantages we do not consider that it would have been reasonable to have designated the existing toilet as a disabled toilet for adult only use or to have built a new toilet. An alternative adjustment of moving the Claimant to other premises was adopted for other reasons. The Claimant makes no complaints about the toilets at Walthamstow.

224. A final claim introduced in closing submissions was a suggestion that the Respondent had a PCP of not asking for assistance from occupational health. This has been extracted from a reasonable adjustment rather than a PCP identified in the further particulars. We do not accept that the evidence established that there was any practice of not asking for assistance from occupational health. The Respondent had referred the Claimant for an assessment on other occasions. However, if we are wrong about that the reasoning in ***Tarbuck v Sainsbury's Supermarkets Ltd*** is directly applicable and explains why a claim based on a failure to investigate what adjustments might be appropriate cannot succeed.

The unfair dismissal claim

The law

225. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed, putting to one side the question of whether any

dismissal is for an automatically unfair reason, the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) …..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

226. Unless the employer can establish that the reason for the dismissal was for one of the potentially fair reasons for dismissal listed in Sub-section 98(2) or is for some other substantial reason then the dismissal will be unfair. If the employer does establish that there was a potentially fair reason for the dismissal then the question of whether the dismissal was fair or unfair is

determined by applying the test in Sub-section 98(4) of the Employment Rights Act 1996.

227. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': ***Thomson v Alloa Motor Co Ltd*** **[1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable ***JP Morgan Securities plc v Ktorza*** **UKEAT/0311/16**.

228. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points ***Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129.**

229. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

230. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23**.

231. In terms of the reasonableness of the investigation and the procedure that was followed, the “relevant circumstances” referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee ***A v B*** **[2003] IRLR 405**. ***A v B*** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not. However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions ***CRO Ports London Ltd v Mr P Wiltshire*** **UKEAT/0344/14/DM**.

232. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

“any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or

Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

233. The passages of the ACAS code that deal with sanctions for misconduct or performance issues say as follows:

19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.

20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

21. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.

22. A decision to dismiss should only be taken by a manager who has the authority to do so. The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

234. As suggested by the passages of the ACAS code set out above the fact that an employee has been given previous warnings in respect of their conduct are matters which an employer is generally able to take into account in deciding on the appropriate sanction for any misconduct it finds established. That can be the case even if the warnings were given for unrelated conduct see - ***Auguste Noel Ltd v Curtis*** **1990 ICR 604, EAT**.

235. Where an employee has been given a final written warning and that has been taken into account by the employer in reaching a decision to dismiss the employee the proper approach for the Tribunal to take is that set out in ***Davies v Sandwell Metropolitan Borough Council*** **2013 IRLR 374, CA**. It does not follow that the fact that an employee has been given a final written warning

means that it will necessarily be fair to dismiss the employee. The test remains that set out in Section 98(4) of the Employment Rights Act 1996. The question will be whether it was reasonable for the employer to treat the subsequent conduct of the employee taken together with the circumstances of the final written warning as a sufficient reason for dismissal. It is not open to the Tribunal to re-open the final written warning but it may take into account whether the warning was issued in good faith, whether there were prima facie grounds for imposing it, and whether it was 'manifestly inappropriate' in deciding whether the dismissal was reasonable. The fact that an employee has not appealed any warning is a matter that might be taken into account.

236. Even where the Tribunal find that the employer has a reasonable belief that the employee had committed gross misconduct it does not necessarily follow that dismissal is the only reasonable sanction. An employer should treat every case on its own facts and take into account any relevant mitigation - ***Brito-Babapulle v Ealing Hospital NHS Trust*** **UKEAT/0358/12/BA**

Unfair dismissal – discussions and conclusions

237. The Claimant had been employed by the Respondent since 10 October 2000 and it was not disputed that she had the right to present a claim of unfair dismissal.

238. It was common ground that the Claimant had been dismissed by the Respondent. Accordingly it was for the Respondent to show that the dismissal was for a potentially fair reason. The Respondent's case was that the reason for the dismissal was the manner in which the Claimant conducted herself on 20 May 2019 taken together with the final written warning she had been given following the Christmas Tree incident.

239. We are satisfied that the reason(s) why Louise Duffield dismissed the Claimant were those she gave in her letter dated 14 August 2019. These can be summed up in her conclusion that the Claimant's conduct amounted to a breach of the Respondent's code of conduct for its employees which amounted to misconduct. She decided that as the Claimant was on a final written warning this was a sufficient reason to dismiss her. We find that those reasons do fall within the definition of 'conduct' found in sub-section 98(2)(b) of the Employment Rights Act 1996. Accordingly we are satisfied that the Respondent has established a potentially fair reason for the dismissal. This point was sensibly conceded by Ms Step-Marsden on behalf of the Claimant.

240. In assessing whether the dismissal was fair or unfair we need to consider whether there were reasonable grounds for the conclusions reached. That is bound up with the question of whether there was a reasonable investigation.

241. In respect of the incident on 20 May 2019 there were matters which were never disputed by the Claimant. She accepted that the intervention of Natalie resulted in an argument that took place in front of customers. She accepted that she walked away. She accepted that there was then a secondary argument that took place in the presence of Julie during which she called

Natalie a 'div'. It appears to have been common ground that Natalie's intervention was inappropriate.

242. In terms of investigating the incident itself we consider that Angela Eusabe spoke to all of the potential witnesses with the exception of Natalie and viewed the CCTV. Angela Eusebe was told that Natalie could not be interviewed as she had been dismissed. We were told that as Natalie was in a probation period the full disciplinary process was not followed. Jo Tanner had asked at an early stage for statements and Natalie had given her account of the events in writing. Ideally the Claimant's account of events would have been put to Natalie as part of an investigation. We take this into account in our overall conclusion.

243. In her report and witness statement Angela Eusebe stated in terms that she was not concerned with 'blame'. To an extent at least Louise Duffield adopted the same stance. We accept that the Respondent is entitled to expect its employees to uphold high standards. An argument between employees in public would ordinarily be a breach of those standards. However, we consider that the gravity of any breach would ordinarily be informed by considering why any argument developed or who carried it on. We would consider that a reasonable employer would have some regard for such matters in deciding what sanction might be appropriate. Ms Step-Marsden invited us to find the dismissal unfair on the basis that there had been a wholesale failure to recognise this.

244. Whilst Angela Eusebe and Louise Duffield suggested that they were not investigating who was to blame we find that their approach to the investigation and evidence was as a matter of fact informed by a desire to understand how the argument started and how it developed. Louise Duffield's questions during the disciplinary meeting included asking Harry whether he considered that Natalie's intervention was unwarranted. One of the conclusions she reached in her letter of 14 August 2019 was that she accepted Harry's evidence that the Claimant had overreacted.

245. We consider that the process as a whole was not as robust as it could have been. Louise Duffield took account of the Claimant's conduct during the secondary argument that took place after the Claimant had spoken to Julie. She held it against the Claimant that she had called Natalie a 'div'. She did not make any findings as to why that secondary argument started nor was she concerned to make findings about whether the Claimant used the language she did in response to aggression from Natalie. We consider that if weight was going to be placed on the entirely of the events a more robust approach would have been to have come to some conclusion about who was primarily responsible for the argument rekindling and the level of aggression that was involved.

246. A matter that gave us some concern was the fact that Louise Duffield accepted Harry's account of the Claimant swearing in front of the customer. Harry was the only person who suggested that the Claimant had sworn. Susan and the Claimant said that there was no swearing. In her written account Natalie had

not suggested that the Claimant swore. We remind ourselves of our role in an unfair dismissal case. It was for Louise Duffield to reach her conclusions on the evidence before her. The fact that we would have come to a different conclusion is immaterial. There was an evidential basis for Louise Duffield's conclusion. Harry had consistently maintained that the Claimant used swear words on two occasions. There was no evidence suggesting that he had any particular reason to lie. We are unable to say that Louise Duffield's conclusion in this respect was plainly wrong. The same reasoning can be applied to her conclusion that the Claimant overreacted to Natalie's intervention.

247. Drawing these threads together we find that Louise Duffield had a reasonable basis to find that the Claimant had allowed a disagreement to escalate in front of a customer, that she had used swear words when walking away and then when the argument started up again she raised her voice in a public space and called Natalie a 'div'.

248. Ms Step-Marsden argued that the dismissal was unfair because of prior involvement of Louise Duffield. She relied on three points. The first was that the Claimant had been a trade union representative when Louise Duffield was attempting to remove paid breaks. Then she had been the person who had given the Claimant a final written warning for the Christmas tree incident. Finally she had given the Claimant a final written warning for sickness absence. We also note that in the Claimant's grievance some of the Claimant's complaints concerned her management by Louise Duffield.

249. We do not consider that there was any unfairness in appointing Louise Duffield to hear the disciplinary matter. She was a manager at an appropriate level who would ordinarily deal with such matters. To deal with the first of these points we make an additional finding of fact that Loise Duffield did not give any thought about any dispute about paid breaks when making the decision to dismiss the Claimant. We consider that the two decisions to give final written warnings to the Claimant were reasonable in the circumstances. The first of these relating to the Christmas tree incident was by agreement. That is a poor foundation for an allegation of actual or potential bias. The final written warning in respect of absence was objectively justifiable and entirely unremarkable given the level of absence. We have regard to our findings in the related claim under Section 15 of the Equality Act 2010 in this regard.

250. The next point raised by Ms Step-Marsden was to argue that there had been a failure to properly investigate the final written warning given for the Christmas tree incident. This was a point raised by Lyn Martin during the appeal but was not persisted in, to any great extent. In assessing the claim relating to the dismissal brought under Section 15 of the Equality Act 2010 we have found that the behaviour of the Claimant during the Christmas tree incident was in part because of the pain she was experiencing and her medication. For ourselves we would conclude that the circumstances surrounding the Christmas tree incident were material to the decision about whether the Claimant should be dismissed. The question for us in an unfair dismissal claim is whether the Respondent acted unreasonably in declining at

the stage of the appeal to re-open the final written warning that had been the agreed outcome.

251. Whilst the Claimant did refer to her health as one of the reasons for her behaviour her focus during the disciplinary process was on establishing that Natalie was the instigator and was to blame for the incident. Before us the Claimant placed more emphasis on the part her health played in the incidents. Bearing in mind that the final written warning for the Christmas tree incident was the product of an agreement with the Claimant's then representative we do not consider that it was obvious that the matter should have been revisited before being relied upon in taking the decision to dismiss the Claimant for 'accumulated misconduct'. There is no suggestion that the warning was given in bad faith. The Claimant had acted very poorly on the telephone during the Christmas tree incident. Absent any hearing at which she put forward an explanation of how her back condition contributed to the incident it is impossible to say that the final warning was manifestly excessive. Having had regard to ***Davies v Sandwell Metropolitan Borough Council*** we do not consider it was unreasonable for the Respondent not to go behind the final written warning.

252. The Claimant says that the dismissal was unfair because her mitigation was not taken into account. She says that this together with other matters meant that dismissal was outside the range or reasonable responses.

253. We have read the minutes of the disciplinary hearing and of the appeal. In both meetings, and particularly the appeal meeting, the Claimant sets out a history of the events that had occurred since the re-organisation. In Louise Duffield's letter of 14 August 2019 she includes a discussion of many of these points and concludes that they do not provide sufficient mitigation for the Claimant's conduct. Jane Martin's appeal outcome letter sent on 18 October 2019 includes a comprehensive summary of the points raised by the Claimant said to provide mitigation for her actions and an analysis of those matters.

254. We do not consider it correct to say that the Claimant's mitigation was not taken into account in the sense that what she said was not considered. The complaint is really that the decision makers did not consider her mitigation sufficient.

255. We have reached our own conclusions about whether the events leading up to the events of 20 May 2019 made the decision to dismiss disproportionate. We have concluded that they did for the purposes of the Equality Act claim. We must remind ourselves that in an unfair dismissal claim we are not asking ourselves what we would have done but asking whether what the employer did was a decision open to a reasonable employer. We need to afford the Respondent that margin of appreciation in respect of any findings about whether mitigating features were present and, if they were, what weight should be given to them.

256. We need to look at the process and decisions as a whole. Having done so we have concluded that the Claimant was fairly dismissed. The Respondent did not act unreasonably in failing to re-open whether the final written warning was

appropriate. It did not act unreasonably expecting high standards of its public facing staff. On the Claimant's own account her behaviour was a breach of those standards at a time when she was on a final written warning. We have taken account of our criticisms that there was not as much focus on the degree to which the Claimant was reacting to Natalie as we might have expected. That said a reasonable employer might to some extent be entitled to say that whatever the degree of provocation the Claimant needs to answer for her own actions. We cannot say that the Respondent acted unreasonably in treating the Claimant's conduct as a sufficient reason for her dismissal.

257. For these reasons the claim of unfair dismissal is not well founded and will be dismissed.

The Claim for Holiday Pay

258. It was clarified at the outset of the hearing that the Claimant's claim for holiday pay was based on her contention that in assessing how much holiday she had taken the Respondent should have regarded 3.75 days that it has regarded as annual leave as compassionate leave due to the ill health of the Claimant's mother.

259. It was common ground that the Respondent has a policy under which it might grant compassionate leave if a request was made. That give rise to a discretion and not any contractual obligation. There is no evidence that the Claimant made a request to take compassionate leave. She does not assert that she did. What she says in essence is that in hindsight if she had made such a request it would have been granted and that she should therefore be credited with annual leave.

260. Whilst the Claimant's moral claim was attractively advanced by Ms Pace Marsden we could not see how the Claimant had any contractual right to retrospectively allocate a period of leave to a discretionary policy granting compassionate leave. For these reasons this claim cannot succeed.

Notice Pay

261. In her ET1 the Claimant has ticked the box claiming notice pay. Ordinarily the Tribunal would have assumed that that was intended to include a claim of wrongful dismissal. The Claimant was summarily dismissed by Louise Duffield. The list of issues did not identify any wrongful dismissal claim. As we were not invited to deal with this claim we did not discuss it in our deliberations. If there are any matters outstanding then the parties may raise them at the remedy hearing.

The Employment Judge's apologies

262. As the parties are aware the Tribunal met in June 2021 and the decisions recorded above were written in note form at that time. The Employment Judge had numerous other outstanding judgments at that time. Shortly after the hearing he sat on a case lasting nearly 2 months. There have been many cases since.

263. The Employment Judge extends his apologies to the parties for the delay in providing this judgment and reasons. He is acutely aware that the parties have been anxiously awaiting the outcome of the proceedings. He apologises for any additional anxiety that the delay has caused.

Employment Judge Crosfill

8 June 2022

Schedule 1

The list of issues agreed between the parties before the hearing

IN THE EAST LONDON EMPLOYMENT TRIBUNAL **CASE NO: 3202937/2019**

BETWEEN:

MS A NEWMAN

Claimant

- V –

LONDON BOROUGH OF WALTHAM FOREST

Respondent

[DRAFT] LIST OF ISSUES

THE CLAIMS

1. The Claimant's claims are as follows: (i) discrimination arising from disability, pursuant to s.15 of the Equality Act 2010 ("EQA"), (ii) failure to make reasonable adjustments, pursuant to s.21(1) EQA 2010, (iii) unlawful deductions of wages, pursuant to s.13 Employment Rights Act 1996 ("ERA"), and (iv) unfair dismissal ss. 94(1) and 98(4) ERA 1996.

DISABILITY

2. Does the Claimant have a disability as defined in s.6 of the EQA?

3. If so what is the alleged impairment(s)? The Claimant relies on a physical and mental impairment being respectively: (i) lumbar spondylitis and multiple disc degeneration and (ii) anxiety and depression.

    3.1 The Respondent accepts the appellant is disabled for the purpose of (i).

    3.2 The Respondent does not accept that the appellant is disabled for the purpose of (ii) and therefore as a result the following require determining:

    3.2.1 Does the Claimant suffer from a mental impairment?

    3.2.2 Does this impairment have a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities?

DISCRIMINATION ARISING FROM DISABILITY

4. Whether the Respondent treated the Claimant unfavourably?

5. The "unfavourable treatment" complained of are as follows:

    5.1 The Claimant was issued with a final written warning.

    5.2 The Claimant was subjected to disciplinary action.

    5.3 The Claimant was dismissed.

6. Did any of the acts set out at paragraph 6 above amount to unfavourable treatment?

7. If so, was the unfavourable treatment because of the something arising as a consequence of the Claimant's disability, namely lumbar spondylosis, or depression?

8. If so, was the unfavourable treatment a proportionate means of achieving a legitimate aim?

9. If so, what was the Respondent's aim and was it legitimate?

FAILURE TO MAKE REASONABLE ADJUSTMENTS (PCP)

10. Did the Respondent fail in its duty to make reasonable adjustments towards the Claimant, having regard to the following:

    10.1 Whether the Respondent was under a duty to make a reasonable adjustment pursuant to s.39(5) EQA 2010 and in particular:

    10.2 Did the Respondent apply a provision, criterion or practice ('PCP')?

    10.3 If so, do the following amount to a PCP;

a. Carrying out the full range of duties.

b. Working at a standard desk.

c. Carrying books.

d. Working from different work locations.

11. Did any of the above PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled?

12. Whether the substantial disadvantage in relation to any of the above PCP is that:

12.1 The Claimant was enduring a lot of physical and emotional pain throughout the day due to her work duties, walking up the stairs to access the toilets and staff area and from and to her car.

12.2 The Claimant was subjected to fear and embarrassment of staff perception when having to take breaks from her duties sitting in front of staff.

12.3 Rotating between work locations meant it was always a stress for the Claimant having to find parking; moving from library to library meant she had to park sometimes miles from the place of work, even with a Disability Badge. Walking back to the place of work, after parking some way away from the buildings left her tired and frustrated.

12.4 The Claimant was not provided with her disability equipment (including a bespoke office chair, desks rise, keyboard, mouse) causing her to be in a lot of physical and mental pain. In turn, this resulted in sickness absence and a disciplinary.

FAILURE TO MAKE REASONABLE ADJUSTMENTS (PHYSICAL FEATURE)

13. Did the Respondent have a 'physical feature' on its premises?

14. If so, does the following amount to a physical feature:

14.1 Toilets located on a different floor to the place of work.

14.2 Not to have disabled toilets on the same floor of employees' place of work.

15. Did the above physical feature put the Claimant at a substantial disadvantage in comparison to persons who are not disabled?

16. Whether the substantial disadvantage in relation to the above physical feature was:

16.1 The Claimant was subjected to embarrassment, as she was having to go to the children's toilets in the Respondent's premises. or, when the children's toilet were out of use, the Claimant was having to go to the public toilets outside of the Respondent's premises, to avoid having to walk up the stairs.

UNLAWFUL DEDUCTIONS OF WAGES

17. What pay was the Claimant entitled to in respect of holidays?

18. Whether the Claimant received the correct pay for her holidays?

19. If not, what pay has been deducted from the Claimant's wages?

20. If a deduction has been made, did the Claimant provide her consent?

UNFAIR DISMISSAL

Fairness

21. What was the reason or principal reason for dismissal?

22. The Respondent relies on the grounds of misconduct

23. Was it a fair reason under section 98(2) of the Employment Rights Act 1996 such as to justify the dismissal of the Claimant?

24. Did the Respondent act reasonably or unreasonably in treating this as a sufficient reason for dismissing him, having regard to equity and the substantial merits of the case (section 98(4) ERA)?

25. Was the decision to dismiss within the band of reasonable responses?

26. Did the Respondent follow a fair procedure?

27. If the procedure followed by the Respondent in dismissing the Claimant was unfair, what is the likelihood that the Claimant would have been fairly dismissed in any event, had a fair procedure been followed?

28. Was the Claimant guilty of conduct, prior to the dismissal, which contributed to her dismissal. If so, is it appropriate to reduce the level of compensation par to the Claimant and if so by what proportion?

REMEDY

29. If the Claimant is successful in any of her claims, what, if any, remedy is the Claimant entitled to?

30. What financial compensation is appropriate in all the circumstances?

31. Is the Claimant entitled to an injury to feelings award and if so, within which Vento Band?

Dated: 20/07/2021