

mf



EMPLOYMENT TRIBUNALS

Claimant: Miss B Zabierowska

Respondent: ISS Facility Services Ltd

Heard at: East London Hearing Centre
On: 7-10 November 2017

Before: Employment Judge M Warren

Members: Ms T A Jansen
Mrs B K Saund

Representation

Claimant: Mr D Marchel (Friend)

Respondent: Ms E Gordon-Walker (Counsel)

Interpreter: Ms D Krogulewska (Polish Interpreter)

JUDGMENT

- (1) The Claimant's claim that she was victimised and discriminated against by reason of disability fails and is dismissed.
- (2) The Claimant's claim for unpaid wages fails and is dismissed.
- (3) The Claimant's claim that she was unfairly dismissed is struck out for want of jurisdiction.

REASONS

Background

1. The Claimant brings claims of disability discrimination, unfair dismissal and for unpaid wages in respect of her employment with the Respondent as a cleaner between 7 April 2015 and 9 December 2016.

The Issues

2. The issues in this case were identified by Employment Judge Goodrich at a hearing on 17 May 2017. On that occasion, the matter had been listed for its final hearing, but after Judge Goodrich had spent time with the parties identifying the issues, there had been insufficient time to complete the matter. It was therefore postponed to 7 November, when the matter came before us. The issues were identified by Judge Goodrich as set out in the paragraphs below, using the paragraph numbering from the agreed list of issues:

Summary of claims

1. The following claims fall to be determined at the hearing:
 - a. Failure to make reasonable adjustments (ss.20-21 Equality Act 2010 (“EA”));
 - b. Direct discrimination (s.13 EA);
 - c. Discrimination arising from disability (s.15 EA);
 - d. Disability related harassment (s.26 EA);
 - e. Victimisation (s.27 EA);
 - f. Unlawful deductions from wages (s.13 Employment Rights Act 1996 (“ERA”).

Reasonable adjustments claim

2. The Respondent concedes that:
 - a. The Claimant was disabled at the material time by virtue of epilepsy;
 - b. The Respondent knew that the Claimant suffered from epilepsy.
3. Were the following PCP(s) applied by or on behalf of the Respondent, on or after 23 August 2016:
 - a. Clean male toilet, female toilet, male cloakroom, female cloakroom, staff canteen, smoking area and sometimes pick up rubbish in offices, within 2 hours;
 - b. Clean all urinals as quickly as possible;

- c. Clean the floor under the pallets as quickly as possible with heavy manual handling involved;
 - d. Move pallets with full stock (up to 1000kg) by pallet truck;
 - e. Reuse refuse sacks;
 - f. Clean toilets without gloves;
 - g. Decline to let the Claimant take her medicine.
4. Taking each PCP in turn, did the PCP place the Claimant at a substantial disadvantage in comparison with other non-disabled employees in that, by virtue of her disability:
- a. The Claimant felt tired; was vulnerable to stress; her memory, concentration and cognition were impacted; and she was in constant fear of having a seizure;
 - b. The Claimant felt tired; was vulnerable to stress; her memory, concentration and cognition were impacted; she was in constant fear of having a seizure; and she suffered from anxiety, stigma and isolation;
 - c. The Claimant felt tired; was vulnerable to stress; her memory, concentration and cognition were impacted; she was in constant fear of having a seizure; and she suffered from anxiety, stigma and isolation;
 - d. The Claimant felt tired; was vulnerable to stress; was in constant fear of having a seizure; and suffered from anxiety, stigma and isolation;
 - e. The Claimant was vulnerable to stress and in constant fear of having a seizure;
 - f. The Claimant was vulnerable to stress; in constant fear of having a seizure and suffered from anxiety, stigma and isolation.
5. Did the Respondent know, or could it reasonably have been expected to know, of the substantial disadvantage(s) and their effect?
6. Could the Respondent have taken steps to prevent the substantial disadvantage(s), on or after 23 August 2016, by:
- a. Allowing the Claimant breaks to avoid her becoming overtired;
 - b. Avoiding strict time limits for completion of tasks;
 - c. Avoiding stressful situations;
 - d. Providing paid time off for treatment / appointments;
 - e. Relaxing triggers for disciplinary action for matters such as sickness absence;
 - f. Exchanging some work with colleagues;
 - g. Providing the Claimant with a place to rest and relax;
 - h. Allowing the Claimant time to take her medicine.

7. Was it reasonable for the Respondent to make the adjustments referred to at paragraph 6 above?

Direct discrimination

8. Did the Respondent treat the Claimant less favourably than Margaret Geeves, Bryonie Wolfe, Patryk Kulok, Tomasz Weslowski and Zdzislaw (surname unknown) (“the comparators”), in that, the Claimant had to wait 1.5 years for a uniform and was only provided with one set, whereas the comparators received their uniform sooner and were provided with two sets?
9. Were the comparators in materially the same circumstances, save for the protected characteristic (disability)?
10. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of Claimant’s epilepsy?
11. If so, what is the Respondent’s explanation? Does it prove a non-discriminatory reason for any proven treatment?

Discrimination arising from disability

12. The Respondent accepts that the Claimant was dismissed and that this could constitute unfavourable treatment for the purposes of s.15(1)(a) EA.
13. Did the Respondent engage in the following treatment (“the alleged treatment”):
- a. On 23, 30 August and 26 September 2016, did Mr Joyce rush the Claimant at work and determine time limits to complete tasks which were unachievable due to the Claimant’s disability?
 - b. On 30 August 2013, was Mr Joyce’s supervision overbearing and did he abuse his power and position, by persistently observing the Claimant during work for over 3 hours without any valid reason?
 - c. On 30 August 2016, did Mr Joyce accuse the Claimant of breaching procedures by starting her work at 14:00, when she had not?
 - d. On various dates between 23 and 31 August 2016, did Peter Joyce fail to provide the Claimant with documents she had requested, namely holiday form, outcome of disciplinary hearing, outcomes of grievances and payslips?
 - e. On 19, 20, 23 and 26 September 2016, did Mr Joyce shout at the Claimant?
 - f. On 20, 23 and 26 September 2016, did Mr Joyce threaten the Claimant with losing her job?
 - g. On 23 September 2016, did Mr Joyce call the Claimant “crazy”?
14. Was the alleged treatment unfavourable?
15. In so far as the Claimant proves that she was treated unfavourably by the Respondent, was the unfavourable treatment because of something arising in consequence of the Claimant’s disability, namely that, as a consequence of her disability the Claimant:
- a. Was slower at doing her job;

- b. Became tired quickly;
 - c. Became stressed when she was unable to complete her tasks to time;
 - d. Was at a risk of seizure;
 - e. Had sickness absence.
16. If so, was the unfavourable treatment a proportionate means of achieving a legitimate aim?
17. It is accepted that Mr Joyce knew that the Claimant was disabled. Did the dismissing officer know, or could they reasonably have been expected to know, that the Claimant had a disability?

Harassment related to disability

18. In so far as the Claimant proves that the Respondent carried out the alleged treatment (referred to at paragraph 13 above), was this treatment “unwanted conduct” for the purposes of s.26(1) EA?
19. If so, was the unwanted conduct related to the Claimant’s epilepsy?
20. If so, did the unwanted conduct have the purpose or effect of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading,, humiliating or offensive environment for the Claimant?

Victimisation

21. Did the Claimant do a protected act within the meaning of s.27(2)(c)-(d) EA? The protected acts relied upon by the Claimant are:
- a. Her grievance against Mr Joyce, dated 31 August 2016 (“the first grievance”);
 - b. Her grievance against Mr Joyce dated 2 October 2016 (“the second grievance”).
22. In making these grievances, did the Claimant make false allegations in bad faith, so as to preclude the protection of s.27(2) EA, by virtue of s.27(3) EA?
23. Did the Respondent subject the Claimant to detrimental treatment:
- a. On or after 23 August 2016, did Mr Joyce require the Claimant to clean all yellow barriers in the entire ambient chamber within 10 minutes?
 - b. Around 3 October 2016, did the Respondent reduce the Claimant’s hours of work from 37.5 to 30 hours;
 - c. The Respondent admits that it dismissed the Claimant on 9 December 2016.
24. In so far as the Claimant proves that she was subject to detrimental treatment by the Respondent, was this because she had done a protected act? The protected act(s) relied upon for each allegation of detrimental treatment are as follows:
- a. For the yellow barriers detriment: the first grievance;
 - b. For the hours detriment: the first grievance;

- c. For the dismissal: the first and second grievance.

Unlawful deductions from wages

25. Were the following wages properly payable to the Claimant:
 - a. 82.5 hours' suspension pay for the period 8-21 August 2016. The Respondent asserts that the Claimant was on unauthorised leave during this period and no wages were properly payable;
 - b. 7.5 hours for 26 September 2016. The Respondent asserts that the Claimant only worked 2 hours on that day and was properly paid for those hours. The claim for SSP has been resolved between the parties;
 - c. 7.5 hours for the period 10-23 October 2016. The Respondent asserts that the Claimant was properly paid for the 60 hours she worked over this two week period;
 - d. 7.5 hours for the period 24 October to 6 November 2016. The Respondent asserts that the Claimant was properly paid for the 67.5 hours she worked over this two week period;
 - e. 15 hours for the period 7-20 November 2016. The Respondent asserts that the Claimant was properly paid for the 15 hours worked to 13 November 2016, and for 45 hours' suspension pay thereafter;
 - f. 22.5 hours for the period 21 November to 4 December 2016. The Respondent asserts that the Claimant was properly paid 52.5 hours' suspension pay until the date of her unauthorised absence from work, commencing 30 November 2016 at 14:00. From that date, no wages were properly payable to her.

Remedies

26. If the Claimant is successful in her claim(s), what is the just and equitable level of compensation having regard to:
 - a. Whether the Claimant has suffered an injury to feelings;
 - b. Whether the Claimant has suffered any pecuniary losses, and if so:
 - i. Whether the Claimant has taken reasonable steps to mitigate her losses;
 - ii. Whether such losses fall to be reduced on *Polkey* grounds.
 - c. Whether the Claimant contributed to her circumstances, such that any award should be reduced.

Evidence

3. We had before us a bundle of witness statements as follow:-
 - 3.1 Mr Peter Joyce, (including two supplementary statements).
 - 3.2 Mr Phil Evans, (including a supplementary statement).

- 3.3 The Claimant, (including a supplementary statement).
- 3.4 Mr Marchel.
- 3.5 Mr Dominik Reimann.
- 3.6 Mr Tomasz Wesolowski.
- 3.7 Mr Patryk Kulok
- 3.8 Mr Konrad Iskra.

4. At the request of the Claimant, witness orders had been issued requiring Mr Wesolowski, Mr Kulok and Mr Reimann to attend. Mr Reimann complied and did attend. Mr Wesolowski's witness order was returned in the post marked, "*not called for*". Mr Wesolowski did not attend.

5. The witness order for Mr Kulok was delivered to the address given. Mr Kulok did not attend. Mr Marchel wanted to take action in this regard. I caused enquiries to be made. The administration reported to me that the letter containing the witness order had been signed for. I was provided with a photocopy of the same. The signature appearing there bears no resemblance at all to the signature on the witness statement of Mr Kulok. Further, the witness order had been issued to require the attendance of a Mr Tomasz Kulok, whereas the witness statement before us was by a Mr Patryk Kulok. Mr Marchel suggested that the Tribunal had made a mistake, but I was able to show him the email on the Tribunal file from him dated 11 September 2017 timed at 11:41 in which he clearly requests the issue of a witness order to a Mr Tomasz Kulok at 50 Hamden Road.

6. In those circumstances, it seemed to us that there was no evidence that Mr Kulok, the required witness who had presented a witness statement, had been served with the witness order.

7. We had before us a properly paginated and indexed bundle of documents originally running to page number 336. During the course of the hearing, we raised with Mr Marchel that we did not appear to have any medical evidence as to the effect of the Claimant's disability, (epilepsy) on her ability to comply with the PCPs relied upon. Mr Marchel responded that the Respondent had accepted that the Claimant was disabled and there was therefore no need for medical evidence. I explained to Mr Marchel that the Tribunal would need to see evidence that the Claimant's disability placed her at a disadvantage when seeking to comply with the PCPs relied upon. All that we had at the moment was her evidence, and that merely in the form of an impact statement. Mr Marchel then said that medical evidence had been provided to the Respondent and they had not placed it in the bundle. The Respondent explained that it had received the Claimant's GP records on the basis of which, it accepted that she was disabled. I asked the Respondent to provide copies of those GP records for the Tribunal the following morning, (this was at the end of day 1). The Respondent complied with my request and the medical records were added to the bundle, page numbers 337 through to 409.

8. We should also record that during Mr Marchel's re-examination of the Claimant during the afternoon of day 2, he requested that he be allowed to ask no further questions of the Claimant and to resume re-examination the following day. He said that she was stressed and that he would not put any more questions to her. The Tribunal adjourned for a short time and upon reconvening, declined to accede to Mr Marchel's request. It seems to us that there were no signs of the Claimant being unwell or unduly stressed, beyond that which any witness in her situation would feel. It seemed to us that Mr Marchel was looking for a way out because he had not been obtaining the answers in re-examination that he was looking for.

9. It seemed to us that being asked questions by one's own representative is not a stressful exercise as compared to cross-examination. We repeated our observation that we did not have any independent medical evidence before us as to the affect of the Claimant's epilepsy.

10. Having regard to the overriding object:-

10.1 The parties are not on an equal footing as the Respondent is represented by Counsel; Mr Marchel is a lay representative.

10.2 It did not seem to us proportionate to adjourn. We did not accept that there was any necessity by reason of the Claimant's health. Mr Marchel suggested that we interpose witnesses, but it seemed to us inappropriate to do so and for there to be a delay in re-examination, given the opportunity that might allow for the witness to be rehearsed or her evidence otherwise discussed. Further, if we were simply to adjourn, which we considered, that would place at risk the possibility that we might not finish the case in the allocated time and that we might go part-heard or have to give a reserved judgment, which would incur further expense of both taxpayer's money and potentially, on the part of the parties as well.

10.3 Avoiding unnecessary formality would point towards acceding to the request as would seeking flexibility.

10.4 Avoiding delay, as discussed above, points away from allowing the request.

10.5 Saving expense also points away from allowing the request.

11. We also considered the relative prejudice; we did not agree that there would be any prejudice to the Claimant in her being required to answer her re-examination questions. This was taking place at 2:20 in the afternoon; it is not as if it was at the end of the day. There is potential prejudice to the Respondent that a delay may give an advantage to the Claimant in having time to put together answers to the questions.

12. Our decision was not to postpone re-examination. We did suggest that it would be helpful if perhaps Mr Marchel made sure that the Claimant understood his question before looking for an answer.

13. In response, Mr Marchel told us that for him, Miss Zabierowska's health was a priority and that if she told him she was not ready to answer questions, he would not ask them. He then asked Miss Zabierowska whether she was going to answer questions or whether she preferred not to, bearing in mind her health, to which she replied, (not surprisingly) that due to her health condition and this entire situation, she was not hiding it is a bit stressful. Upon that, Mr Marchel said that he would ask no further question.

Law

Disability Discrimination

14. Disability is a protected characteristic pursuant to Section 4 of the Equality Act 2010.

15. Section 39(2)(c) and (d) proscribes discrimination by an employer by either dismissing an employee or subjecting her to any other detriment.

16. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

17. Section 39(5) imposes a duty on an employer to make reasonable adjustments.

Reasonable Adjustments

18. Section 20 defines the duty to make reasonable adjustments, which comprises three possible requirements, the first of which is that which might apply in this case set out at subsection (3) as follows:-

"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."

19. Section 21 provides that a failure to comply with that requirement is a failure to make a reasonable adjustment, which amounts to discrimination.

20. There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:

20.1. The relevant provision criterion or practice applied by or on behalf of the employer;

20.2. The identity of non-disabled comparators, (where appropriate);

- 20.3. The nature and extent of the substantial disadvantage suffered by the disabled employee;
- 20.4. The steps the employer is said to have failed to take, and
- 20.5. Whether it was reasonable to take that step.

21. Even if the answer is, “yes” to each of the above questions, the employer will only be liable if it knew or ought to have known that the Claimant was disabled and that she was likely to be affected in the manner alleged, see Schedule 8 paragraph 20 and Wilcox v Birmingham CAB Services Ltd EAT 0293/10 where Mr Justice Underhill said of the equivalent provision in the Disability Discrimination Act 1995 that an employer will not be liable for a failure to make reasonable adjustments unless it has actual or constructive knowledge both that the employee was disabled and that he or she was disadvantaged by the disability.

22. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at paragraph 4.5 suggests that PCP should be construed widely so as to include for example, formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. It may also be a decision to do something in the future or a one off decision.

Direct Discrimination

23. Direct discrimination is defined at Section 13 as follows:

- (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others...*
- (3) *If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

24. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that she has been treated less favourably than that real or hypothetical comparator.

25. How does one determine whether any particular less favourable treatment was, “because of” a protected characteristic? Under the previous legislation, the term used to proscribe direct discrimination was, “on the ground of” the particular protected characteristic. It was not the intention of Parliament to change the legal meaning of direct discrimination, as explained in the Explanatory Notes published with the Act at the time. In the Court of Appeal, Lord Justice Underhill confirmed in Onu v Akwivu and Taiwo v Olaigbe [2014]IRLR 448 at paragraph 40 that there was no difference in meaning between, “because of” and “on the grounds of”.

26. In Onu, Underwood LJ explained that what constitutes the grounds or reason for treatment will vary depending on the type of case. He referred to the paradigm case in which a rule or criterion that is inherently based on the protected characteristic is applied. There are other cases, not involving the application of discriminatory criterion, where the protected characteristic has operated in the discriminator's mind in leading him to act in the manner complained of. The leading authority on the latter case is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, (I quote from paragraphs 13 and 17):

“...in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator...”

I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn.”

27. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, “significant influence”:

“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”

Disability Related Discrimination

28. Disability Related discrimination is defined at section 15 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.*

29. The difference between Direct Discrimination on the grounds of disability and Disability Related Discrimination is often neatly explained in these terms: direct discrimination is by reason of the fact of the disability, whereas disability related discrimination is because of the effect of the disability.

30. As for the difference between making a reasonable adjustment and disability related discrimination, in General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that reasonable adjustments is about preventing disadvantage, disability related discrimination is about making allowances for that persons disability.

31. There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN).

32. If there has been such treatment, we should then go on to ask, as set out at Section 15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:

- 32.1. Whether there was a legitimate aim, unrelated to discrimination;
- 32.2. Whether the treatment was capable of achieving that aim, and
- 32.3. Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.

Burden of Proof

33. In respect of the burden of proof, Section 136 reads as follows:

- “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;*
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.”*

34. The Court of Appeal gave guidance on how to apply the equivalent provision of s136 under the previous discrimination legislation, in the case of Igen Ltd v Wong and

Others [2005] IRLR 258. There, the Court of Appeal set out a series of guidance steps. That guidance may still be relied upon, see Underhill LJ at paragraph 14 in Greater Manchester Police v Bailey [2017] EWCA Civ. 425. We have had regard to that guidance.

Credibility

35. Unfortunately, this is a case which turns on credibility. We have to take care. The Claimant is giving evidence via an interpreter and this leaves scope for misunderstandings. There is also the fact that English is not the first language of Mr Marchel, representing the Claimant. There were times when we and the witnesses had trouble understanding his questions, although we are confident we got there in the end. Even making allowances for those issues, I am afraid we did not find the Claimant a credible witness. This was for the following reasons:

- 35.1. One issue is that Ms Zabierowska was not paid for a period, because she went to Poland during a time when she was suspended, so that she did not return to work when invited to do so and as a consequence, her pay was stopped. At no point until cross-examination had she said that she informed the Respondent in advance that she was to go to Poland.
- 35.2. It was put to Ms Zabierowska that on her return to work on 23 August 2016, after suspension, she had received some brief training from Mr Joyce. She denied this. During cross-examination, she let slip that Mr Joyce, a new manager, (she had been away for some time) had shown her about the place, explained to her what she was supposed to do and where she was supposed to do it. It became apparent that unless the Respondent could produce documents signed by her stating that she had received training, in her view, it could not be said to amount to training. This typified her attitude in her evidence and towards the Respondent generally, both whilst at work and during her cross-examination.
- 35.3. In her second witness statement, the Claimant said that Mr Joyce was wrong in his witness statement when he said that she returned to work solely in the chilled department and yet in a document produced for the Tribunal at page 66(e2,) she complained of exactly that, only being allocated to clean in the chilled area. She made that same complaint in her appeal against a grievance outcome at pages 227 and 245.
- 35.4. Taken to these documents in cross-examination she said that she worked on a rota and sometimes she worked in other locations. But then she said she challenged her manager as to why she had to work in one area only. One of the Claimant's witnesses, Mr Iskra, said he saw her cleaning in other areas after her return to work. Mr Iskra is a friend of Mr Marchel and doing what he could at Mr Marchel's bidding, it seemed to us, to try and help the Claimant's case. His evidence was contradicted by the Claimant's evidence, sometimes. He said he did not see the Claimant working in the chilled area.

- 35.5. The Claimant complains of a series of PCPs (those letters standing for provision, criterion or practices) as set out in the list of issues at 3(a) to (d). She did not complain about these in various grievances raised at the time. If there was truth in her complaint and if she was placed at a disadvantage, she would have said so in those documents. We refer to pages 189, 191, 225, 244, 289 and 293. We know and understand that one should not just assume that because no grievance is raised, an allegation is not true. But in this context, this person would have raised these matters if they were true and this is a contributing factor in assessing her credibility.
- 35.6. When asked about the adjustments contended for and it was pointed out that the Claimant had been moved to the chilled area as an adjustment, she then argued that the scrubbing machines, which were a problem for her, were still used. Pressed about this she agreed that she did not use them, but that other people were using them, they were not meant to be used in that area during the day shift. It was apparent that the Claimant was prepared to cast around for anything she could think of to criticise the Respondent for.
- 35.7. There was no obvious disadvantage to the Claimant working without her uniform, but in cross-examination she had insisted that she was disadvantaged.
- 35.8. The Claimant's case was that she was expected to clean all, "yellow barriers" in 10 minutes. In fairness to her, she acknowledged that there were 160 of them and it would take several hours to clean them all, although she would have had some difficulty in denying that. Even so, she tried to be obstructive in answering the questions, refusing to speculate on their size because she had, "never measured them". She still insisted that she was given this task to do in 10 minutes, which was absurd and entirely implausible.
- 35.9. The Claimant gave contradictory evidence as to whether she says that she merely assumed that Mr Joyce had seen her revised contract, which provides for her to work 37½ hours per week, or whether she knew that he had seen it because she had shown it to him.
- 35.10. Taken to the rota records in the bundle, the Claimant agreed that her hours varied and were below 37½ hours per week regularly before 3 October 2016. Her case was that the Respondent changed her hours from 37 ½ to 30 per week, as an act of victimisation, because of the grievance on 2 October. Nevertheless, she insisted that was how she felt.
- 35.11. The Claimant's case is that she ought not to have been dismissed for refusing to go home and put on her uniform. She said this was not a reasonable request because her uniform was wet from having been washed. Proceeding on the basis that she had only been issued with one uniform not two, the Claimant agreed in cross-examination that she had

been issued her uniform on Monday 7 November, she wore it on 8 November, she agreed that she had washed it when she finished work that day, she then had a rest day on Wednesday 9 November and went to work on 10 November to start at 2 o'clock in the afternoon without her uniform because, she said, it was drying. That is not credible, it would have been dry by then.

35.12. The Claimant denied receiving the letters summoning her to a disciplinary hearing in November 2016, the second of which was sent recorded delivery but, "not called for", (which means the door was not answered to the postman, who would therefore have left a card inviting the addressee to collect the letter from the post office). One additional copy was hand delivered to the house, (although not hand delivered to the claimant personally). A third copy was sent by ordinary first class post, (and one is entitled to assume that correspondence sent by first class post is delivered). Her attitude in evidence was that the Respondent could not produce her signature to acknowledge receipt and therefore, she did not receive it. This is indicative of her belligerent uncooperative attitude and the unreliability of her evidence. It is just not credible for her to say that she did not receive at least one of copy of this letter.

36. For these reasons, we did not find the evidence of Miss Zabierowska credible.

37. As for Mr Marchel, he lives with the Claimant. We saw from the medical records that he has accompanied her on visits to the doctors for a number of years. He works for the Respondent's client, The Co-operative, at the warehouse in question. He told us that he had experience of Tribunals and he was clearly familiar with the process. Much of the Claimant's case, even on the face of it, is without merit and it seemed to us that he must lie behind that. His evidence was not objective, it seemed to us designed to serve the Claimant's case and we found it unreliable.

38. We heard evidence from a Mr Reimann and we found his evidence unreliable. He had misled the Tribunal in May 2017 when he was scheduled to attend the hearing of this case on 17 to 19 May. He said in his witness statement at the time that he would be unable to attend because he was on booked holiday abroad on 15 to 19 May. There was evidence from the Respondent and The Co-operative that he was not booked to be on holiday on those days. He was scheduled to be working. The Claimant knew that this was going to be the Respondent's evidence, because of Mr Joyce's second witness statement. The Claimant, Mr Marchel and Mr Reimann could have produce evidence to show that Mr Reimann was abroad on those dates and they have not done so.

39. We also heard evidence from a Mr Iskra. He is a friend of Mr Marchel, he was not objective. He was clearly attempting to assist the Claimant and his evidence was contradicted by the Claimant, as noted above. His statement was written a year after the events in question. If he did see the Claimant working in the toilets and the urinal etc it may have been before the period of her suspension or in the first few days after her return, before the change in duties.

40. With regard to the statements of the two witnesses who did not attend for the Claimant, Mr Wesolowski and Mr Kulok; in a case where so much turns on the credibility of evidence and where their statements are so extreme in their assertions, we did not consider it appropriate to apply any weight to them at all.

41. As for the Respondent's witnesses, in short, we found Mr Joyce and Mr Evans both credible witnesses.

Findings of Fact

42. The Respondent is a large, well known building service provider; according to one of the ET3s, with 47,000 employees.

43. The Claimant's employment commenced on 7 April 2015. She worked as a cleaner at a huge distribution centre warehouse for the Respondent's client, The Co-operative; 30 cleaners worked at that location. A copy of her contract from when her employment commenced was at page 67; she was engaged to work for 30 hours a week.

44. On 4 January 2016, the Respondent carried out a risk assessment, a written record of which is at page 78a. The reason for the assessment was the Claimant's medical condition, namely that she has epilepsy. Areas of concern are noted on the part of the Claimant as being the use of machinery and working night shifts. She is also recorded as having said that she did not want to work overtime. The risk assessment stipulates that she is not to use machinery. The assessment is dated 4 January 2016 and states that it is to be reviewed on 4 January 2017. The significance of this for the Claimant and her duties, was that she was not to be required to use the machine for cleaning the floor, known as a, "scrubber".

45. On 20 January 2016, the Claimant's contract was amended, a copy is at page 68. Her hours are recorded as being 37.5 per week.

46. In February 2016, an incident occurred in which the Claimant was accused by Co-operative employees of deliberately pushing a trolley into a forklift. As a result of investigations, she was suspended on 16 March 2016. We were not taken to any letter of suspension in the bundle. The Claimant agreed in evidence that she was aware that she had to remain available for work while she was suspended. She also agreed that she saw suspension as a paid holiday. She said that of course, she was happy to be paid and not to have to work.

47. On 19 April 2016, the Claimant attended a disciplinary hearing. For that hearing she prepared a written statement, a copy of which is at page 154. In that statement, she made complaints about her managers. The Claimant agreed in evidence that she had raised these complaints because she was in a disciplinary process at risk of dismissal.

48. On 20 April 2016, the disciplinary process was placed on hold because of the allegations which the Claimant had made. There was an investigatory meeting in relation to her grievance on 9 May 2016, in which she made references to the fact that she suffered from epilepsy.

49. On 23 June 2016, the Respondent wrote a letter to the Claimant's GP making reference to her epilepsy and that letter includes the following:

"Barbara Zabirowski has advised us that she has the condition, but it does not affect her working capabilities."

The significance of that is that the Respondent records it had been told by the Claimant that her epilepsy does not affect her working capabilities. The doctor's reply at page 180, 17 August 2016, is to suggest that the Respondent either contact her neurologist or arrange for occupational health to see her.

50. In the meantime however, Mr Joyce started working for the Respondent at the warehouse, replacing the Claimant's previous manager. At the time The Co-operative were unhappy; the Respondent's contract was under threat. That had nothing to do with the Claimant. Mr Joyce was tasked with putting it right.

51. On 2 August 2016, Mr Joyce wrote to the Claimant to tell her that the disciplinary action was being dropped, that there was no case to answer and called for her to return to work on 8 August. Mr Joyce tried to telephone the Claimant on 8 and 9 August because she had not turned up at work. He obtained no answer but left messages for his call to be returned. No return phone call was made. Therefore, on 10 August Mr Joyce wrote to the Claimant, (page 179) to tell her that in those circumstances, she was absent from work without authorisation and he called upon her to contact him by 12 August.

52. On 16 August 2016, the Claimant sent a text to Mr Joyce to say that she was in Poland. The Claimant says that she told the Respondent before she went to Poland that she had to go there for family reasons. She had never said that before until her evidence in cross-examination and we do not believe her; we find that she did not do so.

53. The Claimant returned to work on 23 August. On her return, given her period of absence, Mr Joyce spent 30 minutes with her showing her around and explaining to her what she had to do. Within a few days, Mr Joyce spoke to her again and she explained that using the mop to clean the floor was making her very tired. She said that this was because of her epilepsy. As a consequence, Mr Joyce moved her to work exclusively in the chilled area where she would only occasionally use the mop, if there was a spillage.

54. On 30 August 2016, Mr Joyce had words with the Claimant, because she did not start work at 2 o'clock, she was late. The Respondent had a policy of staff arriving a few minutes before their contractual start time so that they were ready to start dead on time. The Claimant candidly agreed in evidence that she did not agree with that, she should not have to be at work until exactly 2 o'clock; indicative of her uncooperative attitude to the Respondent and to her work. But to be clear, on this particular occasion, the Claimant had turned up for work after 2 o'clock.

55. On 31 August 2016, the Claimant raised her first grievance, relied upon as a protected act, (page 181). In this document, she complains of Mr Joyce observing her for more than three hours, trying to speed her up, accusing her of breaching procedures by starting work at 2 o'clock, failing to provide her with documents and of the site manager, (not Mr Joyce) entering the women's changing room. She then said:

"I am a disabled person and such treatment causes an additional stress which may get my condition worse and even put my life in danger."

56. On 20 September 2016, Mr Joyce spoke to the Claimant about her wasting time; something he had already spoken to her about a couple of times. The record of this conversation at page 182 includes the following:

"It was noticed by myself that you are walking all the way from chilled area to the ambient to get a cage for your cardboard. However I find it hard to understand why you would have to walk all that way when there is cages in chilled I feel that this is wasting time which is affecting the standards in your area."

57. On a separate point, in evidence the Claimant agreed that she would refuse to pick up litter if it was not in her area, something the cleaning operatives had been asked to do as a means of helping to keep the customer happy. This is indicative of her uncooperative and belligerent attitude to her work.

58. On 28 September 2016, Mr Joyce had cause to write to the Claimant because she had been absent from work. The issue was not her absence as such that was the concern, but that in breach of the Respondent's procedures, she had not telephoned to explain that she was unwell and had merely sent a text.

59. On 2 October 2016, the Claimant raised a second grievance relied upon as a protected act, (page 189). Here she complains of Mr Joyce shouting at her on 19 September; rushing her and others, calling her stupid on 20 September; telling her she was crazy on 23 September, (she links that comment to her disability) and of being shouted at on 29 September. She explains that she'd had epileptic fits on 23 and 26 September, which she said were caused by Mr Joyce's bullying; she complains that Mr Joyce has not conducted a risk assessment; she complains of not receiving a uniform despite her 1½ year service whilst others with short service had received theirs. She refers to being less favourably treated than others, using that precise expression.

60. On 3 October 2016, Ms Ibrahim from human resources met with the Claimant to discuss her grievance. Then on 21 October, The Co-operative raised with the Respondent that its employees have raised with them, further complaints about the Claimant. At page 221 we see that somebody called Mr Dave Gardner wrote about this, suggesting that the Claimant was harassing others. There are statements at pages 203 to 220. One of the matters that we were concerned about, although it had not been raised as an issue, was whether there might have been an element of racism behind this, but looking at the names of some of the people that made those statements, it looks as if some of them may be Polish, so racism seems unlikely. It looks from the statements as if the Claimant was targeting those that had put forward statements against her in April; some of the allegations are quite unpleasant. We

cannot make any findings about these matters and we do not do so, but the existence of the statements is there in the background.

61. On 7 November 2016, the Claimant was provided with uniform. She was given two sets of uniform as confirmed in the document at page 261, which she is recorded as having refused to sign. She did not sign it in our view, because she was belligerent and being deliberately awkward.

62. On 10 November 2016, the Claimant turned up at work not wearing her uniform. Mr Joyce told her to go home and change and that she would be paid for her time in the meantime. Mr Joyce thought that she had complied and had done so, but in fact she went to the canteen and sat down. Forty-five minutes later, he saw her there and so he then asked her to go home and get her uniform once again. She refused, stating that she would remain until the end of her shift. Mr Joyce then spoke to the Co-operative manager, who went to speak to her and asked her to leave. When she refused again, the Co-op Manager went away to call the police. Mr Joyce then took advice from the Respondent's human resources department by telephone as to what to do. He was advised to suspend the Claimant, which he did. When he did so, the Claimant smiled and laughed. She was issued with a letter confirming her suspension, (page 255). It explains why she has been suspended. It also expressly states:

“Should you fail to attend any meeting without prior notification and good reason during your suspension, your pay may be suspended or withheld from the date of the original investigation meeting.”

63. An investigation was conducted by Ms Ibrahim. There is a short investigation report at 259, in which she says that there is a case to answer for gross misconduct. The documents attached to that report included a statement from Mr Joyce as to his version of what happened on 10 November, (at page 260) and at page 267, the Claimant's statement in which she says the allegations against her are untrue. She claimed to have been told to go home without pay for not wearing her uniform. She said the reason she had not been wearing it was because she had just washed it and she did not have a spare one. She confirmed that she said she was going to stay in the canteen and wait for job duties. She said that the receipt document relating to the issue of uniform had been presented to her and she had refused to sign it, because it referred to two sets of uniform and she had only received one set. She said that it was unfair for the Co-operative Manager to threaten to call the police, which she asserted was bullying, harassment and victimisation. She complained of not having been issued with uniform in 1½ years of service and said that there had never been an issue with her not wearing uniform before and so why, she asked, should it be an issue now?

64. The Claimant was invited by letter dated 18 November 2016, to attend a disciplinary hearing on 23 November, but she did not attend. That was then followed by a further letter dated 25 November 2016, inviting her to attend a disciplinary hearing on 30 November, (page 283). It is recorded at the top of that letter that it had been sent by first class post, by special delivery Royal Mail and that it had also been hand delivered.

65. The Claimant did not attend the disciplinary hearing on 30 November 2016. Mr Evans was the disciplinary officer. He decided to dismiss her. This was communicated by a letter dated 9 December 2016, at page 287. The reason for dismissal is given as:

- “1. *Failure to carry out a reasonable request from your Line Manager.*
2. *Refusing to leave site under instruction from your Line Manager & the Client.*”

66. On 22 December 2016, the Claimant appealed against dismissal. The appeal hearing took place on 16 March 2017 and the outcome, by letter dated 29 March, was that the decision to dismiss was upheld. There are no matters relating to the appeal process raised in the list of issues.

Our Conclusions

67. We deal first of all with the discrimination claims and run through the list of issues using the numbering therein.

Failure to make reasonable adjustments

68. The Respondent accepts that it knew that the Claimant had epilepsy and accepts that amounted to a disability. It has not accepted that the disability placed her at a disadvantage in relation to the PCPs.

69. The three PCPs at 3 a. to c: (relating to cleaning toilets in cloakrooms and staff canteen within two hours, cleaning the urinals and cleaning the floor under the pallets) may have been in place for the first few days after the Claimant returned to work on 23 August. For the avoidance of doubt with regard to 3 c. we do not accept there was a PCP requiring heavy manual handling.

70. Mr Joyce told us and we accept, that it was in the first week that the Claimant complained that using the mop was making her tired and he then implemented the adjustment of moving her to the chilled area, where she would only have to use the mop to clean up the occasional spillage. Thereafter, the PCPs a. to c. were not in place.

71. PCP 3 d: There was no PCP of requiring the Claimant to move pallets by pallet truck. The Claimant's evidence was that Mr Joyce told her to do it. She agreed that it was only to be done by those who had received appropriate training and she had not received that training. We accept Mr Joyce's evidence that this allegation is not true.

72. As to PCPs e, f, and g: we accept Mr Joyce's evidence that the Claimant was not required to reuse refuse sacks or clean toilets without gloves and that he never refused to allow the Claimant to take medication.

73. Issue 4: was there a substantial disadvantage? The only PCPs we find were in place were a. to c: cleaning the toilets, cloakrooms, the canteen, urinals, pallets, (not the heavy manual handling aspect) in the first few days after 23 August.

74. We have no medical evidence that the Claimant was affected by her epilepsy as she contends. The only evidence we have is the Claimant's impact statement. We have found the Claimant an unreliable witness and we are not able to accept the impact statement at face value in its entirety. We would accept it is likely that the Claimant suffered anxiety and fear of having a seizure. We do not accept that this would have had an impact on her ability to carry out her duties. We would also accept that, although this was not presented to us in this way, undoubtedly there would have been physical effects in a period following an epileptic fit. We are not medical experts and we can only make findings on the medical evidence presented to us. Nor are we permitted to do our own research.

75. Mr Joyce took at face value and acted upon the Claimant's complaint that using the mop made her tired. There is no evidence that there was an impact on her memory, her cognition or concentration. The letter which we have referred to at page 177 is a minor piece of evidence, but it corroborates our own conclusions that the Claimant is exaggerating. We find that the Claimant was not placed at a disadvantage by PCPs a. to c.

76. Issue 5: did the Respondent know or could the Respondent be expected to know of the disadvantage? In so far as there may have been a disadvantage in the use of a mop, the answer is no. Mr Joyce would not know until the Claimant told him, which she did not do immediately on her return to work, but in a conversation a few days later. To Mr Joyce's credit, he acted upon it. There had been an earlier risk assessment, on the basis of which the adjustment had been put in place, that the Claimant was not required to use machinery.

77. Issue 6: as to the adjustments contended for:-

77.1. a. The Claimant agreed in evidence that she was allowed a 30 minute break and that she did not ask for more.

77.2. b. There were no strict time limits for her tasks. Insofar as there was any time pressure at all, the Respondent removed the Claimant to the chilled area, where there were no such pressures, as the Claimant agreed in cross-examination.

77.3. c. There were no stressful situations to avoid. The Claimant's evidence was that this was only when using machinery and she did not have to do that.

77.4. d. The Claimant agreed she did not ask for time off for treatment or for appointments.

77.5. e. The Claimant agreed that no sickness absence triggers arose. The letter at page 188, which we have referred to, is not such a trigger.

77.6. f. Exchanging work with colleagues was effectively done with moving the Claimant to the chilled area.

77.7. g. The Claimant had a place to rest and relax, the canteen.

77.8. h. The Claimant was allowed to take time to take her medicine.

78. Issue 7: insofar as it was necessary, it was reasonable for the Respondent to make the adjustments and it did so.

79. The Claimant's claim in respect of failure to make reasonable adjustments fails.

Direct discrimination

80. Issue 8: Was the Claimant treated less favourably than the comparators in the provision of uniform? Margaret Geeves left in October 2016 and had no uniform. Bryonie Wolfe received a uniform on 8 October. Patryk Kulok received a uniform on 17 October. Tomasz Weslowski received his uniform on 10 December. Zdzislaw Tadelisz received his or her uniform on 15 October. These dates are not greatly different from the Claimant, who was provided with her uniform on 7 November 2016.

81. We note that in evidence, the Claimant agreed that before Mr Joyce arrived, no-one wore uniform. The fact that the Claimant had worked there for 1½ years before receiving a uniform is irrelevant. There was no detriment in the Claimant waiting for her uniform. She was able to continue working. The expectation to wear uniform was only implemented once the individual had been supplied.

82. Issue 9: none of the comparators had been suspended for a long period immediately beforehand and so are not in the same situation as the Claimant.

83. Issue 10: insofar as there is any difference in treatment either in respect of the comparators or in respect of a hypothetical comparator, (a person in exactly the same situation as the Claimant but not having epilepsy) there are no facts from which we could properly and fairly conclude that such difference was due to the Claimant's epilepsy.

84. Issue 11: the non discriminatory explanation for any difference in treatment is that on Mr Joyce taking the initiative to implement the Respondent's uniform policy as part of improving relations with the client, a bulk order of uniform was made of various sizes, those whose sizes were not covered by that bulk order had to wait longer for a specific order of their particular size to be fulfilled. That accounts for the difference.

85. The claim of direct discrimination fails.

Discrimination arising from disability

86. Issue 13: We deal with each allegation in turn:

86.1. a Mr Joyce did not rush the Claimant and impose time limits on her on 23, 30 August and 26 September.

86.2. b Mr Joyce did not observe the Claimant for three hours on 30 August.

86.3. c On 30 August 2016, Mr Joyce did take the Claimant to task for starting work after 2 o'clock. He was entitled to do so. His taking her to task and the fact that she started late have nothing to do with her disability as suggested at paragraphs 15 a. to e.

86.4. d The Claimant did not ask for a holiday form, such forms were available on site. She did not request of Mr Joyce copies of the grievance outcomes. She did request a copy of the first disciplinary outcome that confirmed no case to answer, which he provided. She also requested payslips, which Mr Joyce was in no position to provide, but he showed her how to access them online. This had nothing to do with the Claimant's disability as suggested at paragraphs 15 a. to e.

86.5. e Mr Joyce did not shout at the Claimant on 19, 20, 23 and 26 September.

86.6. f Mr Joyce did not threaten the Claimant with losing her job on 20, 23 and 26 September.

86.7. g Mr Joyce did not tell the Claimant that she was crazy on 23 September.

87. Issue 14: None of the above alleged treatment was upheld, except Mr Joyce taking the Claimant to task about being late, which is unfavourable treatment.

88. Issue 15: In respect of Mr Joyce taking the Claimant to task over being late, her being late and his taking her to task as noted above, had nothing to do with anything arising out of her disability.

89. Issue 16: The justification defence does not arise.

90. Issue 17: With regard to dismissal, Mr Evans did know of the Claimant's disability, because he had seen the grievance documents in the hearing pack. But the reason he dismissed her was her refusal to go home and put her uniform on and her refusal to leave the premises, which necessitated the involvement of the client. Neither had anything to do with the Claimant's disability or anything arising out of it, as alleged at paragraph 15 a. to e.

91. The claim of disability related discrimination fails.

Harassment

92. Issues 18, 19 and 20: The Claimant relies on all of the allegations of disability related discrimination at 13 a. to g. none of which took place, save for the taking to task over being late, for which Mr Joyce had good reason. That had nothing to do with the Claimant's disability and could not have been said to have created the proscribed environment.

Victimisation

93. Issue 21: Both grievances referred to amounted to protected acts. They made allegations of disability discrimination.

94. Issue 22: We find that the Claimant made those allegations in bad faith. Mr Joyce was managing the Claimant in her first weeks back, as he was entitled to do. She did not like it. She retaliated, raising grievances and alleging discrimination in order to try and put him off managing her, to fight back, to open up the possibility of making a discrimination claim later and claiming compensation. The Claimant cannot therefore rely on the protected acts.

95. Issue 23: In any event, or had we found otherwise:-

95.1. a. Mr Joyce did not require the Claimant to clean all of the yellow barriers in 10 minutes.

95.2. b. Mr Joyce did not reduce the Claimant's hours on or after 3 October; the evidence was that the hours before and after that date were at the same or similar fluctuating levels and were not at 37½ hours a week before that date.

95.3. c. The protected act had nothing to do with Mr Evans' decision to dismiss in any way whatsoever, not to any degree, consciously or unconsciously.

96. Issue 24 is not applicable. The victimisation claim therefore fails.

Wages claims – Issue 25

97. We set out our findings of fact and our conclusion.

98. Just in case this case goes any further, we make the following observation.

99. The Respondent's submissions are premised on the basis that the Claimant's contractual hours are 30 per week. However, it is accepted that her contract was that at page 68. Mr Joyce told us that it was not in her personnel file, but that he had come across it and it had been overlooked. The relevant clause reads as follows:

"Your contracted hours of work are 37.5 per week. Normal working days and hours will be advised to you according to the roster in force. Shift times may change either temporarily or permanently to meet operational requirements."

100. The Respondent suggests that this means that they can vary the Claimant's hours to be more or less than 37.5. But we do not see how that can be so, attributing to those words their ordinary and natural meaning. The days and the hours, which must mean the start and finish times, can vary in accordance with the rota, but the clause is clear, she was entitled to 37.5 hours a week.

101. That said, none of the Claimant's wages claims are identified in the list of issues as being on the basis that she should have received pay for 37½ hours per week. We are only permitted to determine the Claimant's pleaded case, which makes no reference to this. Her first ET1 contains the wages claim; there is no wages claim in the second ET1. The first ET1 contains no reference to not being paid enough because she was entitled to 37½ hours per week. The further and better particulars document produced at the preliminary hearing, pages 66E1 and E2, contains reference to breach of contract and the wages claim, but not to this point. So we deal with the claims as identified in the list of issues:-

- 101.1. a. 8 to 21 August: The Claimant was on paid suspension. She had gone to Poland without the consent of the Respondent. We have not seen the letter of suspension, but the Claimant agreed in evidence that she knew she had to remain available for work. The Respondent asked her to return to work on 8 August and she did not do so until 23 August. She is not entitled to pay during the intervening period.
- 101.2. b. 26 September: The Claimant claimed 7½ hours pay. She agreed that in accordance with her timesheet, she only worked for the 2 hours she was paid for that day.
- 101.3. c. 10 to 23 October: The Claimant agreed in evidence when taken through the timesheets, that she had worked for 60 hours during that two week period and by reference to her payslips, that she had been paid for those 60 hours.
- 101.4. d. 24 October to 6 November: The Claimant agreed in evidence, when taken through the timesheets, that she had worked for 67½ hours during that two week period and by reference to her payslips, that she had been paid for those 67½ hours.
- 101.5. e. 7 to 20 November: This is during the period of suspension before dismissal. The payslip for this period, (page 324) shows that the Claimant was paid for the 15 hours that she had worked over two days on 7 and 8 November, in accordance with the timesheet at page 237 and she was then paid for six days while suspended. The Claimant agreed that was so.
- 101.6. f. 21 November to 4 December: The Respondent was entitled to treat the Claimant as on unauthorised absence as of 30 November. The suspension letter at page 255 made this clear. She had notice of the disciplinary hearing, (page 283) and she did not attend on 30 November. The payslip at page 325 shows that for this period, she was paid 52½ hours, or the equivalent of seven days, which the Claimant agreed was one week and two day's pay. In fact, as the disciplinary hearing was at 2 o'clock when her shift would have started, she was not entitled to pay for 30 November, but she was paid for that day and so she was overpaid by 7½ hours.

102. For these reasons, the Claimant's claim for unpaid wages fails.

Unfair dismissal

103. It seems to us that there is extant, (i.e. still existing) a claim for unfair dismissal. We could not see anywhere that that had been dealt with. Although the claim has not been pursued, presumably because everybody understands that because the Claimant does not have sufficient service, she has no entitlement to bring a claim of unfair dismissal. The point has been overlooked. For the avoidance of doubt, the Claimant's claim of unfair dismissal is dismissed for want of jurisdiction, as the Claimant did not have the required two years service to bring such a claim.

104. So the outcome is, that all Miss Zabierowska's claims are, I am afraid, dismissed.

Employment Judge Warren

13 December 2017