EMPLOYMENT TRIBUNALS

Claimant: **Mr K Coyle**

Respondent: **St Mungo Community Housing Association**

Heard at: **East London Hearing Centre**

On: **31 January, 1 - 3 February 2023**

Before: **Employment Judge Gardiner**

Members: **Mrs J Land**
Mr T Brown

Representation

Claimant: In person
Respondent: Mr M Curtis, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

None of the Claimant's complaints are well founded. Accordingly, all of the Claimant's complaints are dismissed.

REASONS

1. From 11 October 2021 until 10 February 2022, the Claimant was employed by the Respondent as a Night Worker at their Islington Complex Needs Service located on the Holloway Road. A probationary review hearing had been held both on 27 January 2022 and on 3 February 2022. On 10 February 2022 he was emailed the outcome of the probationary review meeting. He was told his employment was terminated with immediate effect. His subsequent appeal was unsuccessful.

2. In these proceedings the Claimant argues that this dismissal was an automatically unfair dismissal on the ground that he had made protected disclosures. He also argues it was an act of direct disability discrimination. In addition, he complains of

pre dismissal incidents which are alleged either to be harassment related to disability; detriments because of his disability; or discrimination arising from disability. He also brings complaints of a failure to make reasonable adjustments; victimisation; and detriment on the ground of trade union membership or activity; as well as bringing a claim for a breach of the Working Time Regulations in relation to rest breaks.

3. All allegations are disputed by the Respondent. It also disputes that the Claimant's medical condition amounted to a disability; and that it knew or ought to have known of this disability.

4. The Final Hearing took place over four days. Substantial time was taken up on the first day clarifying the issues to be determined and creating a revised list of issues. Even this list was not the final list of issues – during the course of evidence, the Claimant withdraw certain allegations, and on the second day of the Final Hearing successfully applied to add three allegations of detriment on the ground of protected disclosures by way of amendment. He was refused permission to amend his claim to add two further allegations of protected disclosure detriment on the second day of the Final Hearing. Oral reasons were given for these decisions at the time and there was no request for written reasons. A Final List of Issues was prepared by Mr Curtis in the light of the Tribunal's decisions and the Claimant's withdrawals. That List of Issues is exhibited to these written reasons.

5. The documentary evidence was contained in three bundles of documents. The first two bundles contained documents collated by the Respondent and ran to 715 pages. The third bundle was provided by the Claimant. Further documents were added to the back of this bundle on the second day by agreement. It ran to 306 pages.

6. Witness statements were exchanged from the Claimant; and, on behalf of the Respondent, from Matthew Bawden, Regional Head, and James Lally, Service Director. The Respondent had taken the decision not to call the Claimant's line manager, Mr Nicholas Penny, to give evidence, even though he was criticised by the Claimant in several of the allegations. In previous correspondence with the Tribunal, the Claimant had applied for permission for a witness order requiring Mr Penny's attendance. He also applied for a witness order for Ms Hannah Archer, an HR Advisor, to attend to give evidence. Those applications had not been determined before the start of the Final Hearing.

7. After argument, it was decided that the application for a witness order should be granted in relation to Mr Nicholas Penny but refused in relation to Ms Hannah Archer. Again, oral reasons were given for this decision at the time and there was no request for written reasons.

8. The Claimant gave evidence on day 2 of the hearing, with his evidence concluding on day 3. The remainder of the witness evidence was heard on day 3 and day 4. At the conclusion of the evidence, both parties made oral closing submissions. The Tribunal took the remainder of the fourth day to deliberate before sending its decision to the parties in writing.

Findings of fact

9. The Respondent is a charity, whose work focuses on helping those who are homeless. It operates from many different locations in various communities. The location where the Claimant was employed to work was the Islington Complex Needs Service on the Holloway Road in North London. It was a converted residential home located over three floors. There were six flights of stairs from leading from the ground floor to the third floor. The building also had a basement. It had around sixteen rooms. Each resident, known as a client, had their own room but shared the use of three communal kitchens. Those living in the building were vulnerable individuals who had complex support needs. There was an office for the Respondent's staff on the ground floor where there was a computer for staff to use for their work duties. CCTV was in use to monitor communal areas inside the building and areas outside the building including the area close to the entrance. In evidence, the building was referred to as a hostel, and we refer to the building in this way in these Reasons.

10. The Respondent employed four members of staff to be present at the hostel during the daytime, and two Night Workers to be present at night-time. Agency workers would also be engaged on a regular basis to work on the night shift, which ran from 10pm until 8am. Of those permanent staff, several were members of trade unions, and the Respondent had regular interaction with union representatives.

11. During 2021, the Respondent advertised a vacancy. The advert was expressed as seeking two Night Workers to join the team. It did not state or suggest that the two Night Workers would be working together on the same shift.

12. The Claimant was employed to work as a Night Worker at the hostel, working 37.5 hours each week. It was a full-time role. His shift pattern was to work for four nights in a row, followed by four nights off. The other vacancy for a Night Worker was unfilled such that agency workers continued to work on the night shifts to cover the vacancy.

13. The Claimant's role was subject to the Respondent's Code of Conduct, this included a prohibition on sleeping whilst on duty, and on using alcohol before or during a shift. The Claimant's duties were summarised in a Job description. The key responsibilities included "carrying out regular checks in the hostel, "checking conditions of all communal areas"; and ensuring the hostel was secure by regular patrols and monitoring external doors and access in and out of the building. It included a willingness to lone work at times.

14. In this role, the Claimant reported to Nicholas Penny. Mr Penny's job title was that of Deputy Manager. He had overall responsibility for the operation of the Islington Complex Needs Service. He in turn reported to Mr Matthew Bawden, Regional Head for Islington. Mr Bawden had oversight and management of a number of accommodation-based services in that region.

15. Before the start of his employment, on 6 September 2021, the Claimant underwent an occupational health assessment by phone. In advance of speaking to the occupational health practitioner, the Claimant completed a confidential health questionnaire, which was for occupational health use only. The key passage

entered by the Claimant on this questionnaire was “successful operation. Ongoing physiotherapy. Knee is stronger. Mobility excellent”. The Claimant contended in the course of his evidence that he had been told by the occupational health nurse that he should tick all the boxes indicating that he was fully fit for work. This was because the Claimant understood that the Respondent did not look favourably on phased returns to work. We do not accept that this is likely to have been the approach taken by occupational health. They are likely to have wanted to form an accurate assessment of the Claimant’s health.

16. We accept that not all new employees are required to undergo an occupational health assessment. We find that the Respondent asked the Claimant to undergo an occupational health assessment because it genuinely wanted to know whether there were any health issues which might require adjustments to enable the Claimant to carry out the role in a safe manner for himself, for his colleagues and for the clients at the hostel. We do not accept that a trained occupational health professional would have steered him towards a conclusion that was not in accordance with his own medical experience and needs.

17. A letter from the occupational health practitioner confirming that he was fully fit for work was sent to the Respondent on the same date, with a copy to the Claimant. The Claimant did not inform the Respondent that he disagreed with the conclusions of the occupational health assessment.

18. At this point, the Claimant was employed by the Royal Marsden NHS Foundation Trust as a Kitchen Porter. In that role, the Claimant was a volunteer union representative for the GMB union. He had been on long term sick leave since 5 January 2021 with knee pain. He had undergone an anterior cruciate ligament repair operation on 14 July 2021 and had not returned to any of the duties required in that role.

19. Before the Claimant started his employment with the Respondent, he gave them the impression he would be leaving his employment with the Royal Marsden NHS Trust. That did not in fact happen. His employment with that Trust continued. He worked a few shifts during December 2021, before returning on a 50% basis in January 2022 and full time in February 2022. He did not mention this employment on the declaration form he completed for the Respondent on 1 June 2021; and he had not told the Respondent that his employment at the Royal Marsden was continuing. It was under the impression that the role he had been employed to perform at the Respondent would be his only employment.

20. Under his employment contract (clause 36), he was required to obtain permission from the Respondent before engaging in any other employment apart from his role with the Respondent. On the Declaration of Interest form, he was asked if he had any part-time employment outside of St Mungo’s. He answered “No”. He was also asked on a separate document whether he considered himself to have a disability. Again, he answered “No”, clarifying in a further answer that he did not describe himself as someone who had a physical or mental impairment which had a substantial and long-term effect on his ability to carry out normal day to day activities.

21. For his first two shifts, the Claimant worked a day shift. On his first day he underwent the standard induction applicable to new joiners. This induction included an overview of his responsibilities. He then worked three night shifts in a row. During this time, he worked alongside another person, who had performed the role on a regular basis. That person showed the Claimant how to carry out the building patrols expected of night workers. Night Workers were expected to do the required patrols twice during each night shift. They were also expected to complete a building check sheet recording their observations of different areas of the premises during each patrol. It appears that staff did not routinely document inspections at this time on the building check sheets.

22. As a result of his induction and of the work carried out during the first three night shifts alongside an experienced agency worker, the Claimant was, or ought to have been, fully familiar with the expectations of the role by the end of his first week. Thereafter the Claimant worked as a lone worker.

23. Part of the Claimant's responsibilities included emptying the bins in the communal kitchens. Sometimes clients would empty food waste from their rooms into the bins in the kitchens. If the food waste had been present for some days, this could sometimes smell bad and could attract flies. The Claimant was not responsible for cleaning the hostel. This was done by a team of contract cleaners who attended the hostel on a fortnightly basis.

24. We do not accept the Claimant's contention that he made verbal disclosures about his health and safety concerns to Mr Penny on 25 October 2021 or on 1 November 2021. Nor do we accept that he made verbal disclosures to Mr Penny during the period from 20 October 2021 through December until his dismissal. These are asserted in the List of Issues but are not evidenced in any of the documents to which we have been referred in the three bundles of documents – that is, until an email sent by the Claimant to Mr Lally on 19 July 2022. Even here, the timescale is different – this email suggests protected disclosures were first made "within my opening week" ie by 18 October 2021. If verbal disclosures had indeed been made, we would have expected the Claimant to have referred to such disclosures in his earlier emails to the Respondent – not least because he would have wanted to know what action was being taken to respond to those disclosures. The Claimant's witness statement does not specify any verbal disclosures of information as detailed in the list of issues.

25. Further the Claimant did not mention any knee symptoms to Mr Penny during the period between 11 October 2021 and 8 November 2021. He does not suggest this in his witness statement or in his oral evidence. So far as Mr Penny was aware, the Claimant was fit for all duties as reported by Occupational Health. We do not accept that the Claimant reported any knee problems to HR or to Mr Bawden.

26. On 6 November at 3.30am, a client came into the office at the hostel, stating to the Claimant he had fallen off his bike. He was injured. As a result, the Claimant called 999 and an ambulance attended to take him to hospital. The Claimant decided to carry the client's bike up six half flights of stairs to the third floor where the client had his room. He had not been instructed to do so. He could have taken the bike to the garden which was an alternative place where the bike could have been kept. This was effectively on the same level as the office. Doing so would not have

involved moving the bike up or down any flight of stairs. Although the Claimant reported the incident, his report did not state that he himself had suffered an injury as a result of his decision to carry the bike to the third floor.

27. The Claimant worked the night shift on 7/8 November 2021. At the end of the shift, at 8am, he had a pre-arranged supervision with Mr Penny. The notes of the supervision do not record that the Claimant reported that anything untoward had occurred during the night shift. Nor do they record that the Claimant had chosen to carry a bike up three floors of stairs on an earlier shift or had suffered any knee pain as a result.

28. Various allegations were subsequently made by clients about the Claimant's conduct during that night shift. It was alleged he had not been available to open the premises to residents, leaving them outside for a considerable period of time. It was suggested by witnesses that he had admitted to sleeping on duty and that he appeared to be under the influence of alcohol.

29. On 12 November 2021, Mr Bawden told the Claimant not to attend work the following day as issues had been raised about his conduct at work. The Claimant was told he would continue to be paid. On 15 November 2021, there was an informal investigation meeting conducted by Mr Penny with the Claimant. On 16 November 2021, the Claimant was officially suspended from work. This was authorised by David Fisher, Executive Director of Client Services. The Claimant was informed in a letter of the same date that a formal investigation would take place.

30. Mr Penny undertook the investigation. He had follow up phone calls with the Claimant on 16, 19, 23 and 29 November 2021. On 16 November 2021, the Claimant identified mitigating circumstances surrounding the incident. He said he was on medication for mild blood pressure. He indicated that the side effects of nausea and diarrhoea resulted in him spending significant periods of time in the bathroom and affected his ability to perform duties related to the role. This explained why he could not come to the front door to let the clients in. On 17 November 2021 the Claimant was asked to provide all evidence and mitigation by 30 November 2021.

31. During the telephone call on 23 November 2021, Mr Penny asked the Claimant if he had completed building patrols on the shift of 7/8 November 2021. The Claimant said he couldn't recall, though he remembered taking a few of the bins out. He went on to confirm that he understood that patrols were a duty of the role; and that he was expected to complete at least two during a shift. He did not seek to excuse any failure to carry out the patrols on medical grounds or to refer to any knee symptoms.

32. As part of his investigation, Mr Penny viewed CCTV footage taken on the night in question. It appeared to confirm that clients were waiting outside the building unable to enter for about 17 minutes before another client with a key arrived and had let them in. It also indicated that no patrols took place during the shift and there were no building check sheets completed by the Claimant. Mr Penny notified the Claimant on 25 November 2021 that this was a cause for concern and it would

need to be included in his investigation. He was told that if there was any mitigation around this, he should provide it.

33. On 25 November 2021, Mr Penny sent an email and a WhatsApp message to agency Night Staff, but not to the Claimant. The message read:

> "Hi all,
>
> Hope you have had a good week so far.
>
> Just a quick reminder. Please ensure that you add the completion of Patrols to your E-Handover and complete the corresponding paperwork "Building Checks" and sign to say it has been completed. This document should be found on your clipboard but can be pulled from a the H&S File in the cabinet"

34. This message was sent because Mr Penny had realised from enquiries carried out in the course of his investigation that building check sheets were not routinely completed at the conclusion of each shift.

35. On 25 November 2021, Mr Penny confirmed by email to the Claimant that he was in fact being paid for 10 hours of work every shift. This was made up of 9 ½ hours of work plus 30 minutes paid break.

36. On 26 November 2021, the Claimant sent 13 emails to the Respondent. These emails contained information about his medical condition. They confirmed that the Claimant had been scheduled to have an operation on his knee in July 2021; that the Claimant had subsequently undergone an MRI scan; and that the Claimant had been in receipt of physiotherapy. The Claimant commented on the medical situation at the time of the incident as follows:

> "As far as I can recall, my knee felt a little weak around this time and I did not always feel comfortable walking down stairs. The MRI scan confirms a little swelling and some fluid in this area. To compensate for this, I chose to clean the kitchen on the first floor and to clean and mop the two office area rooms and to empty the bins (which were overflowing) in this area as well as stay late to meet with you. I was able to monitor the night with cctv cameras and knowledge of the residents who were present.
>
> I arranged further physiotherapy in early November – please see attached …. I have spent the last couple of weeks in the gym building up my knee strength and my knee now feels as strong as ever. My next appointment with the surgeon is on 2nd December"

37. In this email the Claimant was inferring, though not stating expressly, that his knee symptoms may have limited the extent of the patrols he carried out around the building during the shift. He was linking knee symptoms to his underlying knee condition. He did not make any reference in this email to the incident on 6 November when he had chosen to carry a client's bicycle up flights of stairs. His email also stated that he had not been shown how to complete building check sheets.

38. For the first time, during the phone call on 29 November 2021, the Claimant referred to his father's ill health as a reason why his ability to perform tasks relating to the role had been affected. He also stated, for the first time, that lifting a bike on a previous shift had affected his mobility on the night shift on 7 November. He appeared to concede during this meeting that he had not completed the required patrols on this shift.

39. On 30 November 2021, the Claimant again raised the issue of his entitlement to rest breaks in an email to Mr Penny. In his response, Mr Penny confirmed that breaks for lone workers were paid. This was not because they were not entitled to breaks but because it was recognised that on occasions these breaks might be interrupted.

40. On 2 December 2021, the Claimant's knee was reviewed by Charles Gibbons, Consultant Orthopaedic Surgeon. He noted that an MRI scan carried out on 17 October 2021 confirmed an intact ACL graft with no evidence of recurrent medial meniscus tear. He said that there was evidence of resolving bone marrow oedema affecting posterior aspect of the left tibial plateau. He was to be assessed again in eight weeks to assess his progress. This medical record was not seen by the Respondent at the time.

41. On 3 December 2021, the Respondent confirmed its position in relation to the Claimant's entitlement to take rest breaks. This was, in essence, that lone working staff were able to take rest breaks, but that these may be interrupted by clients, requiring the staff member to work. The Respondent also arranged for the Claimant to re-attend an occupational health appointment.

42. On 23 December 2021, Mr Penny sent the Claimant his investigation report. He did not consider that there was merit in the allegation that the Claimant had been intoxicated whilst on duty. However, he considered that there should be a probationary review meeting convened to consider two allegations. The first was that on the night shift on 7 November 2021, the Claimant was unable to respond to clients requiring access to the building, and during an exchange with these clients, the Claimant disclosed having been asleep on the shift. The second was that on the night shift of 7 November 2021 the Claimant did not complete mandatory health and safety checks.

43. Mr Penny referred in the report to the Claimant's mitigation for not carrying out mandatory building checks, namely mobility issues arising from a previous operation on his knee. He went on to say that the Claimant had not raised this as a concern to him throughout his employment in order to agree how the mandatory checks should be managed. He referred to the outcome of the previous occupational health report stating that the Claimant was fit for work. He had also reviewed the CCTV for previous shifts and found that the Claimant had not completed any mandatory building patrols whilst lone working during the period from 30 October to 7 November 2021.

44. With the report, Mr Penny attached the evidence gathered in the course of his investigation, including notes of his discussions with the Claimant, as well as what he had been told by those clients who had given evidence as part of his investigation. He attached photos of the Claimant's medications and of leaflets

provided showing their side effects. He did not attach any medical records evidencing the Claimant's knee condition. We find that he did have this evidence in mind in preparing his report, given that he specifically referred to this mitigation in the body of his report.

45. On 29 December 2021, the Claimant sent medical evidence to Mr Bawden in around seven emails. The evidence was similar to the evidence previously provided to Mr Penny. The Claimant alleges that sending this documentation amounted to making an allegation of discrimination, although accepts that he did not use that work in the covering emails. In one of the emails, he took issue with the medical evidence relied upon in the investigation report. He said it did not refer to mitigation in relation to his ACL knee surgery. He also added "I have not at any stage admitted to not completing building checks". In his response, Mr Bawden told the Claimant that points of dispute highlighted in the investigation report could be considered at the probationary hearing.

46. On 29 December 2021, the Claimant had a further occupational health assessment. He was considered fit for the post. The report stated that the Claimant had "denied any limitation to walking, standing or bending and reports knee is fully healed". The outcome was that occupational health confirmed that the Claimant remained fit for the post. The occupational health report was sent to the Respondent on 11 January 2022. This was copied to the Claimant.

47. The Claimant requested and was provided with records of building checks carried out by other night workers. He needed to chase on several occasions for them to be provided. They were sourced by Mr Penny from a file at the hostel and scanned across to Mr Bawden before being provided to the Claimant. He was told that there were some missing sheets for the dates he had requested.

48. The probation review hearing was originally scheduled to take place on 7 January 2022 but subsequently postponed to 27 January 2022. It would be conducted by Mr Penny's line manager, Mr Bawden.

49. On 5 January 2022, the Claimant made a Data Subject Access Request to Tasbih Imhasly who was one of the staff at the Respondent responsible for resourcing. The following day he sent a further email in which he said that "I completed all building checks and it is agreed in writing that I was never asked to complete any sheets".

50. On 27 January 2022, at 11:55 the Claimant sent an email to the dedicated email address for making whistleblowing disclosures at the Respondent. The subject was "Protected disclosure". The Claimant claimed he was making a protected disclosure. As it is an important email in the context of the Claimant's contentions, we set it out in full:

> "To whom it may concern …
>
> I wish to make a protected disclosure in line with St Mungos Whistleblowing Policy and Section 43 Employment Rights Act.
>
> I have serious concerns that the Islington Complex Needs Hostel, 517 Holloway Road, is failing to fulfil its legal obligations provision, that breaches

are continually occurring and will continue to occur and that this represents a significant danger to residents and workers – satisfying the public interest qualifying criteria.

There does not seem to be a cleaner employed by the hostel. Whenever I have attempted to empty the bins (not my official duty) I have had to take a step back to prevent me vomiting as several bins are infested with flies swarming around the bins – at a time of the current pandemic. I have also witnessed rats in one of the kitchens.

I have been wary of even walking down the stairs in case I fall down due to dirt and slippage risk on the stairs. The communal kitchens are simply unfit for human habitation and fire escape routes are being potentially blocked with debris and litter. This represents a significant risk to the 16 residents and staff.

I have also similar concerns around the use of CCTV. There is a camera in what amounts to the changing room. It has become the changing room because the bathroom has no light that works. The camera is also positioned where the lockers are situated and is a blatant breach of right to privacy at work.

There are no signs for the CCTV cameras, no appropriate first aid equipment or signposts, no towel to administer essential/emergency first aid nor appropriate training when workers are often dealing with emergency admissions of vulnerable people. There no training in fire or first aid for night workers who by default become appointed persons on their lone-working shift. All are failures to comply with legal obligations and basic Health and Safety breaches.

Further, other night workers have complained about being denied their statutory right to have a rest break on a ten-hour night shift. This is in breach of the Working Time Regulations and a further failure to comply with legal obligations.

Most workers are employed as lone night workers when advertisements have indicated two workers (double cover) will be in place. Night Workers are only notified of permanent lone working during induction – after making personal decisions to accept employment based on their recruitment process.

Workers have complained that they have never had a Night Worker assessment to confirm fitness for post, further breaching Working Time Regulations.

Workers are coerced to work continual nights – the longest stretch of continual nights I am aware of is 11. This has obvious safety implications for the worker and residents and I am aware that this practice operates in other hostels too – it reinforces a culture where some workers are being denied their statutory rights – and wilfully so – to the detriment of residents and the

legal obligations we owe to them. Workers have become demotivated, further risking potential Health and Safety breaches.

Night workers are often forced to carry heavy items themselves up the stairs as there are no other colleagues present to assist – further breaching the duty of care owed to workers – and could easily result in a serious accident where St Mungos could be held vicariously liable.

Sharps needles are not disposed of correctly. The residents' rooms are filled with drug paraphernalia – to the extent where workers can barely see the floor carpet. Several staff refuse to even open rooms.

I also have documented evidence that there are systemic failures to complete mandatory H&S records and the manager and senior management are aware of this – and they have attempted to conceal this information outlined above and night workers have expressed to me that they victimise those who raise legitimate concerns.

I outlined my Health & Safety concerns to my manager and I was soon suspended – for three months now and I have been subjected to various allegations in an attempt to silence my concerns and refusal to forgo my statutory rights – and I am still awaiting any submission of factual evidence.

The investigation runs to over 200 pages and a miscarriage of justice is likely to continue to re-occur to other workers – as there is clear documented evidence of malpractice and collusion in order to facilitate unfair dismissals to night workers who are deemed to have less employment rights.

Any Health and Safety investigation by HSE would confirm the above – with St Mungos being liable and brought into disrepute.

I also have evidence of 'collusive practices' by this manager with other personnel when attempting to cover up these breaches and evidence of personal data being used in a reckless breach of GDPR. This is also concealed and is likely to recur.

There has been a continual disregard and breaches of the Health Protection Coronavirus Regulations and guidance for hostels. The hostel is riddled with infection – at a time of a pandemic that vulnerable people may be more likely to be at a higher risk of severe outcomes from Covid 19 and less able to manage the risk of transmission of infection. There is no record of monitoring or assessment of residents in line with government guidance. There simply is no record of cleaning or disinfecting – staff refuse to complete these duties in the absence of a cleaner.
I look forward to hearing from you."

51. The disclosure concerned dangers to health and safety in relation to the conditions at his place of work, which the Claimant contended was in the public interest for the Respondent to investigate. The Respondent accepts that in law this email amounts to a protected disclosure. As it was sent to this dedicated whistleblowing email address, it did not thereby come to the attention of the Claimant's line manager Mr

Penny or to his line manager, Mr Bawden. An anonymised copy of the concerns was sent to David Fisher, Executive Director of Client Services, on 31 January 2022. Hannah Archer was also informed that the Claimant had made a protected disclosure. Mr Bawden was not informed of the detail of the protected disclosure until the beginning of May 2022. This was in the context of updating the Assurance and Risk Committee on progress with addressing the Claimant's concerns.

52. Later on 27 January 2022, at 14:05, the probationary review hearing started. It was chaired by Matthew Bawden. Also present was Mr Penny and the Claimant's trade union representative Gary Bolister, as well as Chris Kemp to take notes.

53. Early in the meeting the Claimant raised a concern about the wording of the letter inviting the Claimant to the probation review meeting. It had not indicated that one potential outcome of the probation review meeting was that no further action would be taken. Mr Bawden conceded that the letter was poorly worked and that he had created it using a template. He said he would follow up with the relevant department.

54. When discussing the delay in letting clients into the building, the Claimant indicated that he may have been on the toilet due to a medical condition. Mr Bawden expressed surprise that the Claimant did not bring this issue up in his supervision with the Claimant on the morning after the shift. The Claimant stated that he did not want to mention these things as it was personal. He also stated that his Dad was unwell and so he was not at his best. There was a discussion about whether the Claimant had completed mandatory building checks during the shift. The Claimant indicated that he did not receive adequate training to complete these checks. Mr Penny agreed that there was some mitigation and that full training may not have been provided. He said that he believed that the Claimant had chosen not to complete them. He stated that there was evidence to suggest that building checks had not been completed on several occasions. This was a reference to the CCTV footage which Mr Penny had viewed but which had not been provided to the Claimant to check.

55. The Claimant said he considered this was a whistleblowing case and in that respect he had made contact with external agencies. There was a discussion about the health and safety issues that the Claimant had raised. Mr Penny said he felt disappointed that the Claimant did not feel comfortable telling him about health and safety issues within the hostel and that he would have supported the Claimant if he had raised them with him. This was the first time that either Mr Penny or Mr Bawden was aware that the Claimant regarded himself as a whistleblower. He did not forward his whistleblowing email to Mr Bawden nor did he hand him a copy during the meeting. At the end of the hearing, the Claimant asked everyone to look into the protected disclosure.

56. Towards the end of the hearing the notes record "KC cited disability discrimination". The hearing was adjourned after around two and a half hours. An agenda for the resumed hearing was sent to the Claimant on 2 February 2022.

57. The hearing resumed on 3 February 2022 for a further session which lasted approximately as long as the initial hearing. It was again conducted by Mr Bawden and the same individuals were present. Notes were taken of both parts of the

hearing. The Claimant accepted that the notes of both parts were reasonably accurate. Unbeknown to the Respondent, the Claimant covertly recorded the hearing on 3 February 2022. That recording was not in evidence. At one point in the hearing the notes record the following:

> "KC repeated allegations that MB and NP are involved in discriminatory behaviour. Referring back to the point about the bike, MB advised KC that he could have just said no to the client when he was asked to carry his bike upstairs. He advised that this is not mitigation because KC didn't raise it prior to the event. MB clarified that KC did not tell HP about his disability until after the event"

58. At a later point, there are the following entries:

> "MB went back to the initial question asking KC why he didn't state difficulties referring to his physical health during pre-employment. MB recalled a conversation he had with KC and suggested he wasn't open and honest when asked about this physical health. MB stated that KC confirmed he can carry out his duties and there were no issues.
>
> KC responded, using an example to illustrate that disabilities aren't necessarily constant and they can come and go. MB understood but said one would have to let someone know"

59. After a comfort break during the hearing, the Claimant asked if the minutes of the hearing could be submitted as a grievance. This was a point he repeated at the end of the hearing.

60. The Claimant's references in this resumed hearing to being disabled were the first time he had raised this with the Respondent. He did not raise this during the earlier hearing on 27 January 2022. Whilst there was mention of ACAS during the second hearing, we do not find that the Claimant mentioned he had initiated ACAS Early Conciliation. This step was not taken until the day after the hearing, 4 February 2022.

61. On 4 February 2022, the Claimant sent several emails to various managers at the Respondent including those at the highest level within the organisation. These emails expressed his anger at the way he felt he had been treated by Mr Bawden and by Mr Penny, using intemperate and abusive language. He asked for both Mr Bawden and Mr Penny to be suspended. He alleged he had been subject to a campaign of discrimination, harassment, victimisation, bullying, theft and fraud. He also left a message on Mr Bawden's voicemail, again referring to Mr Bawden in an abusive manner. On 8 February 2022, the Claimant emailed Mr Bawden and Mr Penny saying "Jeez I'm reading about how St Mungo's conducts its business ur like numbers [members] of a sad, pathetic cult – is this how your parents brought you up to be?".

62. On 8 February 2022, Penny Malcolmson, Head of HR Operations, emailed to ask the Claimant to stop using inappropriate language in the way he was communicating with the Respondent's employees.

63. On the same day, the Claimant sent several short emails to Penny Malcolmson, Head of HR Operations. The first forwarded an email sent to himself on 6 January 2022 but addressed to Mr Penny. The last stated "Can these emails not be taken as a grievance?? I have had enough writing about it. I have all the documents confirming my allegations". In her response, also on 8 February 2022, Ms Malcolmson noted he had sent her 5 emails in the space of two and a half hours. She added this:

> "You are suggesting that you want to raise a grievance, which of course is something you have the right to do in line with our processes. You have asked me to consider your emails as a grievance, however, based on these emails I am not clear what your grievance actually is and how that differs from the matters you have raised that I have confirmed are being dealt with under our whistleblowing policy."

64. She encouraged him to speak to his union representative, stating that if he did have a grievance which was different from the matters raised under the whistleblowing policy then it could be progressed under the grievance policy.

65. On 10 February 2022, Mr Bawden emailed the Claimant the outcome to the Probation Review meeting. He decided to uphold the allegations which had been identified in the investigation report. He concluded that the Claimant was not engaged in work and responsive so it was likely that there could have been periods where he could have been sleeping or distracted from his duties. He also upheld the second allegation that the Claimant had not carried out the required building checks, given that these checks had not been noted on the CCTV footage. On this basis, he decided that the Claimant should be dismissed with immediate effect. The outcome letter also referred to the recent communications that the Claimant had made with the Respondent's staff. This was not part of the basis for the Claimant's dismissal, but something that may have led to further allegations of gross misconduct had his employment not been terminated in any event.

66. The Claimant chose to appeal against the outcome of the hearing on 10 February 2022, confirming he was pursuing his appeal in an email on 16 February 2022.

67. On 23 February 2022, a health and safety investigation was carried out at the Holloway site. This was prompted by the Claimant's protected disclosure on 27 January 2022.

68. On 17 March 2022, an appeal hearing was scheduled to take place, to be conducted by James Lally. Mr Lally was Mr Bawden's line manager. It did not take place, although the reasons for this are unclear. On 6 April 2022, the Claimant confirmed that he would be pursuing the appeal.

69. On 3 May 2022, the Claimant asked that the appeal scheduled to take place on 6 May 2022 be rescheduled as his trade union representative was unable to attend on that date for personal reasons. Mr Lally agreed to a postponement and rescheduled the appeal to 30 May 2022.

70. On 11 May 2022, the Claimant requested further information and further documentation from the Respondent. He started his email by saying "I am an

official workplace representative for the GMB Union and, as my previous representative is unavailable, I write to inform you that I will be representing myself in this case".

71. On 16 May 2022, the Respondent replied attempting to answer the various questions asked. The Claimant emailed back on 19 May 2022 raising further questions about the answers provided by the Respondent. On 24 May 2022 Mr Lally replied stating "at the hearing you will have an opportunity to raise any concerns you have regarding the process, after which I will be providing you with a written outcome." He went on to say that "the appeal meeting is the appropriate place for you to raise the queries that you might have that are relevant to the appeal outcome … I do not consider it appropriate for me to respond to queries or requests for further information ahead of the hearing; these are matters to be discussed at the hearing itself".

72. On 24 May 2022, the Claimant indicated he was not satisfied with the Respondent's response. He emailed again on 26 May 2022 and 27 May 2022. On 30 May 2022, the Claimant emailed as follows:

> "You have continually failed to respond to my requests for work related documentation and you are preventing me from fully preparing for my appeal.
>
> I have already had to endure two meetings that lasted over nearly five hours with St Mungo's personnel – there will be no further sham proceedings.
>
> I will not be able to attend any further meetings and I remain dismissed."

73. It was not clear to the Respondent that this was a withdrawal of his appeal, as he now contends. Given the proximity of the scheduled time and date of the appeal hearing, the hearing proceeded in the Claimant's absence on 30 May 2022. Mr Lally explained in evidence, and we accept, that he progressed the appeal to a conclusion because of the serious nature of the allegations that the Claimant was raising which needed to be determined.

74. On 17 June 2022, a probationary appeal hearing outcome letter was sent to the Claimant. It set out Mr Lally's findings in relation to eleven different grounds of appeal. None of the grounds were upheld. As a result, he upheld the original decision to dismiss the Claimant due to an act of gross misconduct. He found that the investigation conducted by Mr Penny was reasonable and that all policies and procedures had been complied with. He dismissed the Claimant's appeal.

75. One of the grounds of appeal was that documents were altered, deliberately withheld and/or information was omitted. So far as the complaint that information was omitted, Mr Lally's outcome letter recorded the following:

> "[Mr Bawden] added that some of these communications had been sent after the Probationary Review Hearing. [Mr Bawden] explained that he did not dispute that you might have a medical need, including the knee injury and the medication that might have caused you to use the bathroom for prolonged periods, but that it had been hard to ensure that all of this

information was collated and contained within the report, not least because some of it had been sent after the report was finalised."

76. The Tribunal finds that this was a record of what Mr Bawden had told Mr Lally in the course of the investigation he conducted when considering the Claimant's appeal.

Legal principles

Protected disclosure detriment claims

77. The three essential features which must be established if a claimant is to succeed in a claim for protected disclosure detriment are:

a. Establishing that the claimant has made a protected disclosure;

b. Establishing a subsequent detriment;

c. Making the necessary causal connection between the protected disclosure and the detriment.

78. Protected disclosures are qualifying disclosures made in circumstances that are deemed to be protected by the Employment Rights Act 1996 ("ERA 1996").

Qualifying disclosures

79. So far as is relevant to the present case, qualifying disclosures are defined as follows, under Section 43B ERA 1996:

(1) In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:

(a) …
(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
(c) That a miscarriage of justice has occurred, is occurring or is likely to occur
(d) That the health or safety of any individual has been, is being, or is likely to be endangered;
(e) …
(f) That information tending to show any matter falling within any one of the proceeding paragraphs has been or is likely to be deliberately concealed.

80. The starting point is that the disclosure must be a "*disclosure of information*" made by the worker bringing the claim. That disclosure must have two features. Both are based on the belief of the worker, and in both cases that belief must be a reasonable belief. The first is that at the time of making the disclosure the worker reasonably believed the disclosure tended to show wrongdoing in one of five specified respects in Section 43B(1); or deliberate concealment of that wrongdoing.

The second is that at the time of making the disclosure, the worker reasonably believed the disclosure was made in the public interest.

81. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 Sales LJ noted that allegations could amount to disclosures of information depending on their content and on the surrounding context. He set out the following test for determining whether the information threshold had been met so as to potentially amount to a qualifying disclosure: the disclosure has to have *"sufficient factual content and specificity such as is capable of tending to show"* one of the five wrongdoings or deliberate concealment of the same. It is a matter *"for the evaluative judgment of the tribunal in the light of all the facts of the case"* (paras 35-36).

82. The Tribunal needs to assess whether, given the factual context, it is appropriate to analyse a particular communication in isolation or in connection with others. In *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540 (EAT), Slade J (at para 22) said that *"an earlier communication can be read together with a later one as embedded in it, rendering the later communication a protected disclosure, even if taken on their own they would not fall within Section 43B(1)(d)*". Whether or not it is correct to do so is a question of fact.

83. In *Kilraine*, one of the alleged protected disclosures was made using these words: *"There have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented*". In itself, this lacked sufficient factual content and specificity. The oblique reference to other documented instances did not incorporate other documents by reference. In *Simpson v Cantor Fitzgerald Europe* [2020] ICR 236, the EAT upheld the ET's decision not to aggregate 37 communications to different recipients in order to assess whether there was a protected disclosure. This was upheld on appeal to the Court of Appeal.

84. So far as the reasonable belief that the disclosure tends to show wrongdoing, there are two separate requirements. Firstly, a genuine belief that the disclosure tends to show wrongdoing in one of the five respects (or deliberate concealment of that wrongdoing). Secondly, that belief must be a reasonable belief. If the disclosure has a sufficient degree of factual content and specificity, then that belief is likely to be regarded as a reasonable belief (*Kilraine* at paragraph 36).

85. The belief has to be that the information in the disclosure tends to show the required wrongdoing, not just a belief that there is wrongdoing (*Soh v Imperial College of Science, Technology and Medicine* EAT 0350/14). What is reasonable within Section 43B involves an objective standard and its application to the personal circumstances of the discloser. A whistleblower must exercise some judgment on his own part consistent with the evidence and the resources available to him (*Darnton v University of Surrey* [2003] IRLR 615, EAT). So, a qualified medical professional is expected to look at all the material including the records before stating that the death of a patient during an operation was because something had gone wrong (*Korashi v Abertawe Bro Morgannwg University Health Board* [2012] IRLR 4 at paragraph 62). However, the disclosure may still be a qualifying disclosure even if the information is incorrect, in that a belief may be a reasonable belief even if it is wrong: *Babula v Waltham Forest College* [2007] ICR 1026.

86. In relation to each of the five proscribed types of wrongdoing, there is a potential past, present or future dimension. For instance, in relation to breach of a legal obligation, the reasonable belief must be that the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation. So far as future wrongdoing is concerned the phrase *"is likely to*" has been interpreted as meaning more than a mere possibility. In *Kraus v Penna* [2004] IRLR 260 the EAT held that to be a qualifying disclosure, the information disclosed should tend to show, in the claimant's reasonable belief, that failure to comply with a legal obligation was "*probable or more probable than not*".

87. So far as criminal offences under Section 43B(1)(a) are concerned, it is not necessary that the criminal offence believed by the worker to have been committed even exists, let alone has been breached. It is sufficient that the worker reasonably believes that a criminal offence has been committed: *Babula*. In that case the claimant reasonably believed that the subject of the disclosure had committed an offence of incitement to religious hatred, when there was no such offence at the time. For the same reason, to amount to a qualifying disclosure, it is not necessary that the worker spells out the precise criminal offence that they have in mind.

88. So far as breaches of a legal obligation under Section 43B(1)(b) are concerned, any legal obligation potentially suffices, including breach of an employment contract: *Parkins v Sodexo* [2002] IRLR 109]. Employment Tribunal cases have held that a wide range of legal obligations are potentially applicable. A belief that particular conduct amounts to discrimination is a *"breach of a legal obligation"*.

89. It is not necessary for the disclosure to allege actual or likely illegality or breach of a legal obligation if it is to be capable of qualifying for protection. However, whether the worker mentions criminality or illegality or health and safety in their disclosure, or whether it is obvious that they had these matters in mind are relevant evidential considerations in deciding what they believed and the reasonableness of what they believed. They are not an additional legal hurdle (*Twist DX Limited v Armes* UKEAT/0030/20/JOJ at paragraph 84-87). Where the breach of a legal obligation is not obvious, a Tribunal should identify the source of the legal obligation to which the claimant believed that the employer was subject, and how it had failed to comply with it. Merely believing that conduct 'was wrong' could be a belief that the employer had breached a moral or lesser obligation, which would be insufficient (*Eiger Securities LLP v Korshunova* [2017] ICR 561). In that case, the claimant complained to her line manager that it was wrong for him to trade from her computer, without identifying that he was the person trading rather than her and told him what her clients thought of this behaviour.

90. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, the disclosure in issue related to an occasion when the worker had raised a child safeguarding issue and claimed to have received an inadequate response. The tribunal held that this did not tend to show breach of a legal obligation, and this was upheld in the Court of Appeal. As the Court of Appeal noted, nothing in the Particulars of Claim or the witness statement indicated that the claimant had a particular legal obligation in mind. It was only later that her representative suggested a potential breach of the Children Act 2004 and the Education Act 2002.

91. Section 43B(1) also requires a claimant to have a reasonable belief that the disclosure was in the public interest. This requirement has two components – first a subjective belief, at the time, that that the disclosure was in the public interest; and secondly, that the belief was a reasonable one.

92. What amounts to a reasonable belief that disclosure was in the public interest element was considered by the Court of Appeal in *Chesterton Global Limited v Nurmohamed* [2018] ICR 731. The Court of Appeal considered that a disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests. Motive was irrelevant. What was required was that the worker reasonably believed disclosure was in the public interest in addition to his own personal interest. So long as workers reasonably believed that disclosures were in the public interest when making the disclosure, they could justify the public interest element by reference to factors that they did not have in mind at the time.

93. Underhill LJ, giving the leading judgment, refused to define "public interest" in a mechanistic way, based merely on whether it impacted anyone other than the claimant or whether it impacted those beyond the workforce. Rather a Tribunal would need to consider all the circumstances, although the following fourfold classification of relevant factors was potentially a *"useful tool"*:

    a. The numbers in the group whose interests the disclosure served – although numbers by themselves would often be an insufficient basis for establishing public interest;

    b. The nature and the extent of the interests affected – the more important the interest and the more serious the effect, the more likely that public interest is engaged;

    c. The nature of the wrongdoing – disclosure about deliberate wrongdoing is more likely to be regarded as in the public interest than inadvertent wrongdoing;

    d. The identity of the wrongdoer – the larger or more prominent the wrongdoer, the more likely that disclosure would be in the public interest.

94. Underhill LJ said that Tribunals should be cautious about concluding that the public interest requirement is satisfied in the context of a private workplace dispute merely from the numbers of others who share the same interest. In practice, the larger the number of individuals affected by a breach of the contract of employment, the more likely it is that other features of the situation will engage the public interest.

Protected disclosures

95. The alleged disclosures were made to the Claimant's employer. As a result, if the alleged disclosures are qualifying disclosures, then they will be protected disclosures (Section 43C Employment Rights Act 1996).

Detriment

96. In *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] IRLR 374 at paragraph 27, Sir Patrick Elias LJ summarised what in law amounts to a detriment in the context of a whistleblowing claim. He said this:

> 27. In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases. In *Derbyshire v St. Helens MBC* [2007] UKHL 16; [2007] ICR 841, paras. 67-68 Lord Neuberger described the position thus:
>
> > "67…. In that connection, Brightman LJ said in *Ministry of Defence v Jeremiah* [1980] ICR 13 at 31A that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".
> >
> > 68. That observation was cited with apparent approval by Lord Hoffmann in *Khan* [2001] ICR 1065, para 53. More recently it has been cited with approved in your Lordships' House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"."
>
> 28. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective.

Causation

97. Section 47B ERA 1996 is as follows:

> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act on the ground that the worker has made a protected disclosure.

98. Section 48 ERA 1996 is as follows:

> (1A) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1A), it is for the employer to show the ground on which any act or deliberate failure to act, was done.

99. The effect of these sections is that it is for the worker to prove, on the balance of probabilities that there was a protected disclosure; that there was a detriment; and that the employer subjected the claimant to the detriment. If so, then the burden shifts to the employer to show the ground on which the detrimental act was done: Section 48(2) ERA. If a Tribunal rejects the reason advanced by the employer, then it is not bound to accept the reason advanced by the worker, namely that it was on the ground of a protected disclosure: it is open to the Tribunal to find that the real reason for the detriment was a third reason.

100. The Tribunal must consider what, consciously or unconsciously, was the employer's motivation for the detrimental treatment. Causation will be established unless the protected disclosure played no part whatsoever in its acts or omissions: *Fecitt v NHS Manchester* [2012] ICR 372, CA. The result is that there will be a sufficient causal connection if a protected disclosure was one of several reasons for the detriment, even if it was not the predominant reason. It is enough if it was a material influence, in the sense of being more than a trivial influence. There is no need to consider how a hypothetical or real comparator would have been treated.

Automatically unfair dismissal

101. Section 103A provides as follows:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure"

102. Where an employee, as here, lacks the requisite two years' continuous service to claim ordinary unfair dismissal, he will acquire the burden of showing, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason (*Ross v Eddie Stobart Limited* EAT 0068/13).

Disability

103. The statutory definition of disability in Section 6 of the Equality Act 2010 is as follows:

> "A physical or mental impairment which has a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities."

104. The Tribunal must assess whether this definition is satisfied as at the date of the alleged discrimination, by reference to the evidence as to that point in time. The Tribunal is to deduce the extent of the impairment caused by the underlying condition, where possible, if the Claimant was not taking medication.

105. An impairment is long-term if it has lasted or is likely to last for at least 12 months. The phrase 'likely to last' means 'could well' last. An impairment is substantial if it is more than trivial. The focus is on what the Claimant cannot do, rather than on what he can do.

106. Paragraph 5 of schedule 1 to the Equality Act 2010 provides as follows:

> (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if:
>
> a. Measures are being taken to treat or correct it; and
> b. But for that, it would be likely to have that effect.
>
> (2) "Measures" includes, in particular, medical treatment ….

107. The Tribunal must have regard to the Secretary of State's Guidance on matters to be taken into account in determining questions relating to the definition of disability.

108. It is for the Claimant to prove, on the balance of probabilities, that he satisfies the definition of disability.

Direct disability discrimination

109. Section 13 of the Equality Act 2010 is worded as follows :

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

110. The Claimant seeks to compare himself against how a hypothetical non-disabled employee would have been treated, who was in all other respects in a comparable position to the Claimant.

111. The focus is on the mental processes of the person that took the decisions said to amount to discrimination, namely Mr Penny and Mr Bawden. The Tribunal should consider whether Mr Penny or Mr Bawden was consciously or unconsciously influenced to a significant (ie a non-trivial) extent by the Claimant's disability. Their motive is irrelevant.

Burden of proof

112. Section 136(2) of the Equality Act 2010 is worded as follows :

> (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.

113. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).

114. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that her treatment was in part the result of his nationality.

115. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 54). To shift the burden of proof a Claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between her disability and her treatment, in the absence of a non-discriminatory explanation.

116. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the Claimant's treatment.

Discrimination arising from disability

117. Section 15 Equality Act 2010 is worded as follows :

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

118. The first issue for the Tribunal to assess is whether the Claimant's dismissal was influenced to any significant extent by any consequences of the disability. This requires a focus on the reasoning in the mind of the alleged discriminator. The Tribunal needs to consider the conscious or unconscious thought processes of the alleged discriminator, keeping in mind that their actual motive in acting as they did is irrelevant.

119. In *York City Council v Grosset* [2018] ICR 1492, the Court of Appeal considered the extent of knowledge that was required under Section 15(1). In short, there is none. If there is a causal link between the consequences of the disability and the detrimental treatment, it is not necessary that the decision maker knew of that connection (see paragraph 39).

120. Section 15(2) provides a limited statutory defence. That is that there is no discrimination arising from disability if the Respondent shows that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability. However, as Sales LJ put it in *Grosset* "if the defendant does know that there is a disability, he would be wise to look into the matter more carefully before taking unfavourable action" (paragraph 47). By reference to an example at paragraph 5.9 of the EHRC Employment Code of Practice, he stated (at paragraph 51) that "it is not suggested that the employer has to be aware that the employee's loss of temper was due to her cancer, but only that the employer should be aware that she suffers from cancer (ie so that the employer cannot avail himself of the defence in subsection 15(2))".

121. If the detrimental treatment was influenced by any consequences of the disability, then it is for the Respondent to show, under Section 15(1)(b) on the balance of probabilities that the decision was justified. That requires that the Tribunal form its own assessment of whether the dismissal was a proportionate means of achieving a legitimate aim. This is a different analysis from the range of reasonable responses approach required when considering the unfair dismissal claim.

122. In assessing proportionality, the Tribunal must assess whether on a fair and detailed analysis of the working practices and business considerations involved, the decision was reasonably necessary in order to achieve the legitimate aim (*Hardys & Hansons Plc v Lax* [2005] ICR 1565). In *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160, Lord Justice Elias said (at paragraph 26):

> "An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment — say allowing him to work part-time — will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified."

123. The EHRC Employment Code of Practice states as follows (at para 5.21):

> "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."

Harassment

124. Section 26 of the Equality Act 2010 is worded as follows :

> (1) A person (A) harasses another (B) if-
>
> a. A engages in unwanted conduct related to a relevant protected characteristic, and

b. The conduct has the purpose or effect of –

i. Violating B's dignity, or
ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B

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

a. The perception of B;
b. The other circumstances of the case
c. Whether it is reasonable for the conduct to have that effect

125. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally (*Munchkins Restaurant Ltd v Karmazyn and others* EAT 0359/09). The Equality and Human Rights Commission : Code of Practice on Employment (2011) states as follows :

> 7.7. Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.
>
> 7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not meant that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

126. When considering whether a comment was related to a protected characteristic under Section 26 Equality Act 2010, this covers a wider category of conduct than conduct "because of a protected characteristic" under Section 13 Equality Act 2010. A broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (*Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester* [2018] UKEAT/0176/17).

127. In assessing whether the conduct met the proscribed threshold, Tribunals should not place too much weight on the timing of any objection (*Weeks v Newham College of Further Education* UKEAT/0630/11). Whether it was reasonable for the Claimant to regard treatment as amounting to treatment that violates her dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336). In that case the EAT said :

> "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended."

Failure to make reasonable adjustments

128. The Tribunal must assess whether the Respondent applied a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison to those employees not sharing his disability. If so, the duty to make reasonable adjustments is engaged. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

129. In order for the disadvantage suffered by the employee to be "substantial" it must be more than minor or trivial: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 21.

130. Paragraph 20 of Schedule 8 to the Equality Act 2010 is worded as follows:

> An employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know … that the employee has a disability and is likely to be placed at a disadvantage.

131. The burden of proof is on the Claimant to establish the existence of the provision, criterion or practice and to show that it placed him at a substantial disadvantage - see *Project Management Institute v Latif* [2007] IRLR 579 at paragraph 45. In other words, to establish that the duty to make reasonable adjustments has been engaged.

132. Thereafter the onus remains on the Claimant to identify the potential reasonable adjustments with a sufficient degree of specificity to enable the Respondent to address them evidentially and the Tribunal to consider the reasonableness of providing them. At the point where the duty to make reasonable adjustments has been engaged, and the Claimant has identified one or more potential reasonable adjustments, the burden of proof is reversed. The Respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved – *Latif* at paragraphs 53-54.

133. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 73.

134. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice. The Tribunal is required to have regard to this Code when considering disability discrimination claims.

Victimisation

135. Section 27 of the Equality Act 2010 is worded as follows:

> (1) A person victimises another person (B) if A subjects B to a detriment because:
> (a) B does a protected act; or

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

136. Under Section 27(2)(d) making an allegation (whether or not express) that A or another person has contravened the Equality Act is a protected act.

137. In order to succeed with a claim of victimisation, there must be a sufficient causal connection between a protected act and the alleged detriment. In the present case, the Respondent accepts that the Claimant did two protected acts, namely he complained of disability discrimination during the meetings on 27 January 2022 and 3 February 2022.

Detriment on grounds relating to union membership or activities

138. Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992, so far as is relevant, provides:

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of:

a. …

b. preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him from doing so.

ba preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so …

(2) In subsection (1) "an appropriate time" means-

a. a time outside the worker's working hours, or

b. a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services

and for this purpose "working hours" in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.

Entitlement to rest breaks

139. So far as is material, regulation 12 of the Working Time Regulations 1998 is worded as follows:

12(1) Where a worker's daily working time is more than six hours, he is entitled to a rest break.

12(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

140. Regulation 21(b) excludes the application of Regulation 12(1) "where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons, as may be the case for security guards and caretakers or security firms".

Time limits under the Equality Act

141. Section 123 Equality Act 2010 is worded as follows:

> **Time limits**
>
> (1) Subject to section140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

142. The three-month time limit runs from the date of the discriminatory act or discriminatory omission. In a case where the discriminatory omission is a failure to make reasonable adjustments, time runs from the date when, if the employer had been acting reasonably it would have made the reasonable adjustment (*Kingston Upon Hull City Council v Matuszowicz* [2009] ICR 1170). The Tribunal should have regard to the facts as they would reasonably have appeared to the Claimant, including what the Claimant had been told by the Respondent (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

143. In employment tribunal cases, the three-month statutory time limit for issuing claims is prescribed for good reason. Extending that time limit should be the exception, not the rule. The onus is on the Claimant in each case where an extension is sought to show why it would be just and equitable to extend the time limit (*Robertson v*

Bexley Community Centre [2003] IRLR 434 at paragraph 25). The Tribunal will consider all the circumstances, paying particular attention to the prejudice that will be caused to each party if the discretion to extend time is exercised or refused.

CONCLUSIONS

Protected disclosures (issue 1)

144. The Claimant alleges that he has made three sets of protected disclosures as set out in **issues 1.1.1 to 1.1.3**. We have rejected the Claimant's factual contention that he made verbal disclosures to Nicholas Penny on 25 October 2021 and 1 November 2021 about hygiene concerns in the hostel (**issue 1.1.1**); and that there were other verbal disclosures to Mr Penny from 20 October 2021 throughout December 2021 (**issue 1.1.2**).

145. We find that the only protected disclosure made was the disclosure contained in his email sent to the dedicated whistleblowing email address on 27 January 2012 (**issue 1.1.3**). It disclosed information which in his reasonable belief tended to show danger to the health of residents and staff; and which he reasonably believed was in the public interest for him to disclose. Given its wording, it also potentially amounted to a qualifying disclosure as a disclosure of breach of a legal obligation or as disclosure of deliberate concealment. Given the Respondent's concession that this was a protected disclosure, and in the absence of any specific questioning about these alternative routes to finding that the communication amounted to a protected disclosure, the Tribunal does not need to consider this further.

Automatic unfair dismissal (Section 103A ERA) (issue 1.6)

146. As the Claimant has less than two years' service, he has the burden of showing on the balance of probabilities that the reason for his dismissal was the protected disclosure made on 27 January 2022. The Tribunal does not accept he has discharged this burden of proof. There is no direct evidence that Mr Bawden was aware of the existence of the 27 January 2022 email, still less than he had seen the email by the time he decided to dismiss the Claimant. Whilst the Claimant referred in general terms during the hearings on 27 January 2022 and 3 February 2022 to whistleblowing about health and safety, he did not hand the email to Mr Bawden during either meeting. Nor do the minutes record him as saying he had emailed the dedicated whistleblowing email address. Therefore, there is no basis for thinking that Mr Bawden was influenced in his decision making by the Claimant's disclosures as contained in the 27 January 2022 email.

147. Further, the Tribunal accepts the evidence of Mr Bawden that the reason why he dismissed the Claimant was as set out in his dismissal email. He considered that the concerns with the Claimant's conduct were of a kind or degree to consider termination of his employment. They were so serious in their nature that they destroyed the employment relationship between him and the Respondent. The

failure to carry out the mandatory checks was considered to be gross misconduct and was the principal reason for his dismissal.

Protected disclosure detriment (Section 47B ERA) **(issue 2)**

148. The following detriments are alleged to have been carried out on the ground that the worker had previously made a protected disclosure:

2.1.1 Withholding building check sheets from the Claimant, in relation to building checks carried out by the Claimant's night and day staff colleagues. Requests were made as follows:

2.1.1.1 To Mr Penny on 4 January, 5 January (twice), 6 January 2022
2.1.1.2 To Mr Bawden on 19 and 20 January 2022

2.1.2 Fail to respond adequately when the Claimant asked for clarity regarding his entitlement to rest breaks on 7, 9, 13, 14 and 22 December 2021

2.1.3 Continue the Claimant's suspension beyond 26 November 2021.

149. All of these alleged detriments significantly predated the only protected disclosure. As a result, we do not find that the protected disclosure made on 27 January 2022 had any influence on these alleged earlier detriments. The protected disclosure detriment complaints must therefore fail.

Disability (Section 6 EqA) **(issue 3)**

150. We accept that the Claimant was a disabled person throughout his employment with the Respondent. He had a physical impairment which was long term and had a substantial adverse effect on his normal day to day activities. He had experienced knee symptoms since January 2021 that had prevented him from working as a kitchen porter for several months. Those knee symptoms were serious enough that the Claimant required an ACL reconstruction operation in July 2021. He needed post operative physiotherapy which continued into October 2021 and beyond. He continued to be under the care of an orthopaedic surgeon for ongoing assessment until at least early February 2022. He had not returned from sick leave to his kitchen porter role until around December 2021, and thereafter resumed on a phased return to work basis for around a month.

151. In assessing adverse impact on normal day-to-day activities, we are to deduce the impact without any treatment, including physiotherapy treatment. Assessed in that way, by the time he started work with the Respondent on 11 October 2021 his symptoms were still at a level that had a non-trivial impact on his normal day-to-day activities. Although by that point they had not lasted for at least 12 months, they could well last for at least 12 months at a sufficiently serious level to cross the statutory threshold. They had already lasted for nine months; he was still undergoing physiotherapy; and was still under the care of his consultant surgeon.

Treatment continued thereafter with continued involvement of the orthopaedic surgeon until at least January 2022.

Knowledge of disability **(issue 3.3.4)**

152. We find that the Respondent did not knew that the Claimant was a disabled person at any point until he referred to disability discrimination during the first of the two probationary review hearings on 27 January 2022. Before the start of his employment, when completing pre-employment paperwork, the Claimant did not indicate he was disabled. We do not accept that he told HR before he started work of the extent of any symptoms, given he was recording on the induction forms that he did not have any disability. Nor did he tell Mr Bawden in August 2021 about the ongoing effect of his surgery, as the Claimant alleges in the List of Issues. This was not a contention made in the Claimant's evidence; and even if it had been, we would have preferred the contrary evidence of Mr Bawden that he was not aware of any ongoing restriction on the Claimant's mobility before the Claimant started work. The occupational health assessment on 6 September 2021 indicated that he was fit for the post and did not suggest he needed any adjustments.

153. For whatever reason, the Claimant continued to downplay his symptoms significantly once his employment had started. The Claimant did not mention any knee symptoms to Mr Penny during his induction or at any point until the disciplinary investigation. During various telephone calls as part of that investigation, he had told Mr Penny he had been able to lift a bicycle up six flights of stairs. Whilst his email of 26 November 2021 referred to his knee injury and consequent treatment, it described the impact on his work duties in trivial terms – "My knee felt a little weak around this time and I did not always feel comfortable walking down stairs". It described the current position as follows - "my knee now feels as strong as ever". In a further phone call on 29 November 2021, he said that his mobility had been impacted by carrying the bicycle but did not specify to what extent.

154. The outcome of the further occupational health assessment carried out on 29 December 2021, which lead to an occupational health report being seen by Mr Penny on 11 January 2022, was that the Claimant did not report any ongoing issues with his left knee and was fit for full duties.

155. Given that both occupational health assessments concluded that he was fit for all duties; and given what he was writing in his email of 26 November 2021; we do not find that the Respondent ought to have known that the extent of his symptoms had reached the threshold to amount to a disability before the hearing on 3 February 2022. We reach this conclusion despite the medical evidence sent to the Respondent on 26 November 2021 (emailed to Mr Penny) and on 29 December 2021 (emailed to Mr Bawden). That evidence needs to be viewed in the context of the purpose for which it was being provided, namely specific mitigation for events during the night shift on 7/8 November 2021; and in the context of the way it was described in the covering email of 26 November 2021. It also needs to be viewed in

the context of the subsequent occupational health report confirming that the Claimant was fit for all duties.

156. We are aware that an employer must carry out its own assessment rather than rely on the conclusions reached by occupational health as to disability status (*Gallup v Newport City Council* [2013] EWCA Civ 1583*).* However, there was nothing in what occupational health advised about the extent of the Claimant's symptoms that could potentially indicate to the Respondent that the Claimant may be disabled. Nor was there anything identified apparently requiring further questioning or medical investigation.

157. We have found that the Claimant told the Respondent he was disabled during the first probationary review hearing on 27 January 2022 and the resumed hearing on 3 February 2022. At this point we accept that the Respondent knew of the Claimant's disability or ought to have known of that disability. However, given the oblique way in which the issue was raised by the Claimant, according to the contemporaneous notes of the meeting, we do not accept that the Respondent knew the extent of any substantial disadvantage suffered by the Claimant in coping with particular work tasks as a result. Nor was it reasonable to expect the Respondent to carry out its own investigations into those disadvantages, at that point, save to the extent that it was relevant to the specific allegations being considered at the probationary review meeting.

158. Given the Respondent's lack of knowledge of the Claimant's disability until 27 January 2022, this has implications for the Claimant's claims for direct disability discrimination (section 13 Equality Act 2010); harassment related to disability (section 26 Equality Act 2010); and failure to make reasonable adjustments (section 20 Equality Act 2010). However, in case we are wrong in relation to our finding as to the date of knowledge, we address each of those claims on the assumption that the Respondent did know of the Claimant's disability or ought to have known of the Claimant's disability throughout the Claimant's employment with the Respondent.

***Direct disability discrimination (Section 13 EqA)* (issue 4)**

159. The only remaining allegations of direct disability discrimination are two – that the Respondent failed to refer to medical documentation or take it into account in the investigation report carried out by Mr Penny as investigating offer and sent to the parties on 23 December 2021 (**issue 4.1.5**); and the Claimant's dismissal (**issue 4.1.2**).

160. The Claimant's direct disability discrimination claim relies on a comparison with how a non-disabled person would have been treated whose situation was in all other respects the same. The Claimant compares himself to the treatment of Nicholas Penny, who is said to be an actual comparator. But Mr Penny was not in an analogous position. He was not facing an investigation into his conduct, nor was he seeking to rely on medical factors to excuse his behaviour. He was not still in his probationary period or facing a probationary review hearing whose outcome could

determine whether he kept his job. He is therefore not an actual comparator under Section 13 EqA.

161. Therefore, the Claimant must compare his treatment with that of a hypothetical non-disabled Night Worker who was also in his probationary period and who was facing an investigation and subsequent probationary review hearing following equivalent allegations from witnesses who were present on the same shift.

Failing to refer to medical records in investigation report or take them into account **(issue 4.1.5)**

162. We do not find that the Claimant has proved facts from which the Tribunal could infer in the absence of a non-discriminatory explanation that any part of the reason for either the contents or the format of the investigatory report was influenced by the Claimant's disability. The report did refer to the Claimant's explanation that he had mobility issues arising from a previous operation on his knee. Although the report did not exhibit any medical evidence, we have found that Mr Penny had this evidence in mind. Mr Penny was not obliged to exhibit every medical record that had been supplied by the Claimant.

163. Even assuming (contrary to our conclusion above) that Mr Penny did know of the Claimant's disability, there is no proper evidential basis for inferring that Mr Penny could have been influenced to treat the Claimant unfavourably in the conclusions or format of his investigation report by such medical information as he had been sent by the Claimant. Their absence from any appendix to the report does not provide a sufficient evidential basis for potentially drawing such an inference.

164. As a result, the burden of proof does not switch to the Respondent. Even if it had, we would have accepted the non-discriminatory explanation put forward by Mr Penny as the entirety of his reasons for preparing his report as he did. This was that he considered there was a case to answer, notwithstanding the Claimant's alleged mitigation. He had specifically stated in his report conclusions that the Claimant mitigation was inconsistent with the previous occupational health advice; and he had noted the Claimant's failure to raise any concerns about his mobility with him.

Dismissal **(issue 4.1.3)**

165. In relation to Mr Bawden's dismissal decision, we do not find that the Claimant has proved facts from which an inference could be made that the decision was influenced by the Claimant's disability. Although the Claimant had sent medical records to Mr Bawden, the notes of the probation review hearings on 27 January 2022 and 3 February 2022 do not indicate he was potentially influenced in deciding the outcome by the content of those records. The Claimant does not point to any other evidential features which are capable of leading to an inference of disability discrimination.

166. Even if the burden of proof had shifted to the Respondent to disprove any influence from the Claimant's disability, we find that the entire reason for this decision was as set out in the probationary review outcome email. No part of the decision was influenced consciously or unconsciously by his knowledge of the Claimant's health condition.

Harassment related to disability (Section 26(1) EqA) **(issue 5)**

Issue 5.1.1 – Taking five hours in total to conclude the probationary review hearing spread over 27 January and 3 February 2022

167. The total combined length of both hearings was around five hours. Comfort breaks were taken after regular intervals. The Claimant had a union representative present throughout. It is clear from the hearing notes that the Claimant did not complain about the length of the hearing at any point. The Tribunal does not find that the length of the combined hearings amounted to unwanted conduct. Nor was it conduct that violated the Claimant's dignity or had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. Furthermore, we do not find that the reason for the length of the hearing was related to the Claimant's disability. There are no facts from which the Tribunal could potentially draw such an inference in the absence of a non-discriminatory explanation so as to switch the burden to the Respondent. In any event, the Respondent has discharged the burden of proof. Mr Bawden did not know that the Claimant was disabled until the second hearing. The entire reason for the length of the two hearings was the nature of the allegations being discussed, coupled with the extent of the responses from the Claimant and from his trade union representative.

Issue 5.1.2 – Withholding of medical documentation from the original investigation report by Mr Penny and failing to amend the report when the medical documentation was resent on 29 December 2021

168. Mr Penny did not exhibit all the medical documentation that the Claimant had provided to him to his original investigation report. In the body of his report, he did refer to the point that the Claimant was making in drawing his attention to this evidence – namely that the Claimant was saying he had mobility issues. He did not deliberately ignore this evidence, given that he had asked the Claimant to provide medical evidence at the point when the Claimant had first raised the issue of his mobility on 25 November 2021.

169. Even if the absence of any reference to his knee symptoms in the investigation report was unwanted treatment, the Tribunal does not find that this absence violated his dignity or had the purpose or effect of creating a proscribed environment. The Tribunal has particular regard to the Claimant's repeated downplaying of the significance of his ongoing symptoms – in the pre-employment occupational health report, in his email dated 26 November 2021 and in what he told the occupational health practitioner on 29 December 2021, which led to the

occupational health report dated 11 January 2022. That indicates that the Claimant was not pressing for details of his health to be widely known.

170. Furthermore, the Tribunal does not find that the treatment was related to disability. The burden of proof does not pass to the Respondent because there are no facts from which the Tribunal could draw such an inference. The mere absence of the medical records in an appendix to the report is insufficient. In any event, we accept the Claimant's non-discriminatory explanation, namely that the evidence was not considered of sufficient significance given the conclusions of the pre-employment occupational health report and the absence of any reference by the Claimant to such symptoms during his first three weeks in post.

Issue 5.1.3 – Conduct of the hearing on 3 February 2022 and specifically a comment by Mr Bawden suggesting that the Claimant was not being honest in relation to his medical position; and alleged aggressive verbal attacks from Mr Penny on the Claimant's disability mitigation

171. According to the notes taken recording what was said during the probation review meeting, at one point Mr Bawden stated that the Claimant was "not being open and honest". This comment represented his genuine view of the Claimant's presentation, given a conversation he recalled having with the Claimant before the start of employment, as recorded in the hearing notes. His view had been fortified by the apparent absence of significant ongoing knee symptoms in what was said on two occasions to occupational health, in what the Claimant wrote in the email on 26 November 2021, and in the absence of any verbal comments by the Claimant whilst he was working that he was restricted by ongoing knee symptoms.

172. The Tribunal accepts that the comment was unwanted. It does not accept that it was sufficiently serious to cross the threshold required by Section 26(1)(b) EqA. The notes do not record any particular reaction from the Claimant at the time the comment was made. In the context of an apparent lack of candour from the Claimant, it was a reasonable comment to make during a probationary review hearing and was or should have been viewed as such.

173. Mr Bawden's comment was not related to the Claimant's disability. Even after five hours of a probationary review hearing, and notwithstanding the medical evidence already provided, the Claimant had not identified his alleged disability in sufficiently clear terms, given the apparently unchallenged findings of the occupational health assessments that the Claimant was able to do all his duties.

174. The Tribunal does not find that Mr Penny made aggressive verbal attacks during the probationary review hearing about the Claimant's disability mitigation. Therefore, this aspect of this issue is factually misconceived.

Issue 5.1.6 – Mr Bawden suggesting that mitigation concerning the Claimant's state of health 'does not matter as was presented after the event'

175. At this point in the probationary review hearing, there was a discussion about whether the Claimant was at fault for not carrying out mandatory building patrols. Mr Bawden was making the point that the Claimant's medical mitigation for failing to do so was not persuasive in circumstances where the Claimant had not previously alerted the Respondent to any medical restrictions on the duties he was able to perform.

176. Even if this comment was 'unwanted' the Tribunal does not consider that this crosses the threshold required by Section 26(1)(b) EqA. It did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Mr Bawden was sharing his current thinking about the relevance of the medical mitigation and giving the Claimant an opportunity to persuade him to see the medical evidence as providing stronger mitigation. Furthermore, the comment was not related to the Claimant's disability. Rather it was a comment made because the Claimant had never previously alerted the Respondent to any medical restrictions on what he was able to do at work.

Issue 5.1.7 – Comments from Mr Lally in the appeal outcome letter, specifically that 'the medical documents were sent after the hearing'

177. The Tribunal has set out its factual finding as to the particular comment included in the appeal outcome letter. It was a record of what he had been told by Mr Bawden. The Claimant's formulation of the comment does not correspond to the wording in the appeal outcome letter. The list of issues characterises this as "further offensive and hostile comments from James Lally re disability". This was merely a record of what Mr Bawden had told Mr Lally. Even if the comment was unwanted, the Tribunal does not consider that this comment had the purpose or the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or offensive environment for the Claimant. At one point during the Final Hearing, the Claimant indicated that he did not intend to ask any questions of Mr Lally. When it came to Mr Lally's turn to give evidence, he was in fact questioned by the Claimant but he did not challenge Mr Lally on this wording in cross examination.

178. Furthermore, we do not consider that the inclusion of the relevant sentences of the appeal outcome letter were related to disability. They were included because this was what Mr Lally had been told by Mr Bawden.

Discrimination arising from disability: (Section 15 EqA) **(issue 6)**

179. The only allegation of unfavourable treatment arising in consequence of disability is expressed in the following terms **(issue 6.1)**:

> "Failure to lift suspension and discontinue investigation after receipt of medical documentation sent on 29 December 2021 despite [Mr] Bawden having knowledge of disability"

180. It is said that the something arising in consequence of disability is twofold – firstly the submission of medical documentation to Mr Bawden on 29 December 2021 and secondly the fact that the Claimant was nervous walking downstairs **(issue 6.2)**.

181. The continuation of the suspension was not a consequence of the medical documentation sent in by the Claimant on 29 December 2021. Rather it was the result of the Respondent's standard practice that disciplinary suspensions would continue after an investigation had been completed and until the end of the disciplinary hearing if the investigation established that there was a case to answer. Furthermore, the medical documentation did not disprove the allegations that were to be considered at the probationary review hearing. It did not exonerate the Claimant. Rather it potentially provided some mitigation which might reduce any sanction imposed if the allegations were upheld. Therefore, this medical documentation did not require the Respondent to discontinue the investigation.

182. Whilst the Claimant's injury may have made him nervous walking downstairs, that nervousness did not cause the unfavourable treatment advanced by the Claimant – namely the "failure to lift the suspension and discontinue the investigation".

183. The Respondent contends that the continuation of the suspension was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon are:

(1) Ensuring appropriate standards of behaviour at work
(2) Ensuring safety and wellbeing of vulnerable clients
(3) Enforcing disciplinary standards and policy.

184. The Tribunal accepts that these were the Respondent's aims and that they were legitimate aims. In assessing proportionality, the Tribunal must carefully assess the potential impact on the Claimant and weigh that against the impact on the Respondent's business if the unfavourable treatment continues. The Tribunal acknowledges that the Claimant may have been frustrated and anxious by the ongoing suspension and disciplinary investigation. It gives weight to those considerations. However, it considers that the combined need for the Claimant to pursue these three aims is a weightier factor, which justifies the continuation of the suspension and the investigation. The Claimant was facing credible criticisms from clients for the way he had conducted himself on the relevant shift. That raised legitimate concerns about the Claimant's competence raised doubts about the safety of vulnerable clients when the Claimant was on duty. The Respondent owed a duty of care to those vulnerable clients it was accommodating in the hostel. Those concerns and doubts could not be resolved until the process had been concluded. It was appropriate to treat the Claimant consistently so far as disciplinary suspension is concerned with how the Respondent had treated other employees whose conduct was being investigated. Therefore, the Respondent has shown that the ongoing suspension and investigation was justified.

185. In any event, as already found, the Respondent did not know, and could not reasonably have been expected to know that the Claimant had a condition amounting to a disability.

Failure to make reasonable adjustments (Section 20 EqA) **(issue 7)**

Provision, criterion or practice

186. By the end of the hearing, the Claimant was alleging that there were three provisions, criteria or practices ("pcps") which placed him at a substantial disadvantage as result of his medical condition.

187. The first was a "lone working policy". This is understood to be a policy that allows Night Workers to work alone at the hostel. We accept that the Respondent had such a policy and that this was therefore a provision criteria or practice (pcp).

188. The second alleged PCP is "operating a 'one strike and you're out' disciplinary policy in relation to the incident giving rise to the investigation". The Tribunal does not accept that the Respondent had such a policy, whether in general or in the specific situation facing the Claimant. The Claimant has not proved that the Respondent had a policy that equivalent misconduct would always led to dismissal for a first offence. Therefore, this allegation fails on the facts.

189. The third alleged PCP is "requiring the Claimant and similar workers to carry heavy objects (such as bicycles) up six flights of stairs alone". The Tribunal does not accept that this was a practice at the Respondent. The Claimant was not required to carry a bicycle up any stairs. He was required to ensure that the bicycle was not blocking any fire exits or communal areas. But he could have done this by moving the bicycle to the area in the garden where it could have been stored. There is no evidence that there was a general policy that Night Workers in the Claimant's position had to carry heavy objects. Therefore, this allegation fails on the facts.

Putting the Claimant at a substantial disadvantage

190. The Claimant has not sufficiently established the extent to which the lone worker policy put the Claimant at a substantial disadvantage in comparison to workers who are not disabled, given any knee symptoms. The Claimant's own contemporaneous explanation was vague, restricted to his symptoms on the shift of the 7/8 November 2021 and did not suggest that there was a significant problem:

> "As far as I can recall, my knee felt a little weak around this time and I did not always feel comfortable walking down stairs"

191. He inferred that as a result, he chose not to carry out the building patrols to the full extent expected. The previous shift, he was apparently able to carry a bicycle up six flights of stairs the previous shift.

Actual/Constructive knowledge of substantial disadvantage

192. In any event, we conclude that the Respondent did not know at any point before the Claimant's dismissal, nor ought it to have known, that the lone worker policy was likely to place the Claimant at substantial disadvantage. It did not know that the Claimant was disabled until 27 January 2022 and even then it was not clear to the Respondent, nor ought it to have been, what difficulties this would have caused the Claimant. The clear advice from occupational health, received on 11 January 2022 was that the Claimant was fit for all duties.

Reasonable adjustments

193. So far as the alleged reasonable adjustments are concerned, all but the last concern changes to the nature of the Claimant's duties in his Night Worker role. Even if (contrary to our finding) the Respondent did know or ought to have known that the Claimant's knee symptoms placed him at a substantial disadvantage in relation to his work duties, it was not reasonable to expect the Respondent to suggest changes whilst he was still suspended as part of the probationary review investigation. In the event, he was dismissed. Therefore the Respondent did not need to consider the practicalities of his return to work.

194. The failure to make reasonable adjustments claim is therefore not well founded.

Victimisation (Section 27 EqA) **(issue 8)**

195. It is conceded by the Respondent that the Claimant complained of disability discrimination in the hearings on 27 January and 3 February 2022 and that this amounted to a protected act. We do not find that there were any earlier allegations of disability discrimination – either on 26 November 2021 or 29 December 2021 as the Claimant alleges. Forwarding medical evidence as mitigation to be taken into account as part of a disciplinary process is not an express or implied allegation of disability discrimination.

196. In addition, whilst the decision to contact ACAS to start Early Conciliation on 4 February 2022 was a protected act, there is no evidence that this protected act had come to the attention of either Mr Penny or Mr Bawden before the last of the alleged detriments said to have occurred because of the alleged protected acts. Therefore, the issue for the Tribunal to consider is whether any of the allegedly detrimental treatments listed in paragraph 8.2 of the List of Issues occurred because of the references made to disability discrimination in either of the probationary review hearings. We do not consider that they did.

197. Our conclusions in relation to each of the alleged detrimental treatments are as follows:

    a. *Ongoing disciplinary investigation and the dismissal itself* – we are satisfied that no part of the reason for the ongoing disciplinary investigation or the subsequent dismissal was as a result of references to disability discrimination in

the probationary review hearings. The disciplinary investigation had started before any allegations of discrimination had been made. It was appropriate for that investigation to continue until there was an outcome following the conclusion of the probationary review hearing and an outcome letter had been prepared. The outcome was fully supported by the evidence gathered in the course of the investigation and that was the entire basis on which the Claimant was dismissed.

b. *Accuse Claimant of not conducting a building check when this was an accusation which could have been made against others.* This accusation was made in the investigation outcome report which was sent to the Claimant on 23 December 2021. Accordingly, it predates any protected act and so cannot have been caused by it.

c. *Deliberate omission of material facts and documents (medical evidence and building check sheets completed by others) throughout investigative process.* The Claimant was provided with all the building check sheets for the dates requested that had been filed by other day and night staff. It was therefore not omitted. Medical evidence provided by the Claimant was taken into account by Mr Bawden, who described it as "plausible mitigation".

d. *Matthew Bawden 'goads' Claimant in hearing 'submit it to court then – you sound like you are threatening us*'. We do not find that this was said in either hearing. It is not recorded in the typed notes of the hearing. To the extent that the Claimant bases this factual assertion on his covert recording of the meeting, that has not been introduced into evidence.

e. *Refusing to answer questions from the Claimant and interjecting by Matthew Bawden and Nicholas Penny within the hearing – to deflect questions from the Claimant regarding the Claimant's concerns as to the investigation*. We do not accept the Claimant's characterisation of how the hearing was conducted. At times, the hearing was a tense one, as the feelings were strong on both sides. We accept the evidence from Mr Penny and Mr Bawden that the hearing was conducted in an appropriate manner. As a result, the allegation is factually misconceived.

f. *Failed to investigate the grievance raised verbally on 3 February 2022 and in writing on 8 February 2022*. We accept that the Claimant asked for the minutes of the probationary review hearing on 3 February 2022 to be treated as a grievance. As the minutes record, Mr Bawden responded that he could raise a grievance. We interpret that response as Mr Bawden saying that he could submit a written grievance. His email of 8 February 2022 did not clearly identify the grievance he intended to bring, as Ms Malcolmson said in her response. The reason why it was not taken any further had nothing to do with allegations of disability discrimination. Rather it was because the nature of the grievance was not sufficiently clear.

g. *Continuing with appeal process and concluding it with an outcome letter after claimant had withdrawn from the appeal process and did not attend the hearing was an act of victimisation in retaliation for the Claimant issuing proceedings*. We find that the Claimant had not formally withdrawn his appeal. He had merely informed the Respondent that we would not be attending the appeal hearing. In those circumstances, it was appropriate for the process to continue to its conclusion. The decision to do so was not taken because the Claimant had made allegations of disability discrimination.

Detriment short of dismissal on grounds relating to union membership or activities (Section 146 TULRCA 1992) **(issue 9)**

198. The Claimant was a member of a trade union. He was also a recognised union official, at least in relation to his other employment with Royal Marsden NHS Trust. The one respect in which he argues he has suffered detriment on grounds relating to union membership or activities is that the "Respondent continually failed to fully reply to requests for work related documentation during the period from around 5 May to 28 May 2022 thus preventing the Claimant from preparing for the appeal".

199. We have carefully considered the Claimant's requests and the Respondent's responses between these dates. We find that Mr Lally's responses were appropriate, proportionate to the nature of the appeal and timely. He did make a reasonable attempt to provide the Claimant with answers to the questions initially posed. He reasonably concluded that further queries could be raised during the appeal hearing.

200. In any event, we note the Claimant must show that the sole or the main purpose of the allegedly detrimental treatment must be to prevent or deter him from taking part in trade union activities or making use of trade union services. Whilst the Claimant's email of 11 May 2022 does refer to his role as a trade union representative, there is no basis for inferring that any part of the reason for Mr Lally's subsequent responses was related to his union membership or activities, still less that this was the sole or the main purpose for this treatment. Mr Lally had initially agreed to postpone the appeal hearing because the Claimant's trade union representative was not available on the original date.

Failure to provide rest breaks **(issue 10)**

201. We find that the Claimant's role was a special case under Regulation 21(b) of the Working Time Regulations 1998. The Claimant was engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons. Therefore, the Claimant did not have a statutory right to a rest break under the Working Time Regulations 1998. However, we accept the evidence of the Respondent that he was permitted to take breaks during a night shift, so long as he was available to attend to any urgent requests for assistance. In recognition of this, he was paid for all time spent between the start and the end of the shift.

Application of time limits **(issue 11)**

202. Had there been merit in any of the claims advanced under the Equality Act, we would not have held that they were out of time as there is no evidence that any short delay in bringing the proceedings has caused any prejudice to the Respondent. Therefore we would have extended time for the Claimant to bring his claims on the basis it was just and equitable to do so.

Employment Judge Gardiner
Dated: 13 February 2023

APPENDIX – FINAL LIST OF ISSUES

Any reference to paragraphs is in relation to the Case Management Order of Employment Judge Shore dated 26 September 2022.

1. Public interest disclosure claim/s

1.1 What did the Claimant say or write?

1.1.1. The Claimant alleges he made verbal disclosures to Nicholas Penny of the Respondent on 25th October 2021 and 1st November 2021 that the hostel was filthy, the bins were not emptied, sinks were blocked, there was general filth and a bad stench [para 54]

[The Respondent does not accept any disclosures were made to Nicholas Penny]

1.1.2 The Claimant alleges he made verbal disclosures to Nicholas Penny "from 20 October 2021 throughout December till dismissal regarding health and safety, breaches of the Working Time Regulations 1998 and failure to follow Covid legislation and guidance". [para 57]

[The Respondent does not accept any disclosures were made to Nicholas Penny]

1.1.3 The Claimant alleges he provided details to the Respondent of health and safety concerns on 27 January 2022 by email.

[The Respondent accepts the Claimant made a disclosure of information by email on 27 January 2022and that this was a protected disclosure]

1.2 In any or all of these, was information disclosed which in the Claimant's reasonable belief tended to show that:

1.2.1 The health or safety of any individual had been put at risk?

1.3 If so, did the Claimant reasonably believe that the disclosure was made in the public-interest? The Claimant relies on the following as going to show the reasonable belief:

1.3.1 Pattern of failures running through the hostel - basic and blatant Health and Safety failures - putting staff and residents at risk. Please see disclosure document 27.01.2021

1.4 If so, was that disclosure made to:
1.4.1 the employer

[It is accepted that the disclosure of 27th January 2022 was made to the Claimant's employer, and that any disclosures made to Nick Penny were made to the Claimant's employer]

1.5 [deleted]

Unfair dismissal complaints

1.6 Was the making of any proven protected disclosure the principal reason for the dismissal?

1.6.1 Did the Claimant have at least two year's continuous employment?

(If not, the burden is on the Claimant to show jurisdiction and therefore to prove that the reason or if more than one the principal reason for the dismissal was the protected disclosure(s))

1.6.2 Has the Claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?

1.6.3 What was the principal reason for the dismissal?

1.6.4 Has the Respondent proved its reason for the dismissal, namely conduct?

1.6.5 If not, does the tribunal accept the reason put forward by the Claimant or does it decide that there was a different reason for the dismissal?

2 Protected disclosure detriment

2.1 Did the Respondent do the following things:

2.1.1 Withhold building check sheets from the Claimant, in relation to building checks carried out by the Claimant's night and day staff colleagues. Requests were made as follows:

2.1.1.1 To Mr Penny on 4 January, 5 January (twice), 6 January 2022

2.1.1.2 To Mr Bawden on 19 and 20 January 2022

2.1.2 Fail to respond adequately when the Claimant asked for clarity regarding his entitlement to rest breaks on 7, 9, 13, 14 and 22 December 2021

2.1.3 Continue the Claimant's suspension beyond 26 November 2021

2.2 By doing so, did it subject the Claimant to a detriment?

2.3 If so, was it on the ground that he made a protected disclosure?

3 Disability

3.1 Did the Claimant have a physical or mental impairment at the material time?

[The Respondent does not accept that the Claimant had a disability at the relevant time] The Respondent does not accept that the effects of the Claimant's knee injury were 'substantial', and does not accept that the Claimant's knee injury was not long term at material time.

3.2 What is the alleged physical or mental impairment?

[The Claimant is relying upon an injury to his knee Claimant sustained ACL and meniscus injury in January 2021 - ACL and meniscus key-hole surgery performed 14 July 2021]

3.3 Did the alleged impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

3.3.1 If so, was that effect long term? In particular, when did it start and has it lasted for at least 12 months?

3.3.2 Is or was the impairment likely to have lasted at least 12 months or the rest of the Claimant's life, if less than 12 months?

3.3.3 Were any measures taken to treat or correct the impairment? But for those measures would the impairment have been likely to have had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities***?***

3.3.4 Did the Respondent have knowledge of the Claimant's alleged disability? If so, when?

[The Respondent denies having knowledge of the Claimant's knee injury until disclosed after the Claimant was suspended and during the investigation process on or around 25 November 2021]

The Claimant contends he informed HR personnel during seven-month recruitment of surgery waiting on NHS waiting list - surgery performed 14 July 2021

Claimant alleges completing Occupational Health form confirming injury and operation in July 2021 and effects of physical impairment

Claimant alleges speaking to M Bawden in August 2021 about effect of surgery before taking up post in October 2021 (confirmed in minutes dated 03 February 2022).

Clamant had provided medical disclosure and statement to respondent pre-employment and verbal disclosures with Santina Zavarise

4 Section 13: Direct discrimination on grounds of disability

4.1.1 Did the Respondent subject the Claimant to the following treatment falling within section 39 Equality Act, namely:

4.1.2 Dismissal of the Claimant on 10th February 2022;

4.1.3 [withdrawn]

4.1.4 Continuation of investigation from 26 November 2021 until dismissal despite the Respondent being aware of the Claimant's condition; *(NOTE: Withdrawn by Claimant during hearing on 1 February 2022)*

4.1.5 Fail to refer to Medical documentation or take it into account in the investigation report by
Investigating Officer on 23 December 2021;

4.2 Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant cites Nicholas Penny as a comparator - or any day or night worker.

4.3 If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

4.4 If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

5. Harassment related to disability (Equality Act 2010 section 26)

5.1 Did the Respondent do the following things:

5.1.1 take five hours to conclude allegations related to disability [Claimant is referring to the probationary hearings on 27th January and 3rd February 2022]

5.1.2 with-holding of medical documentation from original investigation report by N Penny and failing to amend report when the medical documentation was resent on 29 Dec 2021 to Mr Bawden.

5.1.3 continual harassment related to disability in hearings on 03/02/22. Mr Bawden stated Claimant was 'dishonest 're disability. Mr Penny made aggressive verbal attacks on disability mitigation.

5.1.4 [incorporated into 5.1.3]

5.1.5 [Incorporated into 5.1.3]

5.1.6 mitigation re disability 'does not matter as was presented after the event' – MB

5.1.7 further offensive and hostile comments from James Lally re disability in the written outcome to the appeal, specifically that 'the medical documents were sent after the hearing'. This was said as part of the outcome to an appeal that the claimant withdrew from to prevent further harassment

5.1.8 decision to proceed with disciplinary investigation after C submitted medical evidence on 26 November 2021 and 29 December 2021 *(NOTE: Withdrawn by Claimant during hearing on 1 February 2022)*

5.2 If so, was that unwanted conduct?

5.3 Did it relate to disability?

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

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

6 Section 15: Discrimination arising from disability

6.1 The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 Equality Act is:

6.1.1 Failure to lift suspension and discontinue investigation after receipt of medical documentation sent on 29 December 2021 despite Bawden having knowledge of disability

6.1.2 [incorporated into 6.1.1]

6.1.3 [Incorporated into 6.1.1]

6.2 Can the Claimant prove that the Respondent treated him as set out in paragraph 5.1 above because of the "something arising" in consequence of the disability? Namely: the submission of medical documentation to Mr Bawden on 29 December 2021, and the fact that the Claimant was nervous walking down stairs

6.3 Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? Namely:

6.3.8 Ensuring appropriate standards of behaviour at work

6.3.9 Ensuring appropriate safety and wellbeing of vulnerable clients

6.3.10 Enforcing disciplinary standards and policy

6.4 Alternatively, can the Respondent show that it did not know, and could not reasonably have been expected to know, that the Claimant had a condition amounting to a disability prior to 25 November 2021?

7 Section 20: Failure to make reasonable adjustments

7.1 Did the Respondent apply the following provisions, criterions or practices ("PCPs") namely:

7.1.1 operating a lone working policy (30 - 7 November 2021)

7.1.2 operating a "one strike and you're out" disciplinary policy in relation to the incident giving rise to the investigation (8 November 2021)

7.1.3 requiring the Claimant and similar workers to carry heavy objects (such as bicycles) up 6 flights of stairs alone (implemented for C on 6/7 November 2022)

7.1.4 [withdrawn]

7.1.5 [Incorporated into 7.1.2]

7.2 Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

7.2.1 As a lone worker, the Claimant was expected to carry heavy bicycle up 6 flights of stairs at 3am - exacerbating existing disability

7.3 Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant asserts the adjustments required as follows The Claimant says they should have been put in place from 26 November 2021 onwards:

7.3.1 Non-slip on stairs to prevent severe injuries for staff and residents

7.3.2 ensure safe and clean place of work

7.3.3 allocating certain duties to another worker or having a clear discussion and agreement if required

7.3.4 conducting a physical risk assessment of the building with workers/employees

7.3.5 employ a cleaner

7.3.6 provide manual lifting training - in particular as claimant required to lift bicycle by himself up 6 flights of stairs

7.3.7 providing 'double-cover' as agreed in recruitment and in employment contract

7.3.8 to discuss time off for physiotherapy and rehabilitation - if reasonable

7.3.9 on-site walking aids to be available if and when required

7.3.10 ensure adequate rest-breaks as per contract

7.3.11 raise trigger absence levels for staff with disability

7.3.12 failure to take into account personal circumstances in disciplinary process.

[The Respondent referred the Claimant to Occupational Health on becoming aware of the Claimant's injury to his knee in November 2021 during the investigation process. The Claimant did not return to work after the report was provided. Had the Claimant returned to work, the Respondent would have taken steps to avoid disadvantage to the Claimant in accordance with the Occupational Health report].

7.4 Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

[The Respondent denies knowledge of the Claimant's condition prior to the Claimant's suspension on 8th November 2021 and could not have been reasonably expected to know of any disadvantage to the Claimant as alleged prior to this date].

8 Victimisation (Equality Act 2010 section 27)

8.1 Did the Claimant do a protected act as follows:

8.1.1 Complaints of disability discrimination on 26 November 2021, 29 December 2021 27 January 2022 and in hearing on 3 February 2022.

8.1.2 [Incorporated into 8.1.1 above]

8.1.3 Claimant contacts ACAS on 2 February 2022, as communicated on 3 February 2022

8.2 Did the Respondent do the following things :

8.2.1 Ongoing disciplinary investigation and the dismissal itself

8.2.1 Accuse Claimant of not conducting a building check when this was an accusation which could have been made against others.

8.2.2 [withdrawn]

8.2.3 Deliberate omission of material facts and documents (medical evidence and building check sheets completed by others) throughout investigative process

8.2.4 Matthew Bawden 'goads' claimant in hearing 'submit it to court then - you sound like you are threatening us...'

8.2.5 Refusing to answer questions from C and interjecting by M Bawden and Mr Penny within the hearing - to deflect questions from the Claimant regarding claimant concerns of investigation

8.2.6 [incorporated into 8.2.5 above]

8.2.7 Failed to investigate the grievance raised verbally on 3 February 2022 and in writing on 8 February 2022 **[**

8.3 By doing so, did it subject the Claimant to detriment?

8.3.1 [incorporated into 8.2.1 above];

8.3.2 [incorporated into 8.2.1 above]

8.3.3 Claimant contends continuing with appeal process and concluding it with an outcome letter after claimant had withdrawn from the appeal process and did not attend the hearing was an act of victimisation in retaliation for C issuing proceedings

8.4 If so, was it because the Claimant did a protected act?

8.5 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

9. Detriment short of dismissal on grounds related to union membership or activities contrary to section 146 of the Trade Union & Labour Relations (Consolidation) Act 1992

9.1 Did the Claimant suffer a detriment as follows:

9.1.1 [withdrawn]

9.1.2 The Respondent continually failed to fully reply to requests for work-related documentation during period from around 5 May to 28 May 2022 thus preventing claimant from preparing for the appeal

9.1.3 [Incorporated into 9.1.2 above]

[The Claimant will say he confirmed his official trade union role in hearing on 3 February 2022 and again in correspondence from 5 May 2022 and alleges this was a material consideration in the decision to dismiss].

9.2 If the above are considered to amount to detriments, did they arise because of the Claimant's trade union activities or the Claimant being a member of a union?

10 Breaches of the Working Time Regulations 1998

The Claimant alleges the WTR were breached as there was not an opportunity to take rest breaks because the Claimant was a lone worker.

11 Time/limitation issues

11.1 The claim form was presented on 6 April 2022. ACAS EC was 4 February 2022 to 7 March 2022. Accordingly any act or omission which took place before 5 November 2022 is potentially out of time, so that the tribunal may not have jurisdiction.

11.2 Can the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

11.3 Was any complaint presented with in such other period as the employment Tribunal considers just and equitable?