EMPLOYMENT TRIBUNALS

Claimant: Mrs Renata Oterska
Respondent: James T Blakeman and Co Ltd
Heard at: Birmingham
On: 4 – 8, 11 – 15 and 18 -20 March 2024 for hearing and 16 – 17 May 2024 for deliberations in chambers
Before: Employment Judge Meichen, Mr K Hutchinson, Mr K Palmer
Appearances:
For the claimant: in person supported by her son and assisted by a Polish interpreter
For the respondents: Mr A McGrath, counsel

JUDGMENT

The claim is dismissed.

REASONS

Introduction

1. This is the tribunal's unanimous judgment following a 13-day final hearing. There were a few challenges in this case which we shall mention by way of introduction.

2. The claimant found the hearing very difficult. Although an interpreter had been provided and she was therefore able to engage fully in the process she became extremely upset on numerous occasions. The tribunal worked with the claimant and her son and the interpreter (both of whom were extremely helpful) to ensure the claimant remained as calm as possible and able to participate. The tribunal communicated extensively with the claimant about anything we could do to make the process easier for her and we took things at a slow pace with plenty of breaks and rest time in order to assist the claimant and ensure she could participate. In this way we consider a fair hearing was achieved.

3. The case preparation by the respondent was suboptimal. During the hearing it transpired that a number of documents were not in the bundle and they should have been. This meant documents had to be added during the hearing. The respondent did not call a key witness, Christian Sarghe, and we did not receive a good explanation as to why not. Perhaps most problematically the respondent had provided two different versions of its witness statements. The first versions had been sent to the claimant and then amended second versions had been provided later to the tribunal. The respondent had not sought permission to provide amended or updated statements. The matter was brought to our attention by the claimant rather than the respondent. This caused confusion at

the hearing and for the claimant. Many of the amendments were inconsequential but we did notice a few more significant changes. We did not receive any good explanation for this matter and we felt it was particularly unsatisfactory for a professionally represented party to have acted in this manner to an unrepresented claimant. We carefully considered whether we should draw any adverse inferences from these matters when we were reaching our conclusions. Despite these additional difficulties caused by the respondent we considered a fair hearing had still been possible. We carefully explained our approach to the claimant and made sure she understood and had enough time to deal with matters.

4. There was insufficient time at the hearing for the tribunal to complete its deliberations and there was a delay of about two months before the tribunal panel could meet again to make our decision. We had a good memory and notes of what had taken place and had been able to have some discussions already so we were able to fairly make a decision, but this issue is mentioned to explain the amount of time it has taken to produce this judgment.

Issues

5. The parties agreed a definitive list of issues at a case management hearing conducted by EJ Faulkner. The issues for us to determine were as follows (for formatting reasons we have not maintained the numbering from EJ Faulkner's order but the content is the same).

Direct discrimination

6. Did the respondent do the following things:

   6.1 On 30 July 2019, Mr Sarghe shouted at her that she should not speak in Polish.
   6.2 On 2 August 2019, Mr Sarghe pointed out a sausage on the floor and told the Claimant, in front of colleagues, to pick it up.
   6.3 On 9 August 2019, Mr Sarghe said to a Romanian colleague that he would see how sooner or later he would sack the Claimant or another Polish employee, Kinghe Michalska who, like the Claimant, performs quality control functions.
   6.4 In July and August 2019, Mr Sarghe tried to trip her up several times – this is what she refers to as "hooks" in her Claim Form.
   6.5 On 13 August 2019, Jane Selman informed her that there were no vacancies on the morning shift, and then two weeks later two English male employees were assigned to that shift.
   6.6 On 19 November 2019, Mr Sarghe bit her on both arms.
   6.7 On 20 November 2019, Dave Bedson (a senior manager for the Respondent) refused to let her go home when she was upset about the events of the previous day.
   6.8 In November 2019, after the Claimant complained about the events of 19 November 2019, Jane Selman failed, in investigating the complaint, to interview all of the people whose names were provided by the Claimant.

6.9 In late November or early December 2019, the Respondent decided not to take any disciplinary action against Mr Sarghe for the incident on 19 November 2019.

6.10 In early January 2020, Brian Littleton (Head of Hygiene and Products) considered and determined the Claimant's appeal against the outcome of Ms Selman's investigation. The Claimant's complaints are threefold, namely that he did not move the Claimant to a different shift, accused her of lying about the incident on 19 November 2019 and brought Mr Sarghe back to the Claimant's shift.

6.11 In January 2020, Mr Sarghe found out about the Claimant's complaint (and one brought by Andrea Dindareanu) and brought a complaint against them.

6.12 On 5 February 2020, after she reported Mr Sarghe to the police, Jane Selman called her to a disciplinary hearing and on 9 March 2020, James Morris (Head of Business Development) issued her with a final written warning. These are two separate allegations of direct discrimination.

6.13 In or before June 2020, the Respondent reinstated Mr Sarghe to the Claimant's shift before mediation had taken place.

6.14 On 30 June 2020, Rochelle Murinas (an external HR consultant for the Respondent) conducted a mediation meeting. The Claimant's complaints are twofold, namely that Ms Murinas met the Claimant and Mr Sarghe together and did not prepare a report of the meeting.

6.15 In July 2020, she presented Jane Selman with a psychologist's report which the Claimant says advised her that her depression and anxiety had been caused by the incident on 19 November 2019 and that she and Mr Sarghe should be separated at work. The Claimant's complaints about Ms Selman's response are twofold, first that she did not follow the advice in the report by moving Mr Sarghe, instead offering the Claimant a role elsewhere which the Claimant says involved inappropriate hours and duties, and secondly that she did not believe the Claimant that she had been bitten by him, believing Mr Sarghe's account instead.

6.16 In late November 2020, Ms Selman and/or Mr Bedson refused to place her on the morning shift.

6.17 On or shortly before 31 December 2020, Ken Baker (Team Leader) asked the Claimant to do overtime, stating that she would also have to work on 3 January 2021, when everyone else returned to work, including Mr Baker himself. Mr Baker did not in fact attend work on 3 January 2021, which the Claimant says led to her having to work with Mr Sarghe as the only Team Leader present.

6.18 On 3 January 2021, Mr Sarghe refused to sign paperwork when requested by the Claimant, in relation to a concern about a meatball product.

6.19 On 7 January 2021, Mr Sarghe enquired of the Claimant – but not others present with her – why she was not cleaning and then instructed her (but not others) to check the shape of a meatball product, which the Claimant says was the responsibility of a Romanian employee assigned to that particular area.

6.20 The twentieth allegation was about a without prejudice communication. As a result of decision taken at a preliminary hearing we no longer need to consider this.
6.21 Between 7 January 2021 and the date of submission of the Claim Form, the Respondent did not take any steps to facilitate the Claimant's return to work from sick leave.
6.22 On 16 December 2021, the Respondent (Jane Selman) refused to permit the Claimant to take annual leave.
6.23 The Respondent did not pay the Claimant for the five bank holidays from 15 April to 3 June 2022.

7. Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

8. The claimant says she was treated worse than:

8.1 Any male employee, including Polish male employees (sex discrimination) and any Romanian or English colleagues – the Claimant says Mr Sarghe did not shout at them not to speak in their own language.
8.2 Two English male employees, Adam and Craig (surnames unknown).
8.3 Andrea Dindareanu, a Romanian woman on the Claimant's shift, Adam (surname unknown) an English male working in quality control, and Jo Roper, an English female working in quality control. Again, I indicated that the Tribunal will have to carefully consider, this time as far as sex discrimination is concerned, the relevance of the Claimant saying that Mr Sarghe would not have treated Ms Dindareanu or Ms Roper in the same way.
8.4 Craig as above, Alex Coman, Sergiu Voicu, Tim Cartwright, Steven Hulme and Ken Baker, who are all male.
8.5 The two English male employees who the Claimant says were assigned to the morning shift – one is called Steve (surname unknown) and the other's name is unknown to the Claimant, but I am satisfied from the information the Claimant provided that they can be identified.
8.6 Adrian Anita, a Romanian male employed by the Respondent as a machine worker, and other male employees, namely Alex Coman, Steven Meadows, Ken Baker, Dave Bedson, Kev Moller, Lenny Craik, Sergiu Voice, Craig Patterson and Tim Cartwright.
8.7 A hypothetical English person who had experienced a similar incident or issue at work.
8.8 The English person (name unknown) who in or around June 2021 complained about a Slovakian employee called Michal who threw a package and hit them with it – Michal was dismissed.
8.9 The same English person.
8.10 The same English person.

8.11 An employee called Sergio, employed in Quality Control and then as an Assistant Team Leader, who brought a complaint against Mr Sarghe but who Mr Sarghe did not complain about.
8.12 A hypothetical English employee.
8.13 A hypothetical English employee – the Claimant says the Respondent would not have treated this comparator in the same way because it assumes English employees know their rights and that she as a Polish employee does not.
8.14 A hypothetical English employee.
8.15 Mr Sarghe, whose account was believed and who the Respondent was not willing to move.
8.16 A Romanian employee called Ilona (surname unknown) and an English employee called Amanda Keeling who were offered places on earlier shifts, in the case of the latter, on her return from maternity leave two or three weeks after the Claimant was refused this option.
8.17 Ken Baker.
8.18 Adam (surname unknown) and Lenny Craik, both English employees.
8.19 Andrea Dindareanu.
8.20 We are not considering the twentieth allegation so this named comparator is irrelevant.
8.21 A hypothetical English employee who was also on sick leave.
8.22 A hypothetical English employee who was also on sick leave.
8.23 A hypothetical English employee who was also on sick leave.

9. If the Claimant was less favourably treated than her comparator in any of the respects alleged, was that because of the relevant protected characteristic. The relevant protected characteristics relied upon are:

9.1 For complaints 1 to 6 and 17, race and/or sex.
9.2 For complaints 7 to 10, 12 to 14, 16 and 18 to 23, race.
9.3 For complaints 11 and 15, sex.

Discrimination arising from disability (section 15 of the Equality Act)

10. Did the respondent treat the claimant unfavourably by:

10.1 After the claimant went on sick leave on or around 7 January 2021, Ms Selman blamed her for the fact that other employees were having to cover her work.

11. It is accepted that the claimant's absence was the cause of the treatment and that the absence arose in consequence of the claimant's disability.

12. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aim was the return of the claimant to work as a QC with any required reasonable adjustments.

12.1 The Tribunal will decide in particular:

12.1.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
12.1.2 could something less discriminatory have been done instead;
12.1.3 how should the needs of the claimant and the respondent be balanced?

12.2 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Failure to make reasonable adjustments (section 20 of the Equality Act)

13. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

14. The Claimant's complaints are that:

14.1 Jane Selman refused to move Mr Sarghe in July 2020.
14.2 The Respondent (Ms Selman and/or Mr Bedson) refused to place the Claimant on the morning shift in late November 2020.
14.3 Leading up to Christmas 2020, she was unable to work weekend shifts because Mr Sarghe was working on both mornings and afternoons.
14.4 Jane Selman contacted the Claimant directly whilst she was on sick leave – on 21 January, 22 January, 11 February, 12 February, 15 February, 20 April, 22 April, 7 June, 29 September, 1 October and 12 October 2021, when the Claimant says she had made clear she did not want to be contacted directly by the Respondent because of her anxiety and depression.
14.5 Between 7 January 2021 and the date of submission of the Claim Form, the Respondent did not take any steps to facilitate the Claimant's return to work from sick leave.

15. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

15.1 Requiring the Claimant to work and/or co-operate with Mr Sarghe (in respect of the first two complaints and the fifth).
15.2 Requiring the Claimant to work on the same shift as Mr Sarghe if she was going to work weekends (in respect of the third complaint).
15.3 Contacting employees whilst they are on sick leave (in respect of the fourth complaint).

16. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that they caused her heightened anxiety and depression, and in addition in relation to the third complaint she was unable to earn overtime pay?

17. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

18. What steps could have been taken to avoid the disadvantage? The claimant suggests:

    18.1 In July 2020 the Respondent could have removed Mr Sarghe from her shift.
    18.2 In November 2020 it could have moved her to the morning shift and leading up to Christmas 2020 she could have been placed on a different shift to Mr Sarghe.
    18.3 In relation to the fifth complaint, she also says the Respondent could have decreased her hours so that she did not have to see Mr Sarghe, or could have dismissed him.
    18.4 In relation to the fourth complaint, the Claimant says the Respondent could have contacted Ms Denniston instead.

19. Was it reasonable for the respondent to have to take those steps and when?

20. Did the respondent fail to take those steps?

Harassment

21. Did the respondent do the following things:

    21.1 On 30 July 2019, Mr Sarghe shouted at the Claimant that she should not speak in Polish.
    21.2 On 2 August 2019, Mr Sarghe pointed out a sausage on the floor and told the Claimant, in front of colleagues, to pick it up, evidence the Claimant says of him taking a stereotypical view of Polish women.
    21.3 In July and August 2019, Mr Sarghe tried to trip up the Claimant several times.
    21.4 On 19 November 2019, Mr Sarghe bit her on both arms.

22. If so, was that unwanted conduct?

23. Did it relate to race and/or sex?

24. 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?

25. 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.

Victimisation

26. Did the claimant do a protected act as follows:

    26.1 Communications sent to the Respondent on 14 and 18 May 2021, when she said that she would be commencing employment tribunal proceedings.

27. Did the respondent believe that the claimant had done or might do a protected act?

28. Did the respondent do the following things:

    28.1 On 7 June 2021, Jane Selman contacted the claimant and said she would need to resign if she wanted to complain to the tribunal.

29. By doing so, did it subject the claimant to detriment?
30. If so, was it because the claimant did a protected act?

31. Was it because the respondent believed the claimant had done, or might do, a protected act?

Time limits

32. Were the complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

    32.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    32.2 If not, was there conduct extending over a period?
    32.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
    32.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
    32.5 Why were the complaints not made to the Tribunal in time?
    32.6 In any event, is it just and equitable in all the circumstances to extend time?

Law

33. We shall now present a summary of the relevant law which we have considered and applied.

Direct discrimination

34. Section 13 Equality Act 2010 ("EqA") provides that: *"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".* Section 23 EqA provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

35. The statutory comparator must not share the claimant's protected characteristic. The status of the comparator was made clear by Lord Scott in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*,* when he observed: *'[T]he comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position*

in all material respects as the victim save only that he, or she, is not a member of the protected class'.

36. In Nagarajan v London Regional Transport [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, *'why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?'.*

37. In Shamoon Lord Nicholls said *'… employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others. The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant …'.*

38. As was confirmed in Martin v Devonshire's Solicitors [2011] ICR 352 since Shamoon, the recommended approach from the higher courts has generally been to address both stages of the statutory test by considering the single 'reason why' question: was the treatment on the proscribed ground, or was it for some other reason? Considering the hypothetical or actual treatment of comparators may be of evidential value in that exercise.

Discrimination arising from disability (section 15 of the Equality Act)

39. Section 15 EqA states 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.*

40. The unfavourable treatment must be shown by the claimant to be "because of something arising in consequence of [her] disability". The tribunal must therefore ask what the reason for the alleged treatment was. If this is not obvious then the tribunal must enquire about mental processes - conscious or

subconscious - of the alleged discriminator see R (on the application of El v Governing Body of JFS and The Admissions Appeal Panel of JFS and Ors [2010] IRLR, 136, SC).

41. In Pnaiser v NHS England [2016] IRLR 170 the EAT set out the following guidance for section 15 claims:

    a. A tribunal must first identify whether there was unfavourable treatment and by whom.
    b. The tribunal must determine the reason for or cause of the impugned treatment. This will require an examination of the conscious or unconscious thought processes of the putative discriminator. The something that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and amount to an effective reason for or because of it. Motive is irrelevant.
    c. The focus of this part of the enquiry is on the reason for or cause of the impugned treatment.
    d. The tribunal must determine whether the reason or cause is something arising in consequence of the claimant's disability. The causal link between the something that causes the unfavourable treatment, and the disability may include more than one link. The more links in the chain the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

42. The 'because of' enquiry therefore involves two stages: firstly, A's explanation for the treatment (and conscious or unconscious reasons for it) and secondly, whether (as a matter of fact rather than belief) the "something" was a consequence of the disability. It does not matter precisely in which order these questions are addressed.

43. The employer will escape liability if it is able to objectively justify the unfavourable treatment that has been found to arise in consequence of the disability. The aim pursued by the employer must be legal, it should not be discriminatory in itself and it must represent a real, and objective consideration. As to proportionality, the EHRC Code on Employment notes that the measure adopted by the employer does not have to be the only way of achieving the aim being relied on, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (4.31).

Failure to make reasonable adjustments (section 20 of the Equality Act)

44. The duty to make reasonable adjustments is in section 20 Equality Act 2010. The relevant duty in this case is at subsection (3):

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

45. The claimant's case is that the respondent discriminated against her by failing to comply with that requirement.

46. It should be noted that the duty requires positive action by employers to avoid substantial disadvantage caused to disabled people. To that extent it can require an employer to treat a disabled person more favourably than others are treated (Archibald v Fife Council [2004] ICR 954). It should also be noted that *"the purpose of the legislation is to assist the disabled to obtain employment and to integrate them into the workforce"* (O'Hanlon v HM Revenue and Customs UKEAT/0109/06).

47. The correct approach to reasonable adjustments complaints was set out by the EAT in Environment Agency v Rowan [2008] ICR 218:

a. What is the provision, criterion or practice ("PCP") relied upon?
b. How does that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?
c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?
d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

48. In reasonable adjustment claims, the burden of proof is on the claimant to establish the existence of the provision, criterion or practice and to show that it placed them at a substantial disadvantage. In this case the respondent accepts that it had the PCPs alleged by the claimant but the substantial disadvantages are disputed. The claimant has identified potential reasonable adjustments, which the respondent says are not reasonable. If the duty to make reasonable adjustments has been engaged (and as the claimant has identified one or more potential reasonable adjustments) the burden of proof is reversed so that the respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved.

49. As to substantial disadvantage section 212 Equality Act 2010 defines "substantial" as meaning "more than minor or trivial". It must also be a disadvantage which is linked to the disability. That is the purpose of the comparison required by section 20. Simler P said in Sheikholeslami v University of Edinburgh UKEATS/0014/17/JW that:

"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question. For this reason, also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.

…. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

50. The Tribunal is required to have regard to the Equality and Human Rights Commission's statutory Code of Practice on Employment when considering disability discrimination claims. Paragraph 6.28 of the Code sets out the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- Whether taking any particular steps would be effective in preventing the substantial disadvantage;
- The practicability of the step;
- The financial and other costs of making the adjustment and the extent of any disruption caused;
- The extent of the employer's financial or other resources;
- The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- The size and type of employer.

51. An important consideration is the extent to which the step will prevent the disadvantage. We must consider whether a particular adjustment would or could have removed the disadvantage: Romec Ltd v Rudham [2007] All ER(D) (206) (Jul), EAT.

52. In Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 the Court of Appeal said: *"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."*

53. Accordingly, it is unlikely to be reasonable for an employer to have to make an adjustment that involves little or no benefit to the disabled person in terms of ameliorating the disadvantage to which he or she has been subjected by the PCP, physical feature or lack of auxiliary aid. We have to consider whether on the evidence there would have been a chance of the disadvantage being alleviated. Our focus should be on whether the adjustment would, or might, be effective in removing or reducing the disadvantage that the claimant is experiencing as a result of his or her disability and not whether it would, or might, advantage the claimant generally.

Harassment

54. Section 26 EqA states 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 subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

55. In GMB v Henderson [2017] IRLR 340, the Court of Appeal suggested that deciding whether the unwanted conduct “relates to” the protected characteristic will require a “consideration of the mental processes of the putative harasser”.

56. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity merely because she thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the tribunal is obliged to take the complainant's perception into account in making that assessment.

57. A number of important authorities have given guidance as to how to interpret the test under Section 26:

57.1 *“… not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. 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. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”* Richmond Pharmacology v Dhaliwal [2009] IRLR 336.

57.2 *“The word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.”* Betsi Cadwaladr University Health Board v Hughes [2014] UKEAT/0179/13.

57.3 *“When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the*

same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable ... Tribunals must not cheapen the significance of these words ["violating dignity", "intimidating, hostile, degrading, humiliating, offensive"]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." Grant v HM Land Registry [2011] IRLR 748 *CA.*

Victimisation

58. Section 27 EqA states as follows:

(1) *A person (A) victimises another person (B) if A subjects B to a detriment because—*
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act

59. In terms of causation the protected act must be more than simply causative of the treatment (in the "but for" sense). It must be a real reason: *"the real reason, the core reason, for the treatment must be identified"* (Woods v Pasab Ltd (t/a Jones Pharmacy) [2012] EWCA Civ 1578). Where there is more than one motive in play, all that is needed is that the discriminatory reason should be of sufficient weight (O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615).

60. In MOD v Jeremiah [1979] IRLR 436, [1980] ICR 13 the Court of Appeal found that a detriment exists *"if a reasonable worker would take the view that the treatment was to his detriment".* A detriment must be capable of being objectively regarded as such; an unjustified sense of grievance cannot amount to 'detriment' (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11). It is not necessary to demonstrate some physical or economic consequence for something to amount to a detriment, as Lord Nicholls said in Shamoon: *"while an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so".* In Deer v University of Oxford[2015] EWCA Civ 52 it was held that the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

The burden of proof

61. Section 136 EqA sets out the burden of proof provisions which apply to claims under the EqA. Section 136(2) states: "*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".* Section 136(3) then states: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

62. These provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to prove facts from which the tribunal could conclude in the absence of any other explanation that the respondent has committed an unlawful act of discrimination. This is known as the "prima facie case".

63. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach was set out in Igen Ltd v Wong [2005] IRLR 258 and it was reaffirmed in Efobi v Royal Mail Group Limited [2019] IRLR 352

64. The Supreme Court has emphasised that it is for the Claimant to prove the prima facie case. In Hewage v Grampian Health Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: *"The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be* proved*, and it is for the claimant to discharge that burden".*

65. Before the burden can shift there must be something to suggest that the treatment was discriminatory (see B and C v A [2010] IRLR 400). Mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular Bahl v The Law Society and others [2004] IRLR 799). Therefore inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status and/or incompetence is not sufficient to infer unlawful discrimination (Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen, Madarassy).

66. In Laing v Manchester City Council and anor 2006 ICR 1519 Mr Justice Elias (then President of the EAT) suggested that a claimant can establish a prima facie case of direct discrimination by showing that he or she has been less favourably treated than an appropriate comparator. He considered that at the first stage *'the onus lies on the employee to show potentially less favourable treatment from which an inference of discrimination could properly be drawn'.* This may involve identifying an actual comparator treated differently or, in the absence of such a comparator, a hypothetical one who would have been treated more favourably. He then went on to say that *'it is only if the claimant succeeds in establishing that less favourable treatment that the onus switches to the employer to show an adequate, in the sense of non-discriminatory, reason for the difference in treatment'*. The claimant must establish that the comparator is — aside from the relevant protected characteristic — in the same, or not materially different, circumstances.

67. The importance of comparators was considered again more recently in Virgin Active Ltd v Hughes 2023 EAT 130. The EAT emphasised the importance of considering whether there are material differences in circumstances between the claimant and comparator before applying the shifting burden of proof. It noted that if 'anything more' is required to shift the burden of proof when there is an actual comparator, it will be less than what is required if the comparator's circumstances are similar but materially different to the claimant's. The greater the differences between their situations the less likely it is that the difference of treatment suggests discrimination. The tribunal had therefore been wrong to hold that the burden of proof had shifted without analysing whether there were material differences between the circumstances of the claimant and comparators relied upon.

68. There is a well-established principle that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. This principle is most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

69. The issue of what the 'something more' is and whether the burden shifts is not subject to hard and fast rules and the answer will vary depending on the nature of the case and the evidence given before the Tribunal. It is important to bear in mind that in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. The outcome at this stage of the analysis will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal (see paragraph 4 of Appendix to Judgment of Court of Appeal in Igen v Wong). Further, we should note the word "could" in s 136(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them (see paragraph 5 of Appendix to Judgment of Court of Appeal in Igen v Wong).

70. The Court of Appeal in Brown v LB Croydon [2007] EWCA Civ 32 in referring to the judgment of the EAT below in that case, quoted the following comments by Elias J as he then was with approval:

25. In other circumstances, where there is no actual comparator, the employee must rely on a hypothetical comparator. Again in some cases it may be relatively plain to a tribunal that the burden switches to the employer. That is likely to occur for example where the employer acts in a way which would be quite atypical for employers. Conversely if the employer acts in a way which would appear perfectly sensible, and does the kind of thing which most employers would do, then the burden is unlikely to transfer. For example if an employer warns an employee for drunkenness at work, and it is not disputed that the employee was drunk, it is not likely in those circumstances in the

absence of particular evidence demonstrating otherwise that that would create an inference of less favourable treatment so as to require some explanation for the employer.

71. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts (see paragraph 6 of Appendix to Judgment of Court of Appeal in Igen v Wong). However, the Employment Tribunal is entitled to take into account the fact it disbelieves the employer's explanation (even though the employer's case is primarily relevant at the second stage): Birmingham City Council v Millwood [2012] EqLR 910, EAT. The tribunal may also draw inferences from the fact that there are inconsistencies in the employer's explanation: Veolia Environmental Services UK v Gumbs [2014] EqLR 364, EAT.

72. In Denman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA, Lord Justice Sedley made the point that 'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred. The Court of Appeal approved such an approach in Base Childrenswear Ltd v Otshudi 2020 IRLR 118, CA. It was open to the tribunal to take into account when drawing inferences a false explanation given for the treatment complained of and the fact that the explanation given had changed, even though it had been argued that this had been done so as to spare the employee's feelings. Lord Justice Underhill observed: *'Giving a wholly untruthful response when discrimination is alleged is well-recognised as the type of conduct that may indicate that the allegation is well-founded.'*

73. An employer's failure to call evidence from key witnesses may result in adverse inferences being drawn. In Efobi v Royal Mail Group Ltd 2021 ICR 1263 the Supreme Court held that tribunals should be free to draw, or decline to draw, inferences in the case before them using common sense. Whether any significance should be attached to the fact that a person had not given evidence depended entirely on the context and particular circumstances. Relevant considerations would include whether the witness was available to give evidence, what evidence the witness could have given, what other evidence there was bearing on the points on which the witness could have given evidence, and the significance of those points in the context of the case as whole.

74. If the burden of proof shifts the last three paragraphs of the Appendix in Igen v Wong should be considered. They state:

> *To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.*

That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge that burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully the explanations for failure to deal with questionnaire procedure and/or code of practice.

75. If the burden of proof shifts the need for the respondent to set out ‘cogent evidence’ explaining a non-discriminatory reason for its conduct is particularly relevant. In *Bennett v Mitac Europe Ltd 2022 IRLR 25* the EAT observed that the requirement for ‘cogent evidence’ does not apply a standard of proof beyond that of the balance of probabilities. Nonetheless, it is the respondent that generally is in a position to provide evidence about the reason for the claimant’s treatment.

Time limits

76. Section 123 EqA states:

123 Time limits
(1) Subject to sections 140A and 140B, 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.
. . .
(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.

77. If any allegation made under the EqA is out of time and not part of conduct extending over a period bringing it in time then we only have jurisdiction to hear it if it was brought within such other period as we think just and equitable. We should remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor. We should consider the balance of prejudice. It is for the claimant to satisfy the tribunal that it is just and equitable

to extend the time limit. The tribunal has a wide discretion but there is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule - see Robertson v Bexley Community Centre 2003 IRLR 434. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings - see Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050 CA.

78. Relevant factors which may be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

79. Having referred to Keeble however the important point to bear in mind is that the Tribunal has a very broad general discretion and therefore we should assess all the factors which are relevant to whether it is just and equitable to extend time without necessarily rigidly adhering to a checklist. The factors which are almost always likely to be relevant are the length of and reasons for the delay and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh). This was explained by Lord Justice Underhill in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

80. In Miller v Ministry of Justice UKEAT/0003/15 (15 March 2016, unreported), Laing J observed that there are two types of prejudice which a respondent may suffer if the limitation period is extended: firstly, the obvious prejudice of having to defend the claim which would otherwise have been defeated by a limitation period; and secondly the "forensic prejudice" caused by fading memories, loss of documents, and losing touch with witnesses. Forensic prejudice is "crucially relevant" in the exercise of discretion and may well be decisive. However, the converse does not follow: if there is no forensic prejudice to the respondent that is not decisive in favour of an extension.

81. The EAT has explained the extent to which the potential merits of a proposed complaint can be taken into account when considering whether it is just and equitable to extend time, in Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132. The EAT held that the potential merits are not necessarily an irrelevant consideration even if the proposed complaint is not plainly so weak that it would fall to be struck out. However, the EAT advocated a careful approach. It said:

> *"It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it [the tribunal] does so with appropriate care, and that it identifies sound particular reasons or features that properly*

support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform.

So, the tribunal needs to consider the matter with care, identify if there are readily apparent features that point to potential weakness or obstacles, and consider whether it can safely regard them as having some bearing on the merits. If the tribunal is not in a position to do that, then it should not count an assessment of the merits as weighing against the claimant. But if it is, and even though it may not be a position to say there is no reasonable prospect of success, it may put its assessment of the merits in the scales. In such a case the appellate court will not interfere unless the tribunal's approach to assessing the merits, or to the weight attached to them, is, in the legal sense, perverse."

Findings of fact

82. The respondent is a manufacturer and supplier of sausage and other meat products. It supplies clients such as Marks & Spencer, Greggs and many fish and chip shops. The respondent operates from a site in Newcastle under Lyme in Staffordshire. It has a very diverse workforce. The respondent employs around 400 workers with about 39% being from an East European background. There are more than 15 different nationalities in the workplace. The respondent's operation is divided between cooked product which was situated in the high-risk red area and raw product which was situated in the blue area.

83. The claimant is a Polish woman. She was born on 18 October 1971. Her employment with the respondent started on 11 April 2010. The claimant was initially employed as a production operative. She was promoted to a quality controller ("QC") from 24 August 2018. It appears that the claimant was something of a reluctant QC and her appointment to that position appears to have happened informally rather than through a clear appointment process. In any event from August 2018 the claimant was performing the duties of a QC and was receiving the higher wage which came with that role.

84. The claimant was a disabled person within the meaning of the Equality Act by reason of the mental impairments of depression and anxiety from July 2020 onwards. This was conceded by the respondent in these proceedings on 20 January 2023. It was agreed at the hearing before EJ Faulkner that the relevant period for the claimant's disability discrimination claim was July 2020 onwards.

85. During her time with the respondent the claimant worked on a number of different shifts. At the relevant time for the purposes of this claim the claimant worked on the "noon shift" which was from 2 PM to 10 PM. The claimant worked alongside her sister and a number of Polish friends. The claimant was a hard worker and knowledgeable in her role.

86. The claimant had a history of raising complaints and grievances a list of which were provided to the tribunal from 2016 onwards. The claimant was quick to complain, and she exhibited oversensitive reactions, sometimes to fairly mundane situations. The claimant struck us as a particularly sensitive person and sadly her sensitivity has resulted in what appears to be an extreme reaction to the events which form the basis of this claim.

87. In July 2019 Christian Sarghe was appointed to be the team leader on the noon shift. Mr Sarghe was a 28-year-old Romanian man who had previously been a production operative on a different shift. From July 2019 the claimant was required to report to Mr Sarghe as well as the senior team leader who was Ken Baker.

88. It appears that right from the start of Mr Sarghe's appointment as team leader there was tension between him and the claimant. The claimant was reluctant to take instructions from Mr Sarghe. The respondent has suggested that this may have been attributable to the fact that Mr Sarghe was younger than the claimant and he was Romanian. We think that the claimant believed that she did not need to take instructions from Mr Sarghe as she was experienced and knew what she was doing. Equally, we think it is right to point out that Mr Sarghe behaved inappropriately in his role as team leader and this is what appears most likely to have led to the increased tension between him and the claimant. We think it was primarily Mr Sarghe's behaviour which led to the breakdown in the working relationship not only between the claimant and Mr Sarghe but also between Mr Sarghe and the team which he was meant to be leading.

89. In making this finding we refer to an email which was dated 16 January 2020 from Jane Selman who was the respondent's head of HR. In that email Ms Selman referred to issues between the claimant and Mr Sarghe and also to a heated exchange he had had with another member of staff, Andrea Dindareanu. Ms Dindareanu was Romanian. Ms Selman said that it was unlikely that Mr Sarghe could return to the noon shift as he had alienated too many staff on that shift to be able to lead the team.

90. We should note that the 16 January 2020 email was one of the documents that we were only provided with during the hearing. We found it to be revealing. It showed that Mr Sarghe had issues with other members of the team he was meant to be leading, including those who were not Polish. It supported our overall impression of what had taken place. Mr Sarghe had been promoted into a position that he was not ready for. He was immature. He had been used to having horseplay and banter with his previous team and it went down badly when he tried to do the same things on the noon shift, particularly with the claimant. We did not think Mr Sarghe was singling the claimant out or behaving inappropriately towards her for any particular reason. He was foolishly trying to engage in conduct that he thought was humorous and he did similar things to other members of the team. This is why he had heated exchanges with others and alienated most of the team.

91. On 31 July 2019 the claimant emailed Dave Bedson who was the production manager. The email referred to a complaint that the claimant had been told by

Mr Sarghe not to speak in Polish with her friends. This was within a few days of Mr Sarghe taking up the role as team leader. Mr Bedson spoke to the claimant and Mr Sarghe about the incident. What had happened was that the claimant was having a discussion with one of her Polish friends, Kinga Michalski. This appeared to be a heated discussion in Polish and Mr Sarghe could hear that his name was being used. As he could hear that he was being talked about, but he couldn't understand what they were saying he asked them to speak in English. The claimant was informed that she was not banned from speaking Polish but if there was a production query or if clarification was required then she should speak English around others who do not speak Polish. If she had an issue with her line manger the claimant should raise that with him in English rather than speaking about him in Polish. At the time the claimant accepted the explanation that she had been given. The tribunal finds it was understandable that Mr Sarghe had asked the claimant to speak in English as she was obviously talking about him, and it was a common language. We did not see anything inappropriate about Mr Sarghe's behaviour on this occasion.

92. On 2 August 2019 the claimant sent an email to Jane Selman complaining that Mr Sarghe was forcing her to do a job that was not part of her duties. Ms Selman arranged a meeting to discuss this with the claimant and a Polish interpreter on 6 August 2019. The complaint related to a situation where the claimant had been asked by Mr Sarghe to pick up a sausage that had fallen onto the floor. The claimant felt that Mr Sarghe was wrong to do this and that he had implied that her cleaning was not thorough enough. She felt she knew what she was doing with her duties and *"there can't be a situation where he tells me what to do".* This supported our impression that the claimant felt she should not have to do what Mr Sarghe told her. The claimant further objected to the way in which Mr Sarghe had spoken to her and she felt he had treated her like rubbish.

93. It appeared to Ms Selman that the claimant was resistant to instructions being given by Mr Sarghe. The respondent told us, and we accepted that as the workplace produced food cleanliness and hygiene were paramount and the respondent operated on a clean as you go policy. It was therefore part of the claimant's role to tidy up and pick up a sausage if it had fallen on the floor. Furthermore we acknowledge that as Mr Sarghe was the team leader it was part of his job to instruct members of his team as to what needed to be done.

94. In the meeting with Ms Selman the claimant was asked what she wanted as an outcome and the claimant said that she wanted Mr Sarghe to be spoken to and told that his treatment of her was unacceptable. Mr Bedson did speak to Mr Sarghe about what had taken place. Mr Sarghe explained to Mr Bedson that it was part of his role to ensure that the area was cleaned properly, and that no product was left on the floor. He had asked the claimant to pick up the sausage as she was closest to it at the time. Mr Bedson accepted that explanation. However he reminded Mr Sarghe of the need to remain polite. We considered there was no evidence that Mr Sarghe was targeting the claimant; she just happened to be closest to the sausage on the floor. We did not see anything wrong in principle with the claimant being asked to pick up a sausage by her team leader as it was part of ensuring the area was clean and tidy which was everybody's responsibility.

95. On 12 August 2019 the claimant emailed Ms Selman to ask if she could move to the morning shift as an operative on services. Ms Selman emailed the claimant back within a few hours to say that there were no vacancies. The claimant has alleged that two weeks after this two white English men were assigned to the morning shift. The respondent has looked into this allegation. We accept the respondent's evidence that the claimant is mistaken. The only new starters in the relevant period were a specialist engineer and somebody who was employed in manufacturing.

96. On 20 November 2019 the claimant came to see Mr Bedson. She was upset. She said that Mr Sarghe wanted to swap her off the shift and he had been joking with her about that for a while. Mr Bedson reassured the claimant that Mr Sarghe did not have the authority to swap off the shift. The claimant also made a further complaint about Mr Sarghe. Mr Bedson understood that the complaint was that Mr Sarghe had pinched the claimant on her arms. However, the claimant says that her complaint was that Mr Sarghe had bitten her on her arms. We think it is most likely that the claimant had reported that Mr Sarghe had bitten her but this was misunderstood by Mr Bedson to be pinching.

97. Even taking into account his misunderstanding the claimant's complaint was in our view not taken as seriously by Mr Bedson as it should have been. He spoke to Mr Sarghe who suggested that he and the claimant would tease each other and as part of this they would pinch or tap one another. Mr Bedson said that no physical contact should take place even if it was a joke.

98. The claimant was clearly dissatisfied with the lack of action taken by Mr Bedson. On 25 November 2019 she put in a written complaint about Mr Sarghe which she sent to Ms Selman. In her written complaint the claimant said that she believed that Mr Sarghe's behaviour had been caused by her nationality. The claimant repeated her complaint that Mr Sarghe had been threatening to change her shift or get her fired. She said that Mr Sarghe had been "hooking" her.

99. It transpired that by "hooking" the claimant meant that Mr Sarghe had been tripping her up. A number of witnesses subsequently supported the claimant's complaint that Mr Sarghe was tripping her up and the respondent's witnesses accepted before us that they thought Mr Sarghe had done that. We therefore find that Mr Sarghe had been tripping the claimant up. Most likely this was a misguided attempt at humorous horseplay. It was clearly inappropriate in the workplace.

100. In her written complaint the claimant alleged that on 19 November Mr Sarghe had bitten her on the left and right shoulder. The respondent did not accept that the claimant had been bitten by Mr Sarghe but it did acknowledge that Mr Sarghe had pinched the claimant, that he had tripped her up and that he had engaged in inappropriate banter with the claimant. It appears quite correct to us that Mr Sarghe engaged in horseplay and teasing of the claimant which was entirely unacceptable in the workplace. It was particularly serious because Mr Sarghe was a team leader who was meant to be in a position of

responsibility. The evidence suggests that Mr Sarghe did not adapt to his more senior role and he engaged in horseplay and banter which he had been used to doing in his previous team.

101. Jane Selman arranged a meeting to discuss the claimant's complaint on 28 November. Again the claimant was accompanied by an interpreter. The respondent's position was that they had not been able to access the CCTV which could show better whether or not the claimant had been bitten. The claimant is very suspicious about this. The respondent regularly reviews CCTV for a variety of reasons. The claimant had made a complaint shortly after the incident and the respondent was able to review the CCTV when she brought complaints about other incidents. In relation to these incidents there was a longer gap between the incident and the claimant's complaint. The respondent had reviewed CCTV in relation to these incidents which have been reported much later and relied on the CCTV to challenge the claimant's account. There has been no cogent explanation as to why the respondent has not been able to access the CCTV for 19 November 2019. The tribunal can understand why the claimant is so suspicious about this.

102. In the meeting with Ms Selman the claimant repeated her complaint that she had been bitten by Mr Sarghe on 19 November 2019. She said that Tim Cartwright, a production operative, was a witness to what had taken place. Ms Selman did not interview Tim Cartwright. Ms Selman has now accepted that she should have interviewed Tim Cartwright. This was an oversight by Ms Selman.

103. Ms Selman interviewed Mr Sarghe and he denied having bitten the claimant. He repeated his case that there was mutual banter and horseplay.

104. Ms Selman concluded that Mr Sarghe had not adjusted his behaviour to reflect his promotion. He believed that he could still have a laugh and a joke. Further, he had not learned where the line is between a joke and offensive behaviour. She said that she could not find any evidence to prove or disprove the biting allegation and she was unable to uphold it. However, she said that whatever the truth was biting or any form of physical contact was unacceptable. She also found that any biting or harassment was not due to the claimant's nationality. Ms Selman wrote to the claimant on 3 December 2019 with this outcome. She said that Mr Sarghe was going to be working as a team leader in a different area so that he would not be working directly with the claimant. This was a temporary solution. The claimant was given the opportunity to appeal the outcome.

105. Although the claimant was not informed about this at the time the respondent also disciplined Mr Sarghe for his inappropriate banter and physical horseplay. He was given a warning.

106. The claimant appealed against Ms Selman's decision by email dated 9 December 2019. She said that the company should ensure that she never had to work in the same team as Mr Sarghe. She said she didn't want to work with Mr Sarghe and he needed to be kept on a different shift permanently.

107. The claimant's appeal was conducted by Brian Littleton, the respondent's head of hygiene and projects. He met with the claimant along with her trade union representative and an interpreter on 19 December 2019. The claimant relied on signed statements from colleagues. These statements undermined Mr Sarghe's suggestion that the claimant had reciprocated so that there had been mutual horseplay or banter between him and the claimant. Furthermore one witness, Andrea Dindareanu, said that she had seen Mr Sarghe bite the claimant on both arms on 19 November 2019. The claimant explained to Mr Littleton that she had written the statements for her colleagues but that they had read and signed them.

108. The claimant repeated the allegation of biting in the meeting with Mr Littleton. She showed Mr Littleton where she had been bitten on her body and he drew a diagram with her so that he could better understand where the incident took place.

109. Mr Littleton interviewed Mr Sarghe and he repeated his denial of the biting incident and reiterated his explanation that there was mutual teasing and physical horseplay.

110. Mr Littleton also interviewed a number of other witnesses including Tim Cartwright who Jane Selman had failed to interview. Mr Cartwright said he had not seen the bite.

111. Mr Littleton also interviewed Andrea Dindareanu who was now known to be a key witness as she had said she saw the biting. Mr Littleton explored with her at length how and where she had seen the claimant be bitten.

112. Surprisingly, Mr Littleton took the view that Andrea Dindareanu could not have witnessed the claimant being bitten because there would have been machinery in the way based on where she had been standing at the time. This theory was obviously not supported by any CCTV because that apparently was still not available. Mr Littleton based his theory on the plan drawn in the meeting with the claimant. However the claimant has pointed out that on that plan Mr Littleton drew machinery which could be moved. It was machinery that was often moved depending on which products were being produced and whether cleaning was taking place.

113. In the hearing before us Mr Littleton accepted that the relevant machinery was movable, that it was frequently moved and that he did not check where the machinery was at the time when the claimant said she was bitten.

114. Furthermore Mr Littleton did not show his plan to Andrea Dindareanu and he did not explain to her his theory that she could not have seen what was happening at the time the claimant said she was being bitten. We found it particularly difficult to understand how Mr Littleton could have reached the conclusion that Andrea could not see when he had not even put that theory to her so that she could respond to it. Moreover Andrea was entirely unequivocal

in the meeting with Mr Littleton that she had seen the claimant being bitten and no reason was ever suggested as to why she might have made that up.

115. Mr Littleton wrote to the claimant with the appeal outcome on 14 January 2020. He decided not to uphold the claimant's grievance about Mr Sarghe biting her, although he acknowledged that there had been banter and horseplay from Mr Sarghe towards the claimant and other colleagues on the shift. We consider that Mr Littleton's conclusion that Mr Sarghe had engaged in horseplay and banter towards the claimant and others was accurate. Mr Sarghe had behaved inappropriately towards other people on the team and this is what led to him alienating the team generally and not just the claimant. Mr Littleton recommended training for Mr Sarghe on what was acceptable conduct in the workplace. Mr Littleton said that he had been unable to find corroborative evidence to support the biting allegation. Mr Littleton acknowledged that Andrea Dindareanu had said that she saw Mr Sarghe biting the claimant but he had not accepted that evidence for the reasons we have explained.

116. Mr Littleton referred to a complaint that the claimant had made in her appeal meeting that she felt Mr Sarghe was checking her work. Mr Littleton acknowledged there had been occasions when Mr Sarghe had entered into the same area as the claimant to sort out an issue or check on the cleaning but this was to be expected as he was still the team leader on the shift. There had been an effort to keep the claimant and Mr Sarghe apart by basing them in different areas but from time to time they had come into contact. This explains why the claimant had been dissatisfied as she wanted Mr Sarghe to move to a different shift and she did not want to work with him at all. Mr Littleton explained that Mr Sarghe had now been moved onto the day shift so as to further minimise his contact with the claimant and that he had decided that this should continue until Mr Sarghe had attended training and mediation.

117. Mr Sarghe attended a disciplinary hearing on 28 January 2020. As a result of that he was issued with a warning. At the hearing he raised an allegation against the claimant. The allegation was that the claimant had told people that he would be sacked and/or not return to the noon shift. He believed that the claimant was running a campaign against him. The respondent treated this as a formal grievance by Mr Sarghe. An investigation was very promptly initiated.

118. The investigation into Mr Sarghe's complaint about the claimant was conducted by Claire Scott, the respondent's head of technical. Jane Selman commissioned her to do an investigation specifically into the allegation that the claimant had said that Mr Sarghe would lose his job. The investigation was completed by 3 February 2020. A number of witnesses supported the allegation that the claimant had said that Mr Sarghe would be sacked.

119. On 4 February 2020 Ms Selman wrote to the claimant to invite her to a disciplinary hearing. The invitation said that the disciplinary would address three allegations:

119.1 The first allegation was that the claimant had made false allegations about Mr Sarghe and encouraged other colleagues to support these allegations by writing statements and encouraging them to sign them. It was said that if proven this could amount to harassment or a breach of the dignity at work policy.

119.2 The second allegation was that the claimant had told several people on the noon shift that Mr Sarghe would be dismissed and/or not return to the noon shift.

119.3 The third allegation was that colleagues on the noon shift had stated that the claimant appeared to dislike Romanian workers. It was said that "this behaviour" if proven amounted to direct discrimination and harassment. The behaviour relied upon was not specified however.

120. This tribunal has struggled to understand where the first and third allegations came from and what the evidence was in support of them. As we have explained Mr Sarghe had made one allegation about the claimant i.e. that she had told people that he would be sacked. That was the only allegation which had been investigated. We did not receive any good explanation as to how and why the first and third allegations came to be relied upon. We do not believe that the respondent ever had any cogent evidence in support of the first or third allegations. The claimant was put forward for a disciplinary in respect of three allegations when there was no basis at all for two of the three allegations.

121. Nevertheless, a disciplinary hearing went ahead on 13 February 2020. The disciplinary was conducted by James Morris, who is the respondent's head of business development. The claimant was accompanied by her trade union representative and there was also an interpreter present. Understandably, the claimant's trade union representative questioned where the complaints had come from and he asked for further statements to be taken.

122. As a result of the claimant's trade union representative's intervention further investigation was conducted. The disciplinary hearing was reconvened on 27 February and an outcome was sent to the claimant on 9 March 2020. In his outcome Mr Morris did not uphold the first allegation but he upheld the second and third allegations. He issued the claimant with a final written warning, which was the most severe disciplinary sanction available short of dismissal.

123. The first allegation had been that the claimant had encouraged others to make statements in support of a false complaint. However when the relevant witnesses were interviewed following the adjourned disciplinary hearing it was immediately established that the witnesses had signed their statements willingly and agreed with the contents. The claimant had been transparent from the start that she had written the statements and then asked the witnesses if they were content to sign them. Accordingly Mr Morris did not uphold the first allegation.

124. The situation begs the question why this allegation ever proceeded to a disciplinary hearing in the first place. The relevant witnesses should have been interviewed at the investigation stage and it would have been quickly established that there was nothing untoward in the claimant having relied on

their statements because they had signed them willingly and agreed with the contents. There was no evidence that anybody had been encouraged to participate in a false complaint. There was never any substance to the allegation and the tribunal did not receive any adequate explanation as to why the allegation proceeded to a disciplinary hearing with the necessary investigation only taking place as a result of intervention by the claimant's trade union representative.

125. The investigation had identified witness evidence that the claimant had said to colleagues that Mr Sarghe would be dismissed and/or not allowed to return to the noon shift. There was therefore a proper basis for Mr Morris to find that those comments had been made and that they constituted some form of misconduct. There was however clear mitigation in that, even on the respondent's own findings, Mr Sarghe had been guilty of inappropriate banter and physical horseplay to the claimant and as a result the claimant believed that she should not have to work with him any longer.

126. Mr Morris' conclusion on the third allegation was perverse, in the sense that there was no evidence to support it and Mr Morris' approach did not make any sense. The allegation was that colleagues on the noon shift had stated that the claimant appeared to dislike Romanian workers. It was said that "this behaviour" if proven amounted to direct discrimination or harassment. Yet, the behaviour which the claimant was said to have engaged in was not specified. Mr Morris made no attempt to identify the discriminatory behaviour which the claimant was supposed to have been guilty of.

127. Furthermore, it was not true that "colleagues" had said that the claimant appeared to dislike Romanian workers. One colleague only, Andrea Coles a Romanian production operative, had said that she believed that the claimant did not like Romanians. Mr Morris did not address this issue. Furthermore when Andrea Coles was pressed on her view as a result of the further investigation prompted by the claimant's trade union representative, she explained that none of the Polish staff would speak to her. She did not socialise with any of the Polish staff and when she went into the canteen the Polish staff would not respond to her when she said hello. She said that all the Polish people on the shift stopped speaking to her when the claimant and Mr Sarghe fell out.

128. What this evidence spoke to was a general division between Polish and Romanian staff with the two factions not speaking to each other. It appeared this division arose because of the dispute between the claimant and Mr Sarghe. Other witnesses also supported the impression that there was a rift between Polish and Romanian staff. In particular Adrian Anita, a Romanian production worker, also referred to Polish staff not speaking to him.

129. None of the people who were interviewed specified any particular behaviour on the part of the claimant which could be said to justify an impression that she was being discriminatory. There was no evidence of anything that could justify singling the claimant out in respect of the apparent division between Polish and Romanian workers and disciplining her alone. Mr Morris never identified any discriminatory behaviour by the claimant and there

was no evidence that she did not like Romanian people generally. She had fallen out with one colleague, Mr Sarghe, who was Romanian but the obvious explanation for that was his inappropriate behaviour (which the respondent in fact disciplined him for). This falling out may have precipitated a more general division between Polish and Romanian staff but there was no evidence that was as a result of discriminatory attitudes, rather it had plainly all been caused by Mr Sarghe's inappropriate behaviour. Nevertheless Mr Morris found the allegation against the claimant to be well founded.

130. Even more confusingly, in his outcome letter Mr Morris relied on an explanation that the claimant had given at the disciplinary hearing. He said that the claimant had said that her generation arrived at work early and did a good job and that her opinion of the younger generation is that they did not have the same work ethic. Mr Morris found that these comments amounted to discrimination on the grounds of age. Apparently, he thought that supported the allegation that the claimant had been discriminatory towards Romanian workers.

131. The tribunal found it difficult to understand why Mr Morris was not focusing on the allegation of race discrimination and why he thought that what he believed the claimant said supported the allegation that she did not like Romanian people and her behaviour was discriminatory on the ground of race.

132. Moreover, the claimant denied having said what Mr Morris found she had said. The disciplinary hearing was recorded and in light of this disagreement the tribunal asked to listen to the recording. We asked the respondent to direct us to the relevant part of the recording. When we listened it was clear that the claimant was right - she had not said what Mr Morris had recorded in his outcome letter. What the claimant had in fact said was as follows: *"the generation of my workers we've been here a long time the younger generation like Andrea they've been here seven or eight months and so we know a bit more about the job I really don't care whether they are Romanian or not".*

133. This was an innocuous comment. It did not support a finding of age discrimination. It certainly did not support the allegation which was under consideration which was that the claimant did not like and had been discriminatory towards Romanian workers.

134. Faced with these difficulties Mr Morris attempted to explain to us that his finding of discrimination was based on a general impression of the claimant rather than any specific evidence. This was a deeply unimpressive explanation. The allegation about race discrimination was serious and it should not have been upheld as there was no evidence supporting it. We find that there was never any cogent evidence supporting this allegation. It should never have been part of a disciplinary hearing and it certainly should never have been upheld.

135. We should also note that we attempted to understand from Mr Morris why he had felt that such a severe disciplinary sanction should be imposed. We struggled to understand his rationale but we should note that when he was asked in re-examination if he would have given a final warning if he had only

upheld the second allegation Mr Morris said that he would not and he would have replaced the final warning with a lesser sanction.

136. The claimant was given the right to appeal the final warning which she did. There was a delay in hearing the claimant's appeal due to the covid pandemic but eventually the appeal was rejected by an independent HR professional appointed by the respondent.

137. Between March and June 2020 the claimant was placed on furlough along with most of the respondent's production staff.

138. The claimant returned to work on 22 June 2020. The claimant raised concerns about returning at that time as mediation had not taken place between her and Mr Sarghe and she would have to work with Mr Sarghe. The mediation did not in fact take place until 30 June 2020. Therefore Mr Littleton's decision that Mr Sarghe would not work with the claimant until mediation had taken place was not complied with. Ms Selman justified this decision on the basis that Mr Littleton's decision was six months ago, Mr Sarghe was primarily working in a different department, mediation was about to take place and because of the pandemic employees were not allowed within 2 metres of each other anyway. As a panel the Tribunal was not impressed with this explanation – it had been the respondent's own decision that the claimant and Mr Sarghe should not have to work together until mediation and that decision had been made for very good reason in view of the history we have outlined above.

139. Mediation between the claimant and Mr Sarghe took place on 30 June 2020. Both parties agreed to make an effort with each other and rebuild their working relationship.

140. There then appears to have been a period of relative calm. However on 7 January 2021 there was another incident between the claimant and Christian Sarghe. On this day the claimant was performing her quality control work alongside Andrea Dindareanu who was at this time also performing the role of QC. It will be recalled that Andrea Dindareanu was an eyewitness in respect of the biting incident in November 2019. She gave an account as to what really took place between the claimant and Mr Sarghe on 7 January 2021. We find that this was an accurate account of what took place. We find that what happened was as follows.

141. Andrea Dindareanu was waiting for some meatball products to come out so that she could check if they were the correct shape. The claimant was sitting next to her because she didn't have any other work to do at that particular point in time. Mr Sarghe said that if the claimant had finished her work, she and Andrea should both look carefully at the shape of the meatballs and let him know if there was a problem. The claimant felt offended by Mr Sarghe's attitude and she got very upset. She started to check the meatballs as she had been instructed but after a while she began crying and went to report the situation to Ken Baker. There were some heated conversations between the claimant, Mr Sarghe and Ken Baker. In the end the claimant left. She was subsequently signed off sick and did not return to work.

142. The respondent investigated the events of 7 January 2021 and found that Mr Sarghe had not done anything wrong.

143. On 11 January 2021 Mr Bedson wrote to the claimant making it clear that if she felt able to return to work the claimant could be temporarily transferred to the day shift whilst the investigation was ongoing. The claimant declined that opportunity.

144. During her absence the claimant's mental health appears to have deteriorated significantly. This is demonstrated by the disability impact statement which the claimant wrote on 26 September 2022. In that statement the claimant described suffering from severe anxiety and depression. She explained how she suffered with frequent panic attacks for example when leaving the home to visit a doctor or go shopping. She felt like she was about to have a heart attack or stroke. She had been struggling to sleep, take a shower, dress or walk the dog. She could not cope with everyday life and her son had had to leave his employment to look after her as she was unable to clean or cook or take medicine or do the shopping. Even dressing was taking a lot out of her and she only washed when she really had to. She described physical symptoms including pain in all her body and feeling extremely tired. She struggled to focus and was scared of people. She had experienced suicidal thoughts and at one point her son had had to hide the knives in the house. The claimant was prescribed significant medication and has received counselling including CBT.

145. Christian Sarghe left the respondent's employment in July 2022. The claimant was informed about that. She was still unfit to return to work.

146. Eventually, the respondent implemented capability proceedings and the claimant was dismissed with effect from 12 March 2024.

Analysis and conclusions

147. We shall now present our analysis and conclusions on the issues that we were asked to determine. Before doing so we should mention that as per the agreed list of issues the claimant had presented a wide ranging and diffuse list of allegations. However, the claimant had presented little to no evidence on some of the allegations. Accordingly we have found that a number of the allegations presented have failed on the facts as there was insufficient evidence in support of them. The case had been extensively case managed and the claimant was aware of the issues, she had assistance and advice in preparing her claim but she had still not presented sufficient evidence in support of many of the allegations. Similarly in respect of many allegations there was a real paucity of any evidence to suggest that the treatment was discriminatory, albeit we did not doubt the claimant's strength of feeling that she had been treated badly. The claimant had relied on a large number of comparators but had presented little to no evidence about some of them. She did not evidence why the comparators were said to be in materially the same circumstances and how she was treated less favourably. This meant the claimant fell short of

establishing a prima facie case. A number of allegations have therefore failed for that reason also.

Direct discrimination (section 13 of the Equality Act)

148. We found that on 30 July 2019, Mr Sarghe told the claimant that she should not speak in Polish. We did not find that he shouted. The claimant had raised a complaint about this on 31 July 2019 and said that she had been forbidden from speaking in Polish. She did not allege that she had been shouted at. We considered that if Mr Sarghe had shouted at the claimant she would have raised this in her initial complaint. Also when Kinga Michalski (who was the colleague who the claimant had been speaking to in Polish) was asked about this incident by Mr Littleton she didn't mention that Mr Sarghe had shouted.

149. The claimant did not establish on the evidence that she was treated less favourably than an actual comparator. We found that a hypothetical comparator in materially the same circumstances would have been treated the same way. The reason for the treatment was not race or sex. We found the reason why Mr Sarghe told the claimant to speak in Polish was because he heard his name and therefore he knew he was being spoken about and he wanted to know what was being said about him. The claimant did not establish a prima facie case that the reason for the treatment was race or sex. There was no detriment to the claimant as she could still speak Polish with her colleagues if she wanted but if she had an issue with her team leader she should raise that in English rather than speak about him in a language he could not understand. When the claimant initially raised her complaint about this matter it was looked into and the claimant accepted the explanation which was given and she agreed that no further action needed to be taken.

150. We found that on 2 August 2019, Mr Sarghe pointed out a sausage on the floor and told the Claimant, in front of colleagues, to pick it up. The reason why Mr Sarghe did that was because he was the team leader and it was part of his job to instruct team members. The sausage needed to be picked up and the claimant was closest to it. The claimant did not establish that her two named comparators were in materially the same circumstances as her. Had somebody of a different sex or race to the claimant been standing in the same position as the claimant in relation to the sausage they would have been treated the same way. The reason for the treatment was not race or sex. There was no detriment to the claimant as it was part of her job to tidy up and this was just a normal part of tidying up. The claimant did not establish a prima facie case that the reason for the treatment was race or sex. We consider the claimant overreacted to this incident.

151. We find that on 9 August 2019, Mr Sarghe said to a Romanian colleague that he would see how sooner or later he would sack the claimant or another Polish employee, Kinga Michalski. This formed part of the inappropriate banter from Mr Sarghe which was directed towards the claimant and others. Mr Sarghe did not have any authority to dismiss the

claimant. He was being immature and teasing the claimant and others. Mr Sarghe did not specifically direct his inappropriate banter towards the claimant or Polish people – it was towards the team and that was why he managed to alienate the team as Ms Selman's email showed.

152. Although there was no evidence that the comparators had been subjected to the same comments as the claimant we found that overall the claimant had not been treated less favourably than the rest of the team – they were all on the receiving end of Mr Sarghe's inappropriate banter. We acknowledge that the claimant appears to have had a particularly extreme reaction to Mr Sarghe's behaviour but we think that is a result of her own sensitivities. The reason for the treatment was not race or sex; it was because Mr Sarghe was engaging in what he thought was humorous banter or teasing of the whole team and he thought that was acceptable based on his experience in his previous team when he not been in the same position of responsibility. The claimant did not establish a prima facie case that the reason for the treatment was race or sex.

153. We found that in July and August 2019, Mr Sarghe tried to trip the claimant up several times. This formed part of the inappropriate horseplay from Mr Sarghe which was directed towards the claimant and others. Mr Sarghe was being immature and teasing the claimant and others. He was trying to be funny and have a joke but it was not well received by the claimant and some other members of the team. Mr Sarghe did not specifically direct his inappropriate behaviour towards the claimant or Polish people – it was towards the team and that was why he managed to alienate the team as Ms Selman's email showed.

154. We should explain that we have carefully considered the whole evidential picture when considering whether Mr Sarghe was picking on the claimant due to her race or sex, or whether Mr Sarghe generally used horseplay and banter towards others regardless of their race or sex. We think the evidence showed quite clearly that it was the latter. For example:

154.1 Ms Selman's conclusion when she originally investigated the complaint was that Mr Sarghe had not adjusted his behaviour to reflect his promotion, he still felt he could have a laugh and a joke and he had not learned where the line was between a joke and offence. Mr Sarghe was behaving inappropriately to the team and not just the claimant and this was led to him receiving a warning for his general behaviour. This conclusion was reached contemporaneously in 2019 long before the claimant had brought a claim. We consider it was genuine and accurate.

154.2 Ms Selman's email referred to Mr Sarghe alienating the team and not just the claimant and issues between Mr Sarghe and other workers, including Romanians. Again this was contemporaneous evidence that we felt indicated the reality.

154.3 Similarly Mr Littleton reached the conclusion that there had been inappropriate banter and horseplay from Mr Sarghe towards the whole team and we again felt this was genuine contemporaneous evidence which accurately reflected the reality.

154.4 Other colleagues of Mr Sarghe provided contemporaneous evidence about him behaving inappropriately to the whole team. For example:

154.4.1 Ken Baker said when he was interviewed by Mr Littleton: *"Christian is one for trying to have banter with not just [the claimant] but every member of staff".*

154.4.2 Kevin Moller spoke about Mr Sarghe's tendency to engage in *"lads horseplay"*, he described it as *"mucking about"*, *"having a laugh"* and *"being lads really".*

154.4.3 Andrea Dindareanu commented on Mr Sarghe's attempts to joke with the whole team: *"Christian believes every time to joke with all of us… not all the people can take something like a joke… He said every time don't all you joke because this is my way to be but not all the people understand this."*

154.4.4 Andrea Dindareanu specifically referred to Mr Sarghe tripping the claimant up and *said "It was his joke joking with all the people with me the same".* She was asked to clarify if she was saying he had done the same thing to her and she said *"Yeah with other people because he says oh we are joking we are team".* She was asked to clarify if it was just her and the claimant and she responded *"No all the people".* She had seen Mr Sarghe pinch and trip other people and not just the claimant.

154.4.5 Eva Pietrzak summed the situation up: *"having a playground organised by somebody at work [Mr Sarghe] is not something that we are particularly fond of… there is a lot of people that behave this way and they have a banter and then pushing each other".*

154.4.6 Teresa Kruszynska said she had seen Mr Sarghe trip the claimant and have banter with her but he had meant it as a joke and done the same to others: *"he's meant it as a joke because had done that to me as well and I'm able to take it as a joke but not everybody had to so I suppose [the claimant] didn't take it as one… this jokes aren't really that funny but it is what is its and he behaves as he does so I took it as joke but she just couldn't".*

155. Although there was no evidence that the comparators had been subjected to the exact same banter or horseplay as the claimant we found that overall the claimant had not been treated less favourably than the rest of the team – they were all on the receiving end of Mr Sarghe's horseplay and banter. We acknowledge that the claimant appears to have had a particularly extreme reaction to Mr Sarghe's behaviour but we think that is a

result of her own sensitivities. The reason for the treatment was not race or sex it was because Mr Sarghe was engaging in what he thought was humorous horseplay or teasing of the whole team and he thought that was acceptable based on his experience in his previous team when he not been in the same position of responsibility. The claimant did not establish a prima facie case that the reason for the treatment was race or sex. There was nothing in the banter or horseplay which had anything to do with race or sex.

156. We found that on 13 August 2019, Jane Selman informed the claimant that there were no vacancies on the morning shift. We did not find that two weeks later two English male employees were assigned to that shift. The reason why the claimant was informed there were no vacancies was because there were no vacancies. The claimant was not treated less favourably as any person who made a similar enquiry at a time when there were no vacancies would have received the same response. The reason for the treatment was not race or sex. The claimant did not establish a prima facie case that the reason for the treatment was race or sex. It was not a detriment for the claimant to be accurately informed that there were no vacancies on the morning shift.

157. We find that the claimant has established on the balance of probabilities that on 19 November 2019, Mr Sarghe bit her on both arms. The particular factors which led us to this conclusion were as follows:

157.1 The unexplained unavailability of CCTV evidence for the day in question. As the claimant has correctly pointed out the respondent has produced CCTV evidence for other incidents where it considers the CCTV supports its interpretation of events. Such evidence has been produced even when the relevant incidents were reported much later than when the claimant reported the biting incident. We were driven to the inference that the respondent had something to hide.

157.2 The failure of the respondent to call Mr Sarghe as a witness and the fact there was no good explanation for that failure. This supported our impression that the respondent had something to hide.

157.3 An eyewitness, Andrea Dindareanu, said that Mr Sarghe had bitten the claimant.

157.4 There was no reason suggested for Andrea Dindareanu to lie. She happened to be a witness to events on 7 January 2021 aswell when she had given an account which was more in Mr Sarghe's favour. This suggested she had no particular axe to grind and was just reporting what she saw. Strikingly, the respondent invited us to accept Andrea Dindareanu's account of 7 January (because it assisted them) but to disregard her account of 19 November (because it assisted the claimant). We felt a much more consistent approach was to consider that the witness was just reporting what she saw on each occasion.

157.5 We did not agree with Mr Littleton's decision to disbelieve Andrea's evidence. He did not check whether the machinery was in a position where it would obstruct her view on the day in question and he did not discuss that theory with Andrea. Furthermore, in the second updated version of his witness statement the reference to machinery being in the way had been removed. This suggested to us that Mr Littleton did not really believe that the machinery had been in the way, and/or that there was no proper evidence that it was.

157.6 We considered the respondent's arguments to the effect that the allegation was not credible because of differences in the claimant's account of what had taken place, in particular exactly where she had been bitten. We found these arguments were insufficient to undermine the claimant's credibility. She had made a contemporaneous complaint and stuck with her story. It was not surprising that there were some misunderstandings because the claimant was operating in a second language and there were issues with interpretation. Overall, the claimant had not been so inconsistent that we should disbelieve her.

158. We should mention that we do not think the biting caused the claimant any physical injury. The biting did not leave a mark or pierce the skin. If it had we are sure the claimant would have taken a picture of it. The claimant was wearing PPE including an overcoat at the time of the incident. Therefore Mr Sarghe could not have made contact with the claimant's skin and he did not bite with any force to try and get through the overcoat. It was a very odd thing to do but Mr Sarghe was not trying to hurt the claimant. He was, in his usual way, messing around and acting in an immature manner to try and be funny.

159. We consider that the biting formed part of the inappropriate horseplay from Mr Sarghe which was directed towards the claimant and others. Mr Sarghe was being immature and teasing the claimant and others. Mr Sarghe did not specifically direct his inappropriate banter towards the claimant or Polish people – it was towards the team and that was why he managed to alienate the team as Ms Selman's email showed. Although there was no evidence that the comparators had been subjected to the same behaviour as the claimant we found that overall the claimant had not been treated less favourably than the rest of the team – they were all on the receiving end of Mr Sarghe's inappropriate behaviour. The reason for the treatment was not race or sex. It was because Mr Sarghe was engaging in what he thought was humorous horseplay or teasing of the whole team and he thought that was acceptable based on his experience in his previous team when he not been in the same position of responsibility. It was misguided horseplay.

160. The claimant did not establish a prima facie case that the reason for the treatment was race or sex. We should say that in respect of this allegation and the other allegations where we found that Mr Sarghe had behaved as alleged by the claimant we considered that particular issue anxiously and at length. The behaviour was strange and inappropriate. However it was in the context of somebody who we knew to have engaged in horseplay and banter which was misguided enough to have alienated the whole team. It was clear

that Mr Sarghe's behaviour was not just directed towards the claimant and he had fallen out with others, including Romanians. There was no racial or sex-based element to the behaviour exhibited by Mr Sarghe. It seemed he had continued his general horseplay and banter which had been tolerated in a previous team and it went down badly when he tried the same thing with the noon shift when he was in a position of responsibility. In these circumstances we did not consider that the claimant had proved any facts from which we could conclude that the behaviour was because of sex or race.

161. As we mentioned at the outset we did carefully consider whether we could draw any inference of discrimination from the respondent's failure to call Mr Sarghe or the suboptimal case preparation by the respondent. Mr Sarghe has left the respondent's employment and we acknowledge that this may have made it more difficult to call him but we were not given a full explanation as to why it had not been possible to call him. However we felt that the circumstances of Mr Sarghe's behaviour were in fact relatively clear from the whole evidential picture which we have endeavoured to describe of general horseplay and banter conducted by him towards the team as a whole. In the specific context that we have described we did not feel it was appropriate to draw an inference of discrimination from the failure to call Mr Sarghe. When we considered the instances of poor case preparation in relation to the specific allegations of discrimination we did not consider that there was anything sufficiently relevant or meaningful to draw an inference of discrimination.

162. We did not find that on 20 November 2019 Dave Bedson refused to let the claimant go home when she was upset about the events of the previous day. The claimant did not establish this on the evidence. We were sure that if the claimant had been so upset that she wished to go home she would have the strength of character to do so, as she did on 7 January 2021.

163. We found that in November 2019, after the claimant complained about the events of 19 November 2019, Jane Selman failed, in investigating the complaint, to interview all of the people whose names were provided by the claimant. In particular we found that Ms Selman failed to interview Tim Cartwright who had been named as a witness by the claimant and was clearly relevant as he was said to have witnessed the biting. We found that the reason for this was an oversight by Ms Selman. The claimant did not establish that there was a named comparator in materially the same circumstances. The reason for the treatment was not race or sex; it was an oversight. Ms Selman would have made the same oversight with a hypothetical comparator. The claimant did not prove any facts from which we could conclude that the oversight was because of race or sex. We did not consider that it could be said the claimant had been subjected to a detriment because the witness was interviewed at the appeal stage and the oversight rectified. Further, the witness said he had not seen the biting incident so he could not have given any evidence in the claimant's favour in any event. There was no basis for any suggestion that the Mr Cartwright's evidence might have been different if he were interviewed earlier.

164. We found that in late November or early December 2019, the respondent decided not to take any disciplinary action against Mr Sarghe for the incident on 19 November 2019. This was the biting incident. The reason why the respondent decided not to take any action in relation to this incident was because they had not found that the biting took place. However Mr Sarghe was disciplined for his general physical horseplay and inappropriate banter. The claimant did not establish that there was a named comparator in materially the same circumstances. The same decision would have been taken with a hypothetical comparator. The reason for the treatment was not race or sex. The claimant did not establish a prima facie case that the reason for the treatment was race or sex. The claimant did not prove any facts from which we could conclude that the reason why she had not been believed or the subsequent decision not to take disciplinary action specifically for the allegation of biting was because of race or sex.

165. We found that in early January 2020, Brian Littleton considered and determined the Claimant's appeal against the outcome of Ms Selman's investigation. The claimant did not establish that there was a named comparator in materially the same circumstances in relation to his matter. In relation to the three complaints about Mr Littleton's conduct of the appeal:

165.1 We found that he did not move the claimant to a different shift. However we found that he did move Mr Sarghe to a different shift as a temporary measure pending training and mediation. It was not clear why the claimant apparently considered that she should have been moved instead. The claimant did not make any request at the time to move shifts. The same decision would have been taken with a hypothetical comparator. The reason for the treatment was not race or sex. The claimant did not establish a prima facie case that the reason for the treatment was race or sex. The claimant did not prove any facts from which we could conclude that the reason why she had not been moved shifts was because of race or sex. We did not consider there was any detriment here. Mr Sarghe was the perpetrator and we consider it was more appropriate for him to be moved

165.2 We did not find that Mr Littleton accused the claimant of lying about the incident on 19 November 2019. His finding was that the claimant had not been bitten as she had alleged but he did not accuse her of lying about it. Although we disagreed with his analysis of the allegation there was no evidence that it was because of race or sex. The same decision would have been taken with a hypothetical comparator. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex.

165.3 We did not find that Mr Littleton brought Mr Sarghe back to the claimant's shift. Mr Littleton's decision was that Mr Sarghe should be moved to the day shift until he had completed training and mediation. As we have explained Mr Littleton's decision was not fully carried out because in June 2020 the claimant and Mr Sarghe were required to work together for a short period before mediation had taken place. That

was not Mr Littleton's decision and it is the subject of a separate allegation. There was no evidence that Mr Littleton's approach was because of race or sex. The same approach would have been taken with a hypothetical comparator. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex.

166. We found that in January 2020, Mr Sarghe found out about the claimant's complaint and brought a complaint against her. Mr Sarghe's complaint was that the claimant had been saying he would be sacked or moved to a different shift. When this was investigated numerous people gave evidence that the claimant had said that. We therefore find that the reason why Mr Sarghe made this complaint was because the claimant had acted in the way alleged. It was not because of race or sex; it was because the claimant had in fact been telling people that he would be sacked or moved to a different shift. Mr Sarghe was aggrieved by the claimant's behaviour and he complained about it for that reason and because he was being disciplined for his behaviour towards her. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex. The claimant did not establish that there was a named comparator in materially the same circumstances. Mr Sarghe would have done the same thing in respect of a hypothetical comparator.

167. We found that on 5 February 2020 Jane Selman called the claimant to a disciplinary hearing and on 9 March 2020, James Morris issued her with a final written warning. We found that the claimant had established a prima facie case of direct discrimination in relation to these matters. We shall summarise our reasons.

167.1 The decision taken to discipline the claimant appeared to have been taken with alarming alacrity.

167.2 As we have explained two of the three disciplinary allegations had not been investigated and there was no basis for them at all. These allegations were only investigated because of the intervention of the claimant's trade union representative at the first disciplinary hearing.

167.3 When matters were investigated it was clear that there was no evidence at all in support of the first and third allegations. These allegations should never have been relied upon to call the claimant to a disciplinary, or to give her a final warning.

167.4 The third allegation did not make sense as the discriminatory behaviour relied upon was not identified and colleagues had not said the claimant did not like Romanian people.

167.5 The decision to uphold the third allegation was perverse in the sense that we have explained.

167.6 Mr Morris had resorted to seeking to justify his decision based on a general impression rather than any evidence.

167.7 The decision to issue the claimant with a final warning appeared extremely harsh to the extent that we do not believe the respondent had any proper basis for issuing a final warning.

167.8 In his evidence to us Mr Morris had accepted that a final warning would not be justified in respect of the second allegation, which was the only allegation where there was any evidence in support.

167.9 Although he was not an actual comparator (as there were material differences) the treatment of Mr Sarghe was a part of the evidential picture. He had received a lesser sanction for more serious misconduct of engaging in physical horseplay and offensive banter towards the team he was meant to be leading resulting in him alienating most of the team and the breakdown of his working relationship with the claimant.

167.10 The respondent had behaved atypically in calling the claimant to a disciplinary and issuing her with a final warning when there was no evidence for some of the allegations relied upon.

168. In these circumstances the respondent’s conduct appeared to us to call out for an explanation. The burden of proof shifted. We found that the respondent had failed to prove that race was not a ground for the treatment in question. The respondent had failed to present cogent evidence explaining a non-discriminatory reason for its conduct. We do not believe we received any cogent explanation for why the claimant was called to a disciplinary with surprising haste in respect of three allegations when two of the three allegations had not been investigated and there was no evidence in support of them. We do not believe we received any cogent explanation for why the claimant was given a final warning for two allegations when there was no evidence in support of one of the allegations and the claimant’s conduct could not properly justify a final warning. The respondent’s actions could not be explained by incompetence or oversight and the respondent did not provide any cogent evidence about this. Accordingly the respondent failed to discharge the burden of proof which is upon it and we must find that this allegation of direct race discrimination succeeds, subject to our findings on jurisdiction.

169. We found that on 22 June 2020, the respondent reinstated Mr Sarghe to the claimant’s shift before mediation had taken place. As we have explained mediation did not take place until 30 June 2020. We have also already explained the respondent’s reasons for this decision. Although we disagreed with the decision and we thought it was poor management by the respondent we accepted the reasons explained to us were genuine and non-discriminatory. There was no evidence that the approach taken was because of race or sex. The same approach would have been taken with a hypothetical comparator. The claimant did not establish that the respondent had acted because it assumed she did not know her rights as a Polish

employee. There was no evidence of that. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex.

170. We found that on 30 June 2020, Rochelle Murinas (an external HR consultant for the respondent) conducted a mediation meeting. We found that Ms Murinas did prepare a report of the meeting. This was in the form of an email which could be seen on page 363 of the bundle. We found that Ms Murinas did meet the claimant and Mr Sarghe together as we understand they were waiting in a room together when the mediation started. There was no evidence that Ms Murinas' approach was because of race or sex. The same approach would have been taken with a hypothetical comparator. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex.

171. We found that in July 2020 the claimant presented Jane Selman with a psychologist's report. The author was Karolina Standing, who has been described as a psychologist or a counsellor. The claimant had consulted her as she was experiencing panic attacks and anxiety due to the behaviour of Mr Sarghe. The claimant was described as terrified and her life was very difficult as she was now in contact again with Mr Sarghe as they were working together. The claimant was described as showing symptoms of deep depression and requiring therapy (CBT). The report stated: *"She is asking for this man to be moved to another department or another shift or she is happy to move if necessary".*

172. We have to observe that the information the claimant apparently provided to Karolina Standing appears to be inconsistent with the information she provided to the mediator and the agreement she reached at the mediation. The claimant had attended mediation just 6 days before Ms Standing's report was written. She had agreed to mediate and then at the mediation she agreed to make an effort with Mr Sarghe and to rebuild the working relationship. She had agreed to speak directly with Mr Sarghe if any issues arose. She had agreed to be open, honest, polite and respectful to Mr Sarghe in order to rebuild their working relationship. The agreement reached was recorded by the mediator and set out in an email on page 363. The claimant had not said anything about feeling anxiety or terror or being unable to work with Mr Sarghe. To put it bluntly it seems to us that at the mediation the claimant had agreed to draw a line under things, move on and work together with Mr Sarghe as best she could but she then went back on that six days letter via the report from her counsellor.

173. Nevertheless, after she received the counsellor's report Ms Selman put a proposal to the claimant. The proposal and the claimant's response to it could be seen in an email chain from 8 – 9 July 2020 at page 371 to 380 of the bundle. The proposal was that the claimant move to fill a QC vacancy in manufacturing. This was on a different shift and the duties were broadly similar to the duties the claimant was already undertaking as a QC in services. We do not accept that either the hours or duties in this alternative role were inappropriate. The claimant did not demonstrate that they were. If

the claimant accepted the offer there would be no need for any interaction between her and Mr Sarghe and a transfer could be put into effect fairly quickly. This was therefore an appropriate offer at the time.

174. The claimant rejected the proposal put forward by Ms Selman. She said that for family reasons she could only work on the noon shift. Ms Selman then responded to say it was a shame the claimant felt the role in manufacturing was unsuitable. With regard to Mr Sarghe moving she said the respondent did not feel that was appropriate for several reasons. Firstly Mr Sarghe had not done anything to warrant such action. Second a move would be impractical because all shifts in services overlap and therefore their paths would cross. Thirdly there were no vacancies available for a team leader.

175. We do not accept that Ms Selman did not follow the advice in the report by not moving Mr Sarghe. The report clearly stated that the claimant was *"happy to be moved if necessary"*. It is correct that Ms Selman's approach was influenced by the fact that the claimant's account that she had been bitten by Mr Sarghe had not been accepted. We have already explained that we do not agree with the respondent's analysis in this respect but we do not consider it to have been discriminatory. There was no evidence that Ms Selman's proposal to move the claimant rather than Mr Sarghe was because of race or sex. The claimant did not establish that there was a named comparator who was in materially the same circumstances. The same approach would have been taken with a hypothetical comparator. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex.

176. We found that in late November 2020, Ms Selman and/or Mr Bedson refused to place the claimant on the morning shift. The claimant said that her situation now allowed her to move to the morning shift. Ms Selman spoke to Dave Bedson about the request and she communicated to the claimant that there was no vacancy available on the day shift. The claimant identified comparators who were offered places on the day shift. However on investigation it transpired that these offers were made later when there was a vacancy on the day shift. This was a material difference between their situation and the claimant's. The tribunal was satisfied that at the time the claimant made her request it was refused because there were no vacancies available on the day shift. There was no evidence that the refusal was because of race or sex. The same decision would have been taken with a hypothetical comparator who requested a transfer at a time when there were no vacancies. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex.

177. We found that on or shortly before 31 December 2020, Ken Baker asked the claimant to do overtime, stating that she would also have to return to work on 3 January 2021. However we also find that the claimant was not singled out in this respect. The team – production operatives and QCs - were all asked to do overtime and return to work on 3 January because of the needs of the business at that time. There was no evidence that the treatment

was because of race or sex. Mr Baker was in a materially different position because he was the senior team leader. The same approach would have been taken with a hypothetical comparator. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex. There was no detriment here. The claimant was treated the same as other team members and by this stage the claimant had been working with Mr Sarghe since the agreement reached at mediation in June in what we found was a period of relative calm.

178. We found that on 3 January 2021, Mr Sarghe did not refuse to sign paperwork when requested by the claimant, in relation to a concern about a meatball product. The claimant's own evidence in her witness statement was that Mr Sarghe had agreed to sign the paperwork in the end. We therefore did not consider that there was any detriment here. There was no evidence that Mr Sarghe's approach was because of race or sex. The claimant did not establish that there was a named comparator in materially he same circumstances. The same approach would have been taken with a hypothetical comparator. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex.

179. We did not find that on 7 January 2021, Mr Sarghe enquired of the claimant – but not others present with her – why she was not cleaning and then instructed her (but not others) to check the shape of a meatball product. We refer to our findings of fact about this incident, in particular our finding that both the claimant and Andrea Dindareanu were asked to check the meatballs. We considered the claimant's account of this incident which could be found on page 9 of her witness statement. The claimant believed that Mr Sarghe was trying to force her to undermine Andrea Dindareanu's work so that Andrea Dindareanu would write a complaint against her. We did not accept that and it does not make sense. We think the claimant overreacted to this incident. There was no evidence that Mr Sarghe's approach was because of race or sex. The claimant relied on a named comparator who was Andrea Dindareanu. We would accept that Andrea Dindareanu was in materially the same circumstances on the day in question. However there was no less favourable treatment as both the claimant and Andrea Dindareanu were asked to check the meatballs. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex. There was no detriment here – checking the product was part of the claimant's job and she was treated the same as the other QC on shift.

180. The 21st allegation of direct discrimination was that between 7 January 2021 and the date of submission of the Claim Form, the respondent did not take any steps to facilitate the claimant's return to work from sick leave. We do not think it is accurate to suggest that no steps were taken to facilitate the claimant's return to work. We shall explain our reasons.

181. At an early stage in the claimant's absence Dave Bedson made it clear that if she felt able to return to work the claimant could be moved to the day shift whilst matters were investigated. This was reiterated in an email sent on

11 January on page 417. The claimant rejected that opportunity as he felt she *“would not have peace because everyone would look at me and ask questions”.*

182. The respondent then sought occupational health (“OH”) advice. They reported on 1 and 9 February 2021. The claimant described Mr Sarghe as being “her only trigger” and she wanted to move to a different shift. The OH opinion was that the claimant was physically capable of being at work and she needed to learn to be professional and work with people that she might not like. Other than a reference to the claimant wishing to move shifts (which had in fact already been offered by this stage) no further advice on adjustments was offered. OH’s view was that the claimant was fit for work, albeit she was experiencing an acute stress reaction and needed support on how to manage the situation in the form of counselling.

183. There was therefore an impasse in that the claimant had refused the opportunity to move shifts but she was reporting to OH that she would not return to work unless she moved shifts. This reflects what we consider was a pattern of the claimant rejecting the opportunity to move shifts when the chance was offered to her but then requesting a move when there were no vacancies available. The claimant was inconsistent on this matter.

184. In light of the above Ms Selman attempted to make contact with the claimant’s trade union representative to see if they could assist with finding a solution. However, she was advised that the claimant had informed the union that she did not want them to act for her any longer. Then, in an email dated 14 May 2021 the claimant advised the respondent that she was *“undergoing psychological therapy”* and every letter she received from the respondent was causing her stress. She said she was not able to respond to any emails or participate in conversations. She asked the respondent to correspond instead with her legal team.

185. We have seen some of the correspondence from the claimant’s legal team. We are unsure of their status as lawyers and we consider their correspondence with the respondent to be aggressive, unprofessional and unhelpful. As far as we can see at no stage during the claimant’s absence did the claimant or her legal or medical advisers make any concrete suggestion as to how the claimant could come back to work. This was despite the fact that Ms Selman asked the claimant if there were any steps that could be taken to enable the claimant to return to work, for example in her email to the claimant of 20 April 2021. The only possibility that was mentioned was to move the claimant to a different shift but as we explained when this was offered to the claimant, she refused it. Ms Selman kept in contact with the claimant and her advisers to see if there was any prospect of the claimant retuning to work. However, the claimant appears to have become extremely psychologically unwell during this period and it is clear that she was focusing on taking legal advice to bring a claim rather than come back to work.

186. The suggestion that Mr Sarghe was the only trigger and he was the only thing preventing the claimant from returning to work was incorrect

because as we mentioned Mr Sarghe left the respondent's employment in July 2022 and the claimant was informed of this but she still did not come back to work. This is supported by the claimant's impact statement which refers to frequent panic attacks which had nothing to do with Mr Sarghe, for example when leaving home to visit the doctor or go shopping. As the claimant's absence progressed she repeatedly asserted that she was no longer aware of the cause of her depression, anxiety and panic attacks.

187. It appears clear to us that the claimant's sadly deteriorating mental health cannot be attributed to the situation with Mr Sarghe. As we have explained the claimant's impact statement described the claimant's decline including experiencing suicidal thoughts and her son being required to leave his employment to look after her. This took place over a period when the claimant was absent from work and had not had any contact with Mr Sarghe for many months. The claimant's highly agitated and upset state was recorded by EJ Faulkner in his case management order following the preliminary hearing in August 2022 when the claimant had been off work with no contact with Mr Sarghe for more than 18 months. At numerous times in the hearing before us the claimant unfortunately reached a similar state, to the point where she was unable to continue with the hearing and we had to take breaks or arrange time for rest and recuperation.

188. The claimant's counsellor, Karolina Standing, wrote a report about the claimant on 19 September 2022. She described the claimant as having required medication and therapy. The claimant had been *"scared, anxious and depressed constantly. She became withdrawn, refusing to see friends and wasn't going out… Mrs Oterska was a nervous wreck and cried all of the time".* Ms Standing said that the claimant was still struggling with everyday tasks. She opined that the claimant was still not able to go back to work and she did not identify any steps that could be taken to enable the claimant to go back to work. At this stage the claimant had been off work for more than 20 months without any contact with Mr Sarghe who she knew had left the respondent's employment. The claimant and her legal and medical advisers did not identify any factor which was preventing her returning or identify anything that could be done to assist her to return.

189. In these circumstances we were driven inexorably to agree with the respondent's position that the respondent had made efforts to facilitate the claimant's return to work but the reality was that the claimant was not capable of working for the respondent and there was nothing further that could be done to facilitate her return to work.

190. We therefore find that this allegation fails on the facts. In any event there was no evidence that the respondent's approach was because of race or sex. The same approach would have been taken with a hypothetical comparator. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex.

191. The 22nd allegation of direct discrimination was that on 16 December 2021, the respondent (Jane Selman) refused to permit the Claimant to take

annual leave. The situation here was that on 16 December 2021 the claimant wrote to Ms Selman to ask how the respondent would handle her unused holiday leave – *"Will the workplace pay me money?".* Ms Selman responded to the claimant's email to say that the claimant could only be paid if she took annual leave which the claimant could not do as she was signed off sick, or when she left the respondent's employment. The claimant was reassured that her leave was accruing and she could take it when she returned. Ms Selman said that she would be concerned if the claimant was asking to take leave then as she was off sick and leave was designed to ensure that workers take a rest and if the claimant was poorly she may not be able to rest. The claimant responded to that to say she was just asking how her unused holiday would be dealt with and she was content with the answer she received on that - *"for me it is no problem that my leave will be carried over to the next year".*

192. We therefore consider that the claimant had not requested to take annual leave. She was instead asking about how she would be paid for her unused leave. Ms Selman had not refused to permit the claimant to take annual leave. She had said that she would be concerned if the claimant was making that request (which she wasn't). We therefore find this allegation fails on the facts. In any event there was no evidence that the respondent's approach was because of race or sex. The same approach would have been taken with a hypothetical comparator. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex. Moreover we find there was no detriment here as the claimant had said that it was "no problem" for her if her leave was simply carried over to the next year. A reasonable employee would take the same view.

193. The 23rd and final allegation of direct discrimination was that the respondent did not pay the claimant for the five bank holidays from 15 April to 3 June 2022. The claimant did not present any evidence in relation to this allegation. The respondent's evidence was that the claimant had been paid public holidays while she was still receiving SSP but once this was exhausted public holidays would accrue but not be paid. It said the same process would be applied to all employees. The claimant did not challenge that aspect of the respondent's evidence. We accept the respondent's evidence. There was no evidence that the respondent's approach was because of race or sex. The same approach would have been taken with a hypothetical comparator. The claimant did not prove any facts from which we could conclude that the reason for the treatment was because of race or sex.

194. In light of the findings above we shall dismiss all of the allegations of direct discrimination save for the allegations in respect of the disciplinary and warning which we shall uphold subject to our findings on jurisdiction.

Discrimination arising from disability (section 15 of the Equality Act)

195. The allegation was that the respondent treated the claimant unfavourably by Ms Selman blaming her for the fact that other employees

were having to cover her work after she went on sick leave on or around 7 January 2021.

196. Following the preliminary hearing before EJ Faulkner the claimant was required to provide the date or dates on which she said this took place. The claimant did that on 03/09/22 (at 16:31) by way of an email sent to the Tribunal and the respondent's solicitors. The claimant gave the date of 20/04/21. Apparently, the respondent was unable to locate the claimant's email of 03/09/22. This meant that the relevant email sent by Ms Selman to the claimant on 20/04/21 was overlooked and not placed in the bundle. It was produced during the hearing and the tribunal invited the parties' submissions on it. Both parties provided submissions which we have considered.

197. The context of this email included that the claimant was no longer represented by her union and at that stage she had a sick note which was due to expire on 25/04/21. The claimant had been absent since 7 January 2021.

198. Ms Selman started her email by observing that the claimant's union had advised her that the claimant did not want them to represent her any longer and therefore she wished to be contacted directly. She said that the respondent had hoped that the claimant's union could represent and support her. Ms Selman then explained that the claimant's role as a QC had been covered by a stand in. Ms Selman also said that the claimant's absence had resulted in the QC team being overstretched and it was causing operational difficulties. In view of this the claimant was asked to provide an update on her health and an estimate of when she believed she would be able to return to work. The claimant was asked if there were any steps that the respondent could consider to enable her to return to work and if so they would be given full consideration. She said that an investigation into the events of 7 January was on hold because of the claimant's absence but if the claimant felt well enough to conclude it she should let Ms Selman know.

199. Taking into account the context and the full contents of the email the tribunal did not consider there was any unfavourable treatment and the claimant had not been put at any disadvantage. We shall explain our reasons. The claimant had been absent for nearly 4 months by this stage and it was factually correct that her absence was causing operational difficulties. The respondent could not appoint a permanent replacement for the claimant as she was off sick. We do not think it was disadvantageous or unfavourable to the claimant for the respondent to point out the operational difficulties her absence was causing. In our view it was appropriate for the respondent to inform the claimant of the effect of her absence as it was a warning that the absence could not be sustained indefinitely. Operational difficulties caused by absence are often used as justification for initiating capability proceedings and dismissing for capability (as took place later on in this case). It is appropriate and not unfavourable to be transparent with employees on sick leave about this issue. Ms Selman's enquiry was not confrontational or impolite. Her approach was mitigated by the express reference to a willingness on the part of the respondent to reasonably adjust

and facilitate a return to work. Read in full it was clear that Ms Selman was primarily seeking to support the claimant to return to work.

200. It was agreed that the claimant's absence was the cause of the treatment and that the absence arose in consequence of the claimant's disability.

201. Had we found that the treatment was unfavourable we would have found that it was a proportionate means of achieving a legitimate aim. The aim relied upon was the return of the claimant to work as a QC with any required reasonable adjustments. This was a legitimate aim. We consider that the respondent acted proportionately. Ms Selman's email primarily focused on supporting the claimant back to work and expressly made it clear that any requested adjustments would be considered. It was factually correct that the claimant's absence was causing operational difficulties and it was appropriate and reasonably necessary way to point that out as part of encouraging the claimant to return to work. Something less discriminatory could not have been done instead; it was necessary to be transparent with and warn the claimant about the effect of her absence. The needs of the claimant and the respondent had been fairly and properly balanced; the emphasis in the email was on supporting the claimant back to work with adjustments but it was also appropriate to point out the difficulties in sustaining her absence.

202. We would have found that the respondent should reasonably have known that the claimant was a disabled person by April 2021. Although this had been denied in the amended response we felt that was ample evidence demonstrating that the respondent should have known by this stage, such as the information from the claimant's counsellor, her own indications that she was struggling with mental health and the fact she had been absent for nearly 4 months.

203. For the above reasons we shall dismiss the allegation of discrimination arising from disability.

Failure to make reasonable adjustments (section 20 of the Equality Act)

204. The claimant's complaints are that:

204.1 Jane Selman refused to move Mr Sarghe in July 2020.

204.2 The Respondent (Ms Selman and/or Mr Bedson) refused to place the Claimant on the morning shift in late November 2020.

204.3 Leading up to Christmas 2020, she was unable to work weekend shifts because Mr Sarghe was working on both mornings and afternoons.

204.4 Jane Selman contacted the Claimant directly whilst she was on sick leave – on 21 January, 22 January, 11 February, 12 February, 15 February, 20 April, 22 April, 7 June, 29 September, 1 October and 12 October 2021, when the Claimant says she had made clear she did not want to be contacted directly by the Respondent because of her anxiety and depression.

204.5 Between 7 January 2021 and the date of submission of the Claim Form, the Respondent did not take any steps to facilitate the Claimant's return to work from sick leave.

205. On these matters the Tribunal has found as follows:

205.1 Jane Selman did refuse to move Mr Sarghe in July 2020. Her reasons were explained in her email of 9 July 2020. Firstly Mr Sarghe had not done anything to warrant such action. Second a move would be impractical because all shifts in services overlap and therefore their paths would cross. Thirdly there were no vacancies available for a team leader. The following context is also relevant:

205.1.1 By this stage the claimant and Mr Sarghe had been kept apart up until 22 June.

205.1.2 On 30 June the parties had been through mediation and through the mediation process they had each agreed to make the effort to build trust and to be polite and respectful towards one another in order to rebuild their working relationship.

205.1.3 No issues had been identified since the mediation.

205.1.4 There were no issues reported by the claimant until the incident of 7 January 2021, when the tribunal agrees with the respondent that Mr Sarghe did nothing wrong and the claimant appears to have overreacted to an innocuous situation.

205.1.5 There is no evidence that Mr Sarghe had misbehaved towards the claimant since she complained about him in November 2019.

205.1.6 Ms Selman had offered the claimant the role of QC in manufacturing which meant she would not have had any contact with Mr Sarghe, but the claimant had turned that down for personal reasons which are unclear.

205.2 In late November 2020, Ms Selman and/or Mr Bedson did refuse to place the claimant on the morning shift. The claimant said that her situation now allowed her to move to the morning shift. Ms Selman spoke to Dave Bedson about the request, and she communicated to the claimant that there was no vacancy available on the day shift. The tribunal was satisfied that at the time the claimant made her request it was refused because there were no vacancies available on the day shift.

205.3 The claimant did not establish that leading up to Christmas 2020, she was unable to work weekend shifts because Mr Sarghe was working on both mornings and afternoons. At this stage the claimant and Mr Sarghe were not prevented from working with one another. They had in fact been working with one another with no issues since 22 June.

They had agreed to work together at the mediation. If the claimant had wanted to volunteer for overtime then she could.

205.4 Jane Selman did contact the Claimant directly whilst she was on sick leave. The evidence in the bundle demonstrated that Jane Selman had contacted the claimant on some of the dates she identified in the allegation - on 21 January, 11 February, 12 February, 15 February, 7 June, 29 September and 12 October 2021. Further, the Tribunal has found that in an email dated 14 May 2021 the claimant advised the respondent that every letter she had received from the respondent was causing her stress and she was not able to respond to any emails or participate in conversations. She asked the respondent to correspond instead with her legal team.

205.5 The tribunal has found that it was not accurate to suggest that between 7 January 2021 and the date of submission of the claim form, the respondent did not take any steps to facilitate the claimant's return to work from sick leave. We have already explained our reasons for that. We reiterate our finding that the reality was that the respondent had made efforts to facilitate the claimant's return but the claimant was not capable of working for the respondent and there was nothing further that could be done to facilitate her return to work.

206. The claimant alleged that the respondent had the following PCPs:

206.1 Requiring the Claimant to work and/or co-operate with Mr Sarghe (in respect of the first two complaints and the fifth).
206.2 Requiring the Claimant to work on the same shift as Mr Sarghe if she was going to work weekends (in respect of the third complaint).
206.3 Contacting employees whilst they are on sick leave (in respect of the fourth complaint).

207. The respondent accepted it had the above PCPs.

208. It was alleged that the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that they caused her heightened anxiety and depression, and in addition in relation to the third complaint she was unable to earn overtime pay. The claimant did not present sufficient evidence as to how the PCPs were said to have put her at the claimed substantial disadvantage. The tribunal concluded as follows:

208.1 We found that the first PCP did not put the claimant at the claimed substantial disadvantage at the relevant time for the first, second and fifth complaints - July 2020, November 2020 and January 2021 onwards. These are our reasons.

208.1.1 We have taken into account the claimant's counsellor's report of 6 July 2020 but as we have pointed out the information the claimant gave her counsellor appears to be inconsistent with what she agreed to do at the mediation, i.e. to rebuild the working relationship with Mr

Sarghe. We do not think that the claimant would have agreed to work with Mr Sarghe in the way that she did at the mediation if she was being put at the substantial disadvantage as claimed.

208.1.2 Other than the counsellor's report the claimant did not present sufficient evidence that this PCP put her at the claimed substantial disadvantage at the relevant time.

208.1.3 Following the mediation the claimant worked well with Mr Sarghe for over 7 months until she overreacted to the incident on 7 January 2021. Again the claimant would not have done that if she was being put to the substantial disadvantage as claimed.

208.1.4 The claimant had turned down opportunities to work away from Mr Sarghe on several occasions - in July 2020 when she turned down the role in manufacturing and in January 2021 when she turned down the vacancy on the morning shift for instance. The reasons for the claimant rejecting these opportunities were not very clear and the claimant later changed her mind on whether she could work on other shifts. We consider that the claimant could easily have worked other shifts and she would not have turned down these opportunities down if she were being put to the substantial disadvantage alleged.

208.1.5 As we have observed the claimant's mental health deteriorated significantly in the period when she was off work after January 2021, when she was not working with Mr Sarghe. It continued to deteriorate months after she last worked with Mr Sarghe and even after Mr Sarghe left the respondent's employment. The claimant herself realised that she did not know the cause of the deterioration. This reinforces out finding that the claimant's heightened anxiety and depression was not caused by working or cooperating with Mr Sarghe. Indeed it happened after she had stopped working or cooperating with Mr Sarghe and at a time when she had no contact with him at all.

208.2 We found that the second PCP did not put the claimant at the claimed substantial disadvantage. Our reasons are as follows.

208.2.1 The claimant had not established the factual premise of the complaint – i.e. that leading up to Christmas 2020, she was unable to work weekend shifts because Mr Sarghe was working on both mornings and afternoons. By Christmas 2020 the claimant had been working with Mr Sarghe for over 7 months since 22 June 2020. If she wanted to work weekend shifts she could have done so, even if Mr Sarghe was also working them. The claimant had agreed to work with Mr Sarghe at the mediation on 30 June 2020 and she had no issues with doing so until she overreacted to the incident on 7 January 2021.

208.2.2 There was no evidence that this PCP caused the claimant heightened anxiety and depression.

208.2.3 This PCP did not mean the claimant was unable to earn overtime pay. She had to work different overtime shifts from those worked by Mr Sarghe up until June 2020. After June 2020 the claimant could work any overtime shift she wanted, even if Mr Sarghe was also working it. This was consistent with what was agreed at mediation.

208.3 We found that the third PCP did not put the claimant at the claimed substantial disadvantage. Our reasons are as follows.

208.3.1 The communications from the respondent were appropriate and focused on enabling the claimant to return to work. There was no reason for them to have caused the claimant heightened depression or anxiety and there was insufficient evidence that they did so.

208.3.2 The claimant said in her email of 14 May 2021 that receiving letters had caused her stress (not anxiety or depression) but she has not explained how or why that would be the case.

208.3.3 The claimant was able to correspond with the respondent in the relevant period, and did so.

208.3.4 The respondent did not correspond excessively with the claimant in the relevant period and they attempted to correspond with both the claimant's lawyers and her union when they were requested not to contact the claimant.

208.3.5 The evidence in the bundle demonstrated that Jane Selman had contacted the claimant on some of the dates identified in the allegation - on 21 January, 11 February, 12 February, 15 February, 7 June, 29 September and 12 October 2021. However there was no evidence that receiving correspondence on those occasions had caused the claimant increased anxiety or depression.

209. If we had found that the duty to make adjustments arose we would make the following findings on the steps that the claimant suggests could have been taken to avoid the disadvantage:

209.1 The first suggested step was that in July 2020 the Respondent could have removed Mr Sarghe from her shift. We would have found it was not reasonable for the respondent to have to take this step. These are our reasons.

209.1.1 The respondent had found that Mr Sarghe had not done anything so wrong as to justify moving him. It had already conducted a disciplinary process and imposed a disciplinary sanction in accordance with its disciplinary procedures.

209.1.2 Following her complaint the claimant and Mr Sarghe had been kept apart until June 2020 and this situation could not continue indefinitely.

209.1.3 The respondent was reasonably entitled to draw a line under the situation and encourage the parties to rebuild their working relationship, which it did via mediation.

209.1.4 On 30 June 2020 the claimant and Mr Sarghe had both attended mediation and through that they had both agreed to work together and rebuild their working relationship. It would not be reasonable to expect the respondent to move Mr Sarghe after the agreement to work together had been reached at mediation (i.e. from July 2020 which is the agreed period for the claimant's disability discrimination claims).

209.1.5 The respondent had acted reasonably to avoid any disadvantage by offering the claimant the role as QC in manufacturing which would have meant she would not have had to work with Mr Sarghe at all. The claimant turned that opportunity down even though her therapist had said she was happy to move.

209.2 The second suggested step was that in November 2020 the respondent could have moved her to the morning shift and leading up to Christmas 2020 she could have been placed on a different shift to Mr Sarghe. We would have found it was not reasonable for the respondent to have to take this step. We refer to our findings above. Furthermore, in November/December 2020 there was no vacancy available for the claimant on a different shift. The claimant had turned down the opportunity to move away from Mr Sarghe by refusing the position in manufacturing. And at this point in time the claimant and Mr Sarghe had agreed to work together at mediation and had been working well together with no problems for around 6 months. These are further reasons why it would not be reasonable for the respondent to have to take this step.

209.3 In relation to the fifth complaint, the claimant also suggested that the respondent could have decreased her hours so that she did not have to see Mr Sarghe, or could have dismissed him. We would have found it was not reasonable for the respondent to have to take these steps. We refer to the findings above. The parties had agreed to work together at mediation and Mr Sarghe had done nothing wrong since then. The respondent had found that Mr Sarghe had not done anything so wrong as to justify dismissing him. It had already conducted a disciplinary process and imposed a disciplinary sanction in accordance with its disciplinary procedures. Furthermore, the claimant never suggested that her hours should be decreased and we do not think she would have accepted that. It was not therefore practicable.

209.4 As we have explained it became clear that Mr Sarghe was not the only trigger for the claimant's absence and the significant deterioration in her

illness was not caused by Mr Sarghe. Overall, we considered that none of the steps proposed by the claimant to do with avoiding Mr Sarghe would have alleviated the disadvantage experienced by the claimant of heightened anxiety and depression.

209.5 In relation to the fourth complaint, the claimant suggested that the respondent could have contacted Ms Denniston instead. We would have found it was not reasonable for the respondent to have to take this step. These are our reasons.

209.5.1 Ms Denniston was part of the legal team that the claimant instructed in April 2021, after she parted ways with her trade union. As we have said we found that the correspondence from the claimant's lawyers was unhelpful, aggressive and unprofessional. The respondent, understandably in our view, questioned with the claimant whether they were in fact lawyers and whether she should be paying them.

209.5.2 The respondent and the respondent's lawyers tried in vain to correspond professionally with the claimant's legal team. We refer to an email from the respondent's solicitor dated 17 May 2021 in which she described having made repeated attempts to contact the claimant's lawyer since 21 April. She had not been able to find any details of the lawyer or firm apparently instructed by the claimant with the law society. The claimant was asked if she would consider allowing the trade union to assist her if the emails from the respondent were causing her stress. We consider this was a reasonable step in the circumstances.

209.5.3 This correspondence resulted in an aggressive and unprofessional email from the claimant's legal team. They asked the respondent's solicitor to verify her qualifications and threatened to report her to the SRA as she had been harassing the claimant. They said:

"We are a group of highly qualified lawyers, solicitors and barristers.

Where did you take your Lpc? What University did you attend? It looks like you do not have your law degree.

Stop harassing her, she is very unwell because of you and your abusive friends. There is no point to speak to you again, the next step will be tribunal/Acas. if you scare Renata one more time, my Barrister will help Renata to report You to the police.

Try to unlawfully dismiss her, then it will be a pleasure to meet you in Employment Court. Let the judge decide if Renata has suffered. Renata will be contacting her employer and also you are making her feel very scared. We will contact your boss because you have committed an offence."

209.5.4 The next day the claimant's legal team suggested that the claimant had been treated as a slave and the respondent was responsible for her suffering. They advised the respondent's solicitor to *"find a good criminal lawyer".*

209.5.5 These are sufficient examples of the completely inappropriate approach of the claimant's legal team.

209.5.6 It would not be reasonable to expect the respondent to correspond exclusively with the claimant's lawyers when they were behaving unprofessionally, they were difficult to contact and it appeared they were holding themselves out as lawyers when they were not.

209.5.7 We think that the respondent acted reasonably in trying to contact the claimant's lawyers as requested and also suggesting contact with the union. We further find it was appropriate for the respondent to initiate some contact with the claimant. The claimant was after all still the respondent's employee and we think it was reasonable and necessary for the respondent to maintain some communication directly with her.

209.5.8 After the claimant's indication that she was finding receiving letters stressful we could only find evidence of 3 letters which the claimant had relied upon where the respondent communicated directly with the claimant. This was over a period of 5 months. This indicated that the level of correspondence from the respondent to the claimant was not excessive.

210. As we have already found we consider that the respondent should reasonably have known that the claimant was a disabled person. The relevant period for the reasonable adjustments claim was said in the list of issues to be from July 2020. By reason of the information provided in the claimant's counsellor's report we are satisfied that the respondent ought to have known that the claimant was a disabled person from that date. However, we would find that the respondent did not know and it could not reasonably have been expected to know that the claimant was likely to be caused heightened anxiety and depression as a result of being required to work with/cooperate with Mr Sarghe from July 2020 or work on the same overtime shift as him. The claimant had agreed via mediation in June 2020 to work and cooperate with Mr Sarghe and there were no issues until the incident on 7 January 2021. The claimant turned down the opportunity to work in manufacturing away from Mr Sarghe.

211. We would further find that that the respondent did not know and it could not reasonably have been expected to know that the claimant was unable to earn overtime pay leading up to Christmas 2020. The claimant never raised that and it was contradictory to the approach she had agreed at the mediation and what she had done since the mediation – i.e. to draw a line under things and work with Mr Sarghe as best she could.

212. We would also find that the respondent did not know and it could not reasonably have been expected to know that the claimant was likely to be caused heightened anxiety and depression as a result of being sent letters by the respondent. The claimant had only mentioned that receiving letters was causing her stress and the letters sent were not excessive or inappropriate. The claimant had communicated directly with the respondent in the relevant period with no issues.

213. For the above reasons we shall dismiss the allegations of failure to make reasonable adjustments.

Victimisation (section 27 of the Equality Act)

214. The claimant alleged that she had done a protected act in communications sent to the Respondent on 14 and 18 May 2021, when she said that she would be commencing employment tribunal proceedings.

215. The claimant's email of 14 May 2021 could be seen at page 461 of the bundle. The claimant made allegations that there had been contraventions of the Equality Act. We do not find that these allegations were made in bad faith. Therefore this was a protected act. The email of 18 May was in the bundle at page 463. It was an email written by the claimant's legal representative. The claimant was copied in and it was sent to the respondent's lawyer. The email makes reference to the claimant experiencing victimisation. We do not find that the allegation of victimisation was made in bad faith. Therefore this email is also a protected act, alternatively it would give rise to a belief that the claimant might do a protected act as her lawyer was saying she believed she had been victimised and legal proceedings appeared to be being threatened.

216. The claimant alleged that she was subjected to detriment because on 7 June 2021, Jane Selman contacted the claimant and said she would need to resign if she wanted to complain to the tribunal.

217. The email of 7 June 2021 from Jane Selman could be seen on page 464 of the bundle. In the email Ms Selman asked for information about the claimant's fitness to return and any adjustments she may need. She suggested obtaining a report from the claimant's GP and/or therapist. She then went on to refer to allegations that the claimant had made in correspondence and her expressed wish to bring tribunal proceedings. Ms Selman said she had tried to understand more about the claimant's reasons for this and had tried to speak to her lawyers and union about it but to no avail. She then said *"In order to bring a majority of tribunal claims you need to have left your employment, as you suggest a return to work date of 2 August 2021 it appears that you wish to remain in our employment. Could you please clarify your position? As stated several times previously by myself Phil and our lawyers we would be happy to speak with your representative from either your lawyers or your trade union.".*

218. We find this allegation fails on the facts because Ms Selman did not say that the claimant would need to resign if she wanted to complain to the tribunal.

219. We further consider that in sending the email of 7 June 2021 the respondent did not subject the claimant to detriment. The claimant did not present any evidence to demonstrate that this email subjected her to detriment. She referred to the email in passing in her witness statement. However the claimant mischaracterised the nature of Ms Selman's email in her witness statement. She said that Ms Selman had said that if she wished to submit this matter to the tribunal she must first leave her employer. That is not what Ms Selman said. There was no threat to the claimant in the email. Read in full Ms Selman was seeking to arrange the claimant's return to work and not procure her resignation. This is why Ms Selman was first and foremost discussing possible adjustments and medical reports. The tribunal considered that the email was a genuine attempt to clarify the claimant's position. By this stage the claimant had been absent for 7 months. Her lawyers had been aggressively threatening legal proceedings but on the other hand the claimant had indicated a possible return to work. The situation clearly required clarification. In these circumstances we considered there was no detriment. The claimant had not been put under a disadvantage by the email and a reasonable employee would not consider that there was a detriment.

220. It appears that the email was sent at least in part because the claimant had done a protected act or because the respondent believed the claimant might do a protected act as Ms Selman thought the situation needed clarifying partly due to the emails from the claimant and her lawyers about her belief she had been victimised/discriminated against and bringing a tribunal claim. However as there was no detriment and the factual basis of the allegation had not been made out the allegation of victimisation must be dismissed.

Harassment (section 26 of the Equality Act)

221. Our findings on the four allegations of harassment are as follows:

221.1 On 30 July 2019, Mr Sarghe shouted at the Claimant that she should not speak in Polish.

221.1.1 We found that this happened, albeit Mr Sarghe did not shout.

221.1.2 We found the conduct was unwanted as the claimant wanted to speak to her friend about Mr Sarghe without him knowing what she was saying.

221.1.3 We found the conduct was related to race, specifically the claimant's Polish nationality as she had been asked not to speak in Polish.

221.1.4 We found the reason why the claimant was asked not to speak in Polish was because she was speaking about Mr Sarghe. We found it was reasonable and appropriate for Mr Sarghe to want to know

what was being said about him. The claimant was not prohibited from speaking in Polish generally but she was told that if she had a problem with her work or her supervisors she should raise that in English. We found that to be an appropriate and reasonable approach to the situation. The claimant accepted this explanation at the time. In these circumstances we found that the conduct did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

221.2 On 2 August 2019, Mr Sarghe pointed out a sausage on the floor and told the claimant, in front of colleagues, to pick it up, evidence the claimant says of him taking a stereotypical view of Polish women.

221.2.1 We found that this happened, but we found that it was not evidence of Mr Sarghe taking a stereotypical view of Polish women. There was no evidence that Mr Sarghe took a stereotypical view of Polish women and it was not established what that stereotypical view might have been.

221.2.2 We found the conduct was unwanted as the claimant did not want to pick the sausage up. This was because the claimant felt she should not have to take instructions from Mr Sarghe.

221.2.3 We found this was an innocuous incident where Mr Sarghe simply asked the claimant to pick a sausage up as she was closest to it. It was part of Mr Sarghe's responsibility to instruct his team on what to do as he was the team leader. It was part of the claimant's general responsibilities to tidy up. It was reasonable and appropriate for Mr Sarghe to ask the claimant to pick the sausage up. The claimant overreacted to this incident. In these circumstances we found that the conduct was not related to race or sex and 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 the claimant.

221.3 In July and August 2019, Mr Sarghe tried to trip up the Claimant several times.

221.3.1 We found that this happened.

221.3.2 We found the conduct was unwanted as the claimant did not want to be tripped up and she did not see it as a joke as Mr Sarghe did.

221.3.3 We found the conduct was not related to race or sex. We refer to our findings above. This was part of general horseplay by Mr Sarghe which he tried with the team as a whole. Some people saw it as a joke, found it funny and reciprocated. Others like the claimant did not. It had nothing to do with race or sex.

221.3.4 We would have found that the conduct had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It was clear that it had had that effect on the claimant and we think that was reasonable.

221.4 On 19 November 2019, Mr Sarghe bit her on both arms.

221.4.1 We found that this happened.

221.4.2 We found the conduct was unwanted as the claimant did not want to be bitten and she did not see it as a joke as Mr Sarghe did.

221.4.3 We found the conduct was not related to race or sex. We refer to our findings above. This was part of general horseplay by Mr Sarghe which he had tried with the team as a whole. Some people saw it as a joke, found it funny and reciprocated. Others like the claimant did not. It had nothing to do with race or sex.

221.4.4 We would have found that the conduct had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It was clear that it had had that effect on the claimant and we think that was reasonable.

222. For the above reasons the allegations of harassment must be dismissed.

Time limits

223. We have upheld two allegations of direct race discrimination (relating to the claimant being called to a disciplinary and being issued with a final warning) subject to our findings on jurisdiction which we shall now set out.

224. The claimant was called to a disciplining hearing on 5 February 2020. The claimant was issued with a final warning on 9 March 2020. Proceedings should therefore have been initiated by 9 June 2020 at the latest. There was no continuing act which extended beyond 9 March 2020.

225. The claimant did not contact ACAS until 8 October 2021 and she did not bring her claim until 18 November 2021.

226. Accordingly the complaints were not made within the time limit in section 123 of the Equality Act 2010.

227. The Tribunal has decided that the claims were not made within a further period that the Tribunal thinks is just and equitable and it is it not just and equitable in all the circumstances to extend time. We shall summarise our reasons.

227.1 The length of the delay was substantial.

227.2 The claimant had not provided any evidence as to why she had not brought her claim in time or why it would be just and equitable to extend time (although we did ask her about it in submissions in case we got to this stage and we have taken what she said into account).

227.3 There was no good reason for the delay:

227.3.1 At the relevant time the claimant had access to trade union advice.

227.3.2 Even after she parted ways with her union in around April 2021 the claimant had then instructed a legal team, but she still did not act promptly to bring a claim.

227.3.3 The claimant was clearly intelligent and aware of her rights; she threatened tribunal proceedings on numerous occasions.

227.3.4 It appeared to the tribunal that the claimant had taken a decision to try and draw a line under matters and move on including rebuilding her working relationship with Mr Sarghe. That is what she agreed at the mediation in June 2020. This is the most likely reason why the claimant did not bring the claim in time.

227.3.5 We carefully considered the claimant's health but the claimant was working with no issues in the period when she should have brought her claim and it was only after she went off sick in January 2021 that her health began to seriously deteriorate.

227.3.6 We do not think the claimant was too ill at any stage to bring a claim. Even after January 2021 the claimant was well enough to correspond with the respondent and to make the decision to part with her union and instead instruct a legal team to represent her. It has not been suggested that she was unable to provide instructions to her lawyers at any stage.

227.4 We took into account the fact the allegations would otherwise succeed and also the fact there was no forensic prejudice to the respondent. However we felt these factors were outweighed by the prejudice to the respondent if we accepted jurisdiction for allegations which were significantly out of time, there was no good reason for the claim to have been brought out of time, the claimant could and should have brought a claim in time if she really wanted to complain about these matters and the claimant appeared to have taken the decision to draw a line under matters in June 2020 through a mediation process but had much later changed her mind.

227.5 There is a public interest in the enforcement of time limits in employment tribunals.

227.6 All in all we could see no proper basis for considering that the claim had been brought within a further period that was just and equitable or that it was just and equitable in all the circumstances to extend time.

228. Any allegation that occurred before 9 July 2021 was out of time. For the reasons set out above we would have found that we did not have the jurisdiction to uphold any other allegation occurring before that day, had any other allegation succeeded in principle.

Overall conclusion

229. The claim is dismissed.

Employment Judge Meichen

21 June 2024