EMPLOYMENT TRIBUNALS

Claimant: **S Hippolyte**

Respondent: **House of Commons Commission**

Heard at: **London Central**

On: **25, 29, 30, 31 July, and (in chambers) on 2 August 2019**

Before: **Employment Judge Quill, Mr I McLaughlin, Mr S Williams**

Representation
Claimant: In Person
Respondent: Ms K Balmer

JUDGMENT

The unanimous judgment of the Tribunal is that:

i. The claim of direct discrimination on the grounds of race contrary to sections 13 and 39 of Equality Act 2010 ("EA 2010") fails;
ii. The claim of direct discrimination on the grounds of disability contrary to sections 13 and 39 of EA 2010 fails;
iii. The claim of harassment related to race contrary to sections 26 and 40 of EA 2010 fails;
iv. The claim of harassment related to disability contrary to sections 26 and 40 of EA 2010 fails;
v. The claim of unfair dismissal contrary to section 94 of Employment Rights Act 1996 ("ERA 1996") fails.

REASONS

Introduction

1. The Respondent, the House of Commons Commission, is the statutory body responsible for the administration of the House of Commons. It employs approximately 2,500 staff across many different departments, including the Parliamentary Security Department ("PSD"). PSD is responsible for the security of the House of Commons.

2. There are approximately 350 operational security staff involved in the provision of search and screening for visitors and vehicles, controlling access to buildings, patrolling and providing security for events, as well as operating a control room.

3. The Claimant was employed by the Respondent as a Security Officer ("SO"). The Claimant had continuity of employment which commenced on 27 January 1993. Prior to 2016 the Respondent's security operations were carried out by the Metropolitan Police Service ("MPS"). On 1 April 2016 the security operations for the House of Commons transferred to the Respondent, and the Claimant's contract of employment transferred due to the operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

4. The Claimant was dismissed with effect from 16 August 2018.

The Claims

5. The Claimant brought the following claims against the Respondent:
   i. direct discrimination on the grounds of race contrary to sections 13 and 39 of Equality Act 2010 ("EA 2010");
   ii. direct discrimination on the grounds of disability contrary to sections 13 and 39 of EA 2010;
   iii. harassment related to race contrary to sections 26 and 40 of EA 2010; and
   iv. harassment related to disability contrary to sections 26 and 40 of EA 2010; and
   v. unfair dismissal contrary to section 94 of Employment Rights Act 1996 ("ERA 1996").

6. In relation to each of the disability claims, the Claimant relied on two alleged medical conditions, which were a gastro/gynaecological condition and a mental health condition respectively.

7. For each one of the Equality Act claims, the Claimant relied on the same 5 allegations. These had been agreed as issues at a Preliminary Hearing.
   a. Allegation One: by the respondent investigating in 2016, an incident when it was alleged the claimant shouted at someone coming into the building; it being the claimant's case that she did shout, but others also shouted and were not investigated.
   b. Allegation Two: by the respondent alleging that the claimant, on 9 March 2017, failed to allow a severely disabled member of the public to be accompanied by a carer.
   c. Allegation Three: in 2017 by the claimant's manager, Ms Elaine Young, coming into the claimant's work area and pushing her forearm against claimant's chest to stop the claimant from leaving the room.
   d. Allegation Four: by the respondent, in 2018, accusing the claimant of using inappropriate language. The respondent alleged that the claimant used the words "fuck off" is to her manager Ms Gina Beston and then said words to the effect of "fuck off or I will fart [possibly piss] in your mouth". The claimant accepts that the words were used, but says that they were used in jest as the manager was a friend.

e. Allegation Five: by dismissing the claimant on or about 16 August 2018.

8. At the outset of the hearing, the Claimant confirmed that these were the claims and allegations which she was pursuing. She also confirmed that the date for Allegation Three was (approximately) 25 April 2017.

9. Although not explicitly stated in the list of issues from the prehearing review, as per her claim form, and as confirmed in her oral testimony, the claimant also alleged that there was a conspiracy to dismiss her which was made up of the individuals listed below.
    i. F Tennet
    ii. S Hankins
    iii. K McGrath
    iv. E Young
    v. P Barnard
    vi. J Chong
    vii. I Cameron
    viii. M Williams
    ix. E Baldock
    x. J Groves
    xi. B Akinjogba

The Hearing

10. The hearing was originally listed for 6 days, from 25 July 2019 to 1 August 2019. In fact, we sat as follows:
    a. Day 1. Preliminary matters and reading day
    b. Day 2. We did not sit.
    c. Days 3, 4 and 5, we heard evidence, finishing at 1pm on Day 5.
    d. Day 6, the parties submitted written submissions and we did not sit.
    e. 2 August 2019, we sat in chambers and made our decision.
    f. Friday 16 August 2019 was due to be the remedy hearing but, in fact, in light of our decision, it will not now be needed.

11. On Day 1, the Claimant indicated that the hearing bundle was agreed, subject to the fact that she believed that some of the pages were not necessary. She confirmed that she was not objecting to the inclusion of those pages. She did not suggest that she there were any additional documents that she wished to have included.

12. On Day 1, the Claimant made applications for 3 witness orders. We made one in relation to a colleague, AD. We were told that he was an SO who could comment on whether bad language was commonplace in the workplace. We declined to make the other two orders on the grounds that the Claimant's account of what the witnesses might say did not demonstrate sufficient relevance. DH was said to be able to comment in relation to Allegation Three, but the Claimant accepted that he had not witnessed the alleged assault. He was also someone who was said to be able to comment on whether bad language was commonplace in the workplace. PW was said to be able comment on whether Gina Beston had said that the Claimant's days were numbered. We were told that his account was contained in a series of text messages sent to the Claimant, and we agreed that we would

allow the messages into the bundle, even without allowing the Respondent to cross-examine him.

13. On Day 1, the Claimant confirmed that she and AD would be her only witnesses. At the end of Day 3, it seemed that the Claimant had finished calling all of her witnesses. Overnight, the Claimant sent an email to the tribunal (not copied to Respondent) seeking permission to call two more witnesses. These were a Mr Porter and a Mr Perring who had been present during Days 1 and 3. The Claimant indicated that she had been in correspondence with them since at least April 2019 in connection with her case (albeit in connection with representation rather than giving evidence). Mr Porter had represented the Claimant, as a union representative, at some stages of the internal proceedings. No witness statements from either had been served. This was contrary to the case management order, requiring written statements. We were told that the Claimant had sent her own written statements (she produced 5, all from herself) to the Respondent, not by way of mutual exchange, but after she had received the Respondent's statements. No explanation for the lateness of the request was given, other than that the Claimant had decided, after the previous day, that she would like to call these witnesses, and that they had agreed. The evidence we were told that they would give did not relate to any new or unexpected issue. Furthermore, as described to us, the evidence did not seem to be particularly relevant to the issues which we had to decide, touching mainly on general work issues rather than the specific allegations in this case. We therefore rejected the request for permission to call these witnesses.

14. On Day 5, the Claimant attended with a single copy of a document which we were told was approximately 155 pages. It was an October 2018 report by Dame Laura Cox. The Claimant said that she wanted this to be added to the bundle. Ms Balmer objected on the grounds that she had not read this lengthy document. We were due to finish the evidence that day by 1pm, and then have written submissions. It would have been impossible, before 1pm, for Ms Balmer to read the document and consider whether it was necessary to recall the Claimant, or any of the respondent's witnesses, in order to ask questions. It would have been practically impossible for Ms Balmer to complete her closing submissions on time, if she also had to read the document and consider if there was anything that she wished to take instructions about or make submissions on. We were told that the document did not name any of the persons relevant to the Claimant's claim as alleged discriminators or bullies or at all. The Claimant appeared to be under a slight misconception that the Cox report was referred to by the respondent's witnesses. In fact, that was not the case, and the report referred to by the respondent's witnesses was in the bundle (and identified by page numbers) was written by Gaynor Scott, and was directly relevant to the issues in the case. The Cox report seemed likely to have little, or no, probative value in relation to the issues which we had to decide. Furthermore, admitting it would either have been very unfair to the respondent (if no adjournment was granted) or else would have required an adjournment to a future date, which was not proportionate in all the circumstances, and would have caused unnecessary expense. The Claimant had had the document in her possession since at least March 2019 (she said she had brought it to the preliminary hearing), but had not told the Respondent that she wanted the document in the hearing bundle either in April (the date for disclosure) or in June (the date by which she had been ordered to inform the Respondent

about which documents she wanted in the bundle). Therefore we decided that allowing the Cox report into evidence was not in the interests of justice.

15. On Day 4, Ms Barnard gave her evidence, and Ms Young commenced hers, finishing on Day 5. We noted that some of the documents in the bundle which were relevant to their evidence contained redactions. Each of them stated (and we accepted) that they had not made the redactions and they did not know who had. The Claimant and the Government Legal Department were in agreement that the Claimant had made a data subject access request in the past, and, at the time, had been supplied with documents which redacted information which was exempt from that request. The copies in the bundle were documents which the Claimant had disclosed in these proceedings. We were told by the GLD (via counsel) that the originals had not been located. We asked for a further check to be made overnight, giving permission for Ms Young to liaise with GLD as part of that exercise. We were told on Day 5 that (with one exception) the only versions of the documents that could be found were already in the bundle. We accepted that explanation, and decided that it was not necessary or appropriate for us to draw any adverse inferences specifically from the absence of unredacted copies.

16. The Tribunal heard evidence from the Claimant in person and her witness (attending under witness order) "AD". It also heard from six witnesses for the Respondent: Assif Hassan (Security Officer Manager), Priya Barnard (Duty Operations Manager), Simon Hankins (Head of Security Operations), Mark Williams (Operations Manager), Elaine Young (Operations Manager) and Emily Baldock (Deputy Director of Security (Strategy and Services)).

17. The Tribunal also received a signed witness statement from Michael Delwiche (Operations Manager) who could not attend in person due to the altered hearing dates. We gave that such weight as we saw fit, and also took account of the list of questions which the Claimant would have asked him had he attended.

Findings in relation to Disability

18. The Claimant has a physical disability which is a gastro/gynaecological condition. The Respondent was aware of that condition.

19. The Claimant alleges that she was suffering with a second disability, namely depression, during her employment. On being questioned, the Claimant referred to having been diagnosed by her GP as suffering from stress and anxiety. The Claimant said that this diagnosis had been made in 2008, and 2015 and 2017.

20. The Claimant stated that she started taking medication for this condition after dismissal. (She stated that her GP had been willing to prescribe it earlier, but that she had declined.)

21. She said that in 2017 she commenced counselling in relation to this condition. This had been arranged because she had contacted a confidential helpline operated by her employer.

22. The Claimant said she had not received any letter from her GP or any other doctor to describe or define the condition to which she was referring. The Claimant said that she believed that the details of the condition would be contained in her GP's notes. She admitted that she had not sent these notes to the Respondent, and that she had not, in fact, sought to obtain them from her GP. She said that the Respondent had written to her seeking copies of the medical evidence that she was intending to rely on. The Claimant stated that she did not believe she had to supply the evidence to the Respondent unless and until the tribunal specifically ordered her to do so.

23. When asked to describe the effects which the alleged mental health condition had on her, the Claimant did not identify anything specifically related to this condition. She described some day to day activities as being difficult for her, but, in each case, she went on to give an explanation which related to the gastro/gynaecological condition rather than the mental health condition.

24. The Claimant stated that she did not tell the Respondent (any of her managers, or anyone in Human Resources) about the alleged mental health condition.

Main findings of fact

25. Security officers carry out their duties in two categories of role. These are search & screening, and post & patrol. There are various individual "posts" for each of the categories. Search & screening roles are predominantly the postings at the high-volume public access points to the site. At these locations, security officers carry out physical searches and x-ray searches of persons entering the site. Post & patrol postings require the officer to monitor a defined area of the site (with some incidental activities such as allowing access to particular rooms). Each of the various postings/ locations has what are called "post notes". These are some specific details and information for the security officer, including an outline of the duties which the officer must carry out while working a shift on that specific "post". The respondent moves its security officers around to ensure that the officers remain multiskilled.

26. In the claimant's case, there were some posts which she did not do. The posts which she could do had been agreed with her, taking account of Occupational Health advice. The claimant did not allege in these proceedings that there had been any breach of the respondent's obligation to make reasonable adjustments in relation to her disability.

27. On the evening of 8 December 2016, the Claimant was on duty in the Courtyards. When working in the Courtyards, it is sometimes necessary for security officers to speak loudly or firmly. This is due to the combination of several factors. The area can be noisy, and it is necessary for the security officer to be assertive, and it is not always possible for the officer to be in close proximity to the visitor to whom instructions are being given.

28. That evening, the Claimant interacted with a visitor to the Respondent's premises. The following day, this event organiser ("EO") sent an email to the Respondent which (amongst other things) criticised the behaviour of a security officer. EO's email did not identify the SO by name. However, it is common ground that the Claimant was the SO in question. EO's email

complained about two issues: firstly, that the SO had not allowed early access to the function room (and the lack of early access meant that two members of the party missed out on a tour); secondly, that the SO had spoken rudely.

29. EO's email was not a sham. EO, who was not an employee of the Respondent, sent the email to the Respondent for her own reasons, and not as part of any conspiracy orchestrated by any of the Respondent's employees.

30. In due course, once it was established that the Claimant was the SO who had dealt with EO's party, the matter was investigated by John Chong, a Security Officer Manager ("SOM") and the Claimant's line manager at the time.

31. The preliminary investigation recommended formal action. As a consequence, the matter was referred to Assif Hassan. Mr Hassan's decision was contained in his letter dated 1 March 2017. He decided that the complaint was not without foundation, but that it should be resolved by informal action. The Claimant's conduct was to be monitored for 6 weeks, and she was to ensure that she acted in a professional and respectful manner at all times to visitors and members of the public.

32. We did not hear from Mr Chong, and we were told that this was because he has left the Respondent's employment. However, even on the Claimant's case, there was no evidence that he had made any remarks related to race, or exhibited any behavior which might cause us to be suspicious that his actions and recommendations could not be taken at face value. Mr Chong was aware of the Claimant's gastro/gynaecological condition. The Claimant did bring a grievance alleging Mr Chong had failed to take proper account of her disability during a shift in May 2018. However, that was long after his investigation of the December 2016 complaint. Mr Chong's contemporaneous written reasons for his recommendations are plausible and are consistent with other documents.

33. Mr Hassan was unaware of any medical conditions that the Claimant had. Mr Hassan gave evidence, which we found credible and to be supported by the contemporaneous documents. Mr Hassan believed that the Claimant had spoken to the customers in a way which they had perceived as rude. He had thought it possible that she had not intended to be rude, but that she had failed to pay sufficient attention to how her words and tone might be perceived by the guests.

34. Mr Hassan stated that he could not remember what investigations (if any) he had conducted into EO's comments about wanting early access to the function room, and into whether, in fact, EO had arranged this with Banqueting Services. The Claimant had acted correctly by denying early access to the function room if the security staff had not been notified by Banqueting Services that EO's group should have early access. On the other hand, the Claimant had acted incorrectly if there had been such a notification, and she had failed to check the point. Mr Hassan did not remember what his findings had been. He was also frank about the fact that he was not 100% certain (though he stood by his witness statement) about which one of three (similar but slightly different) versions of his report was the final one.

35. Since Mr Hassan's involvement was between December 2016 and 1 March 2017, which was more than two years before the hearing, and more than 18 months before the claim was issued, Mr Hassan's assertion that he could not remember was entirely plausible and was not contradicted by any other evidence. We believed him. He was doing his best to remember, but he simply could not give a more detailed account due to passage of time.

36. We are satisfied that neither John Chong nor Assif Hassan made their decisions/recommendations for any reason related to the Claimant's race, or to her admitted disability (being the gastro/gynaecological condition) or to the alleged disability (being the alleged mental health condition). We are satisfied that they each made their decisions in connection with this matter because they genuinely believed that that was the appropriate course of action based on the evidence they had. We are satisfied that they would have taken the same course of action in relation to an SO of a different race or with different medical conditions.

37. Our finding is that Mr Hassan was not part of any conspiracy to dismiss the Claimant, and the events were not especially memorable for him.

38. On 9 March 2017, the Claimant was working when she received a call asking her to attend the waiting area for the Black Rod Garden search point. This waiting area is for visitors who have passed through the security checks, and who will, in due course, attend some room or event elsewhere on the premises. In the waiting area, the Claimant spoke to another security officer, JN, who told the claimant that there was a policy that wheelchair users should not remain in the waiting area when it was busy and requested that the Claimant escort a particular person (who was in a wheelchair) elsewhere.

39. The Claimant left the area and spoke to someone called Miriam who was setting up a function room. Miriam agreed that the Claimant could bring the wheelchair user to that room. The Claimant returned to the waiting area, and without discussion informed the man that he had to follow her out of the waiting area. The Claimant did not select either Miriam or the room specifically because they were suitable for the wheelchair user's requirements. On her own account, the Claimant made no attempt to ascertain what those requirements might be. The man had no limbs, which is a fact which the Claimant says she did not notice. The Claimant said that the only thing that she knew about the man was that he was in a wheelchair.

40. The man had attended the Respondent's premises with an assistant. The assistant was not invited to go with the man. The Claimant said that she did not know the man was with a carer, and that she did not ask. At different times, the Claimant has given different explanations for this, including that it was not her job to ask, that no-one spoke up to say that they were a carer, and that the respondent ought to have given her clearer information about its safeguarding policy. She also said that Miriam had said "just him".

41. The situation was resolved a few minutes later when another of the respondent's employees saw the Claimant with the wheelchair user and asked the Claimant if the man had a carer with him. This led the Claimant to return to the waiting area to find out.

42. Approximately 6 minutes elapsed between the Claimant leaving the waiting area with the man (at around 12:16pm), and returning to ask if anybody was there as carer for the man (approximately 12:22pm). These timings are based on Priya Barnard's account of what the CCTV footage showed. We take account of the fact that the Claimant has not seen the CCTV recording.

43. At about 1.30pm on the same day, 9 March 2017, a Visitor Assistant, RK, sent an email to her supervisor in relation to the incident. According to RK's email the remainder of the man's group (the carer plus two other persons) had been confused and had been given no information about the reason for the man being led away from the waiting area or the reasons that none of them had been invited to go with him.

44. This email was subsequently passed to Faye Tennet (Deputy Head of Security Operations) who in turn forwarded it to Elaine Young. Ms Young forwarded it to Ms Barnard, on 16 March 2017, with a request that either Ms Barnard or a colleague investigate. The same day, Ms Barnard agreed to do so.

45. An email sent by Ms Barnard to Ms Young at 18:05 was in the bundle. In the unredacted part of that email, Ms Barnard states "*I can confirm that Stacey had an argument with a group and someone in a wheelchair*" and goes on to say that Ms Barnard would investigate. She was attempting to work out what the time of the alleged incident was so that she could look at CCTV. The remainder of the email had been redacted, and this was the only such item which the Respondent was able to find, and provide an unredacted version of, on Day 5 (see above). The previously redacted part of the email essentially confirmed what JN had told the Claimant on 9 March 2017, namely that there was an understanding that wheelchair users should not remain in the waiting area for reasons of health and safety, and to give them priority to be escorted by the SO on the "Courtyards" posting to the relevant meeting/function room.

46. Ms Barnard viewed the CCTV and came to the conclusion that it confirmed that the claimant was the SO in question. On 31 March 2017, Ms Barnard completed a document using the pro forma of a preliminary report, which she intended as a draft document. At 19:06, she forwarded it to Ms Young seeking advice on how to proceed. In particular, she was unsure as to whether the report should refer to the extent of the man's disabilities. At 22:49, Ms Young referred the query to Kim McGrath of Human Resources, copying in Ms Barnard. Ms McGrath replied by email dated 1 April 2017 (timed at 08:46). This email was redacted and we were not provided with a full copy of the contents. Amongst other things, the advice was to speak briefly to the Claimant about the alleged incident, and that the completed version of the preliminary report should set out more detail of the allegations.

47. On 5 April 2017, Ms Barnard spoke to the claimant about the matter. This was not a formal investigation meeting, but was a preliminary discussion, as recommended by Ms McGrath. Towards the end of the discussion, the claimant grabbed a piece of paper from Ms Barnard's hand and examined it. The paper had nothing to do with the subject of Ms Barnard's discussion with the claimant and the claimant did not have Ms Barnard's permission to take

this paper, or to read it. Ms Barnard was shocked at the claimant's actions and this was the first time in her career that another employee had done such a thing to her. In her evidence to the tribunal, the claimant admitted grabbing this piece of paper, and stated that she believed her actions to be justified because she thought that the paper might contain the identity of the person who had drawn the 9 March incident to the respondent's attention and she, the claimant, believed that she was entitled to have that information.

48. Following her discussion with the claimant Ms Barnard was of the opinion that the matter should potentially end there. She sent an email to Ms McGrath, copied to Ms Young, on 5 April 2017 at 19:26 to say so. Her view was that what the claimant said was consistent with what was seen on the CCTV footage, which lacked audio.

49. Ms Young also appeared content that the matter should rest there. In any event, Ms Young's opinion was that the decision on whether there should be a formal investigation was one for Ms Barnard. Ms Young, did not seek to interfere with it. At 19:26, Ms Young replied saying "*Thanks Priya. Please can we have something added to the post notes about wheelchair visitors*". On 12 April, the matter having been brought to his attention, Iain Cameron asked that more detail be added to the post notes in relation to the need to have regard to the respondent's safeguarding policy.

50. Ms McGrath responded to Ms Young's and Ms Barnard's emails by email dated 6 April 2017. In that email, Ms McGrath did not expressly disagree with Ms Barnard's opinion, but clearly implied that she thought that the matter should potentially go further. Ms McGrath seemed to think that the wheelchair user had been apart from his carer for up to 20 minutes and it is not clear on what she based that opinion.

51. Following a discussion with Ms McGrath, Ms Barnard gave further thought to the matter and decided that, contrary to her earlier opinion, there were sufficient grounds to recommend that the matter go further. She was cross-examined in relation to her reasons for eventually deciding to recommend formal action despite the contents of her 5 April email. She remained adamant that the decision to do so was hers and hers alone, and that Ms McGrath's input had been only in relation to what the respondent's procedures were, and what Ms Barnard's specific role was at this stage, and what types of evidence could be taken into account during any subsequent formal disciplinary proceedings. We are satisfied that Ms Barnard told the truth, and that she changed her mind for the genuine reasons that she gave, and not because she was part of a plot, or because she had been improperly influenced.

52. Ms Barnard communicated her decision recommending formal action to the claimant on or around 13 April 2017. The claimant was reluctant to accept a copy of the letter inviting her to a formal investigation meeting.

53. On 13 April 2017, having been informed that formal disciplinary proceedings were to commence, the claimant sent the following emails.
    a. She wrote to Mr Simon Featherstone seeking to know the identity of the person who had reported this matter. The email exhibited some anger towards Mr Featherstone and towards the person who had

made the report. Furthermore, the email also described the 9 March incident as "*a trivial matter*".

b. She also wrote to Ms Young, complaining about the disciplinary investigation and stating: "*I do not expect to be contacted regarding this issue again*". Ms Young thought that the complaint lacked merit, and that the Claimant was simply being obstructive. Ms Young's preference would have been to simply delete the email, and take no further action on it, but she knew that she was obliged to forward it to Human Resources, and she did so.

54. The respondent has a policy that its CCTV footage is automatically deleted after a set period of time. The retention period varies from location to location. In relation to the Black Rod Gardens search point waiting area, the retention period was no more than 30 days. The 9 March 2017 footage had already been automatically deleted by 13 April 2017. Ms Barnard accepted in her witness statement and in her testimony that it would have been technically possible for her to have put in a formal request which would have led to a copy of the relevant video being made. She did not do so. On 22 March 2017, the Houses of Parliament were affected by a major security incident and in subsequent days and weeks, Ms Barnard and others spent a large amount of time dealing with the aftermath of that incident. For that reason, she forgot, or else did not have time, to take the steps to ensure that a copy was made. She did not deliberately allow the footage to be deleted in order to prevent the Claimant having sight of it, or to disadvantage the Claimant in any way.

55. Ms Barnard did not supply a copy of the RK email to the claimant because, in Ms Barnard's opinion, the identity of RK was confidential and was not to be revealed to the claimant. Ms Barnard did give sufficient information to the Claimant for the Claimant to know what incident was being referred to. Our finding is that no relevant information from the email was withheld from the claimant. Furthermore, Ms Barnard's decision to withhold the email was not related to the Claimant's race or to the admitted disability or to the alleged disability. She would have made the same decision had the Claimant been of a different race or had different medical conditions.

56. On 20 April 2017, following a request by Faye Tennet, Ms Young spoke to the Claimant to inform her that the email sent to Simon Featherstone had been inappropriate. This meeting took place in a room known as the "Key Room", which was the post at which the Claimant was working at the time.

57. On 25 April 2017, there was a further meeting between Ms Young and the Claimant in the "Key Room". The reason for the meeting was that the Claimant was refusing to accept envelopes handed to her which contained letters connected with the disciplinary investigation. Ms Young had been advised by Human Resources to read out a letter to ensure that the Claimant was not able to say that she had not been informed of the time and place of the investigation interview. The reason that the Key Room was the location of the meeting was that was where the Claimant was on duty at the time. Mr Chong accompanied Ms Young, and we infer that this was so that there would be another witness, in addition to Ms Young, that the Claimant had been informed of the contents of the letter. When Ms Young and Mr Chong arrived at the Key Room, they told other officers to leave.

58. It was common ground that the room was fairly small, and that Ms Young and Mr Chong stood near the door, and that initially the Claimant was seated at a computer work station, and that at some point she stood up and said that she wanted to leave the room. Our finding is that in order for the Claimant to leave the room, either Ms Young and Mr Chong would have each needed to actively move aside so that the Claimant could pass, or else the Claimant would have needed to push them aside to reach the door. Ms Young's account is that she simply read the letter (which she estimated took a couple of minutes) and that the Claimant did not stand up until she, Ms Young, had almost finished reading. Ms Young said that the Claimant said "*Excuse me. Excuse me*" without a pause between the two sentences, and that this more or less coincided with her, Ms Young, reaching the end of the letter, at which point, she and Mr Chong left the room and therefore the Claimant was immediately free to leave after having said "*Excuse me*". The Claimant's account was that the meeting lasted at least 7 minutes (at other points, she also mentioned 20 or 30 minutes). On the Claimant's account, Ms Young was only part way through reciting the letter when she, the Claimant, sought to leave the room. The Claimant alleged that as she tried to make her way to the door, Ms Young reached out her arm and made contact with the Claimant's chest to physically prevent the Claimant moving further.

59. We found Ms Young to be a credible witness. We also thought that it was inherently implausible that someone with her experience and knowledge would risk her career by assaulting a junior colleague.

60. In relation to the Claimant, we reject several of the Respondent's attacks on her credibility. However, there was one issue in relation to which we unanimously decided that she had lied to us. This was in relation to her claim that she had ceased to be a union official at (or before) the TUPE transfer in April 2016. When shown emails from later dates which contained a signature describing her as "*Branch Treasurer /Union Rep /Ass. Organiser*", the Claimant asserted that she remembered that she had not got round to changing her signature by then, but had definitely stepped down. Our finding is that the Claimant was a union official as of 1 May 2017, when the Branch Secretary, Kirk Porter, wrote to the respondent, on the claimant's behalf, pointing out that she was a Branch Officer and this was an important consideration in relation to the procedures which the respondent was obliged to adopt when investigating her. We considered whether it was possible that the Claimant was simply making an honest mistake in relation to a time period which was more than two years before her testimony. However, we decided that her status had been an important issue at the time, and that – in preparing for the tribunal hearing – the Claimant was likely to have refreshed her memory about her dealings with the Respondent. We were therefore confident that the Claimant was fully aware that she had been a union official at the time, and that she lied to the tribunal because she did not want to agree with the respondent's counsel's suggestion that she was well-versed in the relevant procedures.

61. In reaching our decision, we have also taken account of what Mr Chong was reported to have said to the independent investigator, Gaynor Scott, where he specifically stated that Ms Young had not placed her arm onto the Claimant.

62. Our finding is that Ms Young did not use her arm in the manner alleged by the Claimant. In other words, Ms Young did not push her arm into the Claimant's chest to prevent her leaving the room. Given the length of the letter, and given the Claimant's previous actions to try to avoid receiving the letters, we think it is likely that (contrary to Ms Young's recollection) the Claimant was probably expressing her intention to leave, and saying "*excuse me*" when Ms Young was still part way through reading out the letter. However, we do not believe that either of them assaulted the other.

63. Ms Young did not move aside as quickly or as fully as the Claimant would have liked, and the reason for this was that she was determined to make sure that she could later say that the full letter had been read to the Claimant. Her actions were not connected to the Claimant's race or medical conditions, and she would have behaved the same way towards someone of a different race, or with different medical conditions, had that person been refusing to accept letters in connection with disciplinary proceedings. Ms Young did not place her hands/arms on the Claimant.

64. In April 2017, the Claimant submitted a grievance naming Faye Tennet and Elaine Young and (later) Priya Barnard. At the Claimant's request, the disciplinary investigation was put on hold pending a decision on the grievance. The outcome of the grievance was communicated by letter dated 19 June 2017.

65. Following the grievance outcome, the investigation resumed, and the Claimant met Ms Barnard for a formal investigation meeting on 27 July 2017. As well as allegations of misconduct in relation to the 9 March 2017 incident, the claimant now faced additional allegations of failing to follow a reasonable management instruction in relation to her refusal to accept the envelopes enclosing formal letters on 20, 25 and 28 April 2017.

66. Following her formal investigation, Ms Barnard's decision was that the matter should proceed to a disciplinary hearing, and she prepared a report accordingly. Ms Barnard made this decision because she genuinely believed that a formal disciplinary hearing was justified. She did not make the decision for any reason connected to the Claimant's race or medical conditions. She would have would have made the same decision had the Claimant been of a different race, or if she had had different medical conditions. The contents of the report were Ms Barnard's honest opinion, and she made her recommendation in good faith. It was not unreasonable for Ms Barnard to recommend a formal hearing for these two sets of allegations, based on the evidence which Ms Barnard had considered.

67. The disciplinary hearing was originally going to be before Mr Cameron. However, the Claimant objected to this, and a new hearing officer was selected, Mr Hankins. The tribunal bundle contained a set of documents which Mr Cameron had been due to consider. Unfortunately, Mr Hankins was unable to specifically recall what documents he had, and there were no contemporaneous documents to assist. However, he was confident (and the Claimant seemed to accept) that he and the Claimant had each been working from the same set of documents.

68. The meeting took place on 20 September 2017. During the meeting, Mr Hankins considered both of the disciplinary allegations against the Claimant. Neither the Claimant nor Mr Hankins had seen copies of the emails to/from Mr Cameron in April 2017, which suggested changing "*post notes*" to comment on safeguarding policy. However, the safeguarding policy was available to Security Officers by examination of the intranet even before it was explicitly referred to in "*post notes*". Furthermore, the post notes for Courtyards did specify that the security officer performing that duty would sometimes be required to escort visitors to particular rooms.

69. Mr Hankins issued a final written warning dated 10 October 2017, which was expressed to last for two years. He upheld both allegations (that the Claimant had separated the wheelchair user from his carer on 9 March 2017, and had failed to obey reasonable instructions on 20, 25 and 28 April 2017). He deemed them "serious misconduct". Mr Hankins genuinely believed that the Claimant had acted as alleged, and that this amounted to misconduct. He came to his decisions in good faith, and the sanction that he imposed was not manifestly unreasonable. He did not make his decisions for any reason connected to the Claimant's race or medical conditions, and he would have made the same decisions had the Claimant been of a different race or had different medical conditions. He did not issue this warning because he was part of a conspiracy to dismiss the Claimant. He did not make a pre-judgment of the case, and nobody had instructed him as to what the outcome should be. He made his own mind up, based on the evidence he heard.

70. The Claimant did not properly lodge an appeal against the 10 October 2017 warning. She stated that she spoke to an HR officer, Michelle Daniels, by phone, and also said that she instructed her union representative (IB) to lodge the appeal. She admitted that she did not reply to Michelle Daniels email of 21 November 2017 which told her that no valid appeal grounds had yet been lodged, and that further action from the claimant was urgently required if she wanted to appeal. The Claimant informed us that when she made enquiries, she was told that that the time limit had expired. Even on her own account, the Claimant knew that no valid appeal was lodged and that, therefore, the 10 October 2017 warning remained live and on file. This was expressly communicated to IB by Michelle Daniels on 28 November 2017.

71. The lack of appeal does not signify that the Claimant was therefore content with, or agreed with, the final written warning. However, we are satisfied that the claimant did understand the process to appeal, and that she decided not to seek an appeal hearing.

72. On 5 February 2018, the Claimant was on site when a particular incident occurred. The remainder of this paragraph are facts that were not in dispute. When Security Officers are on breaks (and especially cigarette breaks) they are not necessarily obliged to wear full uniform. The Claimant was not wearing her cravat at the time of this particular incident. She was asked by Security Officer Manager, Gina Beston, "*Where is your cravat?*" or words to that effect. The Claimant replied, "*Fuck off*". Subsequently, Ms Beston again asked the Claimant about her cravat, and the Claimant replied "*fuck off or I will fart in your mouth*" or else "*fuck off or I will piss in your mouth*". Ms Beston asked the Claimant why she had said this, and the Claimant said that she did not know.

73. The facts that were disputed were as follows:
    a. The Claimant says that she was on a break at the time, and the Respondent does not necessarily accept this.
    b. The Claimant says that Ms Beston's questions to her were not serious, and Ms Beston was only joking when she asked about the cravat. The Respondent says Ms Beston was making a genuine and serious enquiry.
    c. The Claimant says that she, the Claimant, was being light-hearted in her reply, and that she and Ms Beston were sharing a joke which they both found amusing. The Respondent says that Ms Beston found the Claimant's replies to be shocking, and, that in effect, the Claimant exhibited insubordination to a more senior officer who had been raising a query about uniform.
    d. The Claimant says that only other security officers could have heard the conversation. The Respondent says that, in principle, members of the public and/or office workers in the building could have overheard.

74. On 8 February 2018, Ms Beston reported the matter to the Claimant's line manager, Mr Chong by email. She gave the email a subject heading of "complaint re Stacey Hippolyte". She said she wanted to bring the matter to Mr Chong's attention, and gave him the details of two other security officers who had been present.

75. Mr Chong obtained written accounts from each of the other officers. On or around 9 February 2018, Mr Chong recommended that the matter proceed to a formal investigation. On 28 March 2018, Mr Chong interviewed the Claimant as part of his investigation. The Claimant was accompanied by IB. The Claimant stated that her own words on 5 February 2018 had shocked herself, and also said that she had apologized to Ms Beston for that reason. She said that this was "*later that night*". The Claimant said that other officers used bad language as well, and they were not disciplined for it.

76. Mr Chong completed a formal investigation report dated 28 March 2018, which recommended the matter proceed to a disciplinary hearing. His Human Resources contacts were Karen Bovaird and Dee Ibikunle.

77. Mark Williams was appointed to be hearing officer. On 14 May 2018, he wrote to the Claimant supplying the investigation report and inviting the Claimant to a hearing. The letter referred to the 10 October 2017 final written warning and informed the Claimant that she could be dismissed if the current allegations were upheld.

78. The Claimant submitted a "Formal Counter Complaint against SOMs John Chong and Gina Beston" referring (amongst other things) to incidents where other staff had allegedly sworn without action being taken by Mr Chong. The Claimant also submitted a grievance alleging that, on 19 May 2018, Mr Chong had allocated her a particular post which was not suitable for her medical condition.

79. On 11 June 2018, the Claimant's disciplinary hearing commenced. She was accompanied by Kirk Porter. During this meeting, the Claimant handed Mr Williams the "formal counter complaint" document, and Mr Porter read out

some text messages received from PW. These messages were thereby read into the hearing notes. The messages themselves were not handed to Mr Williams. A printed copy of the texts was supplied to the tribunal as an additional document to the agreed bundle. We accept that these were actual messages sent by PW to the claimant at the times stated. They were sent to her, during a break in the hearing, in response to her request for some information that she could use at the hearing. We do not accept that it was a coincidence that these messages just arrived on the exact date of the hearing and during the exact timing of the break.

80. Even though the respondent did not have the opportunity to cross-examine PW, and even though there is no reason to think that PW sent these messages intending them to be used as reliable evidence in an employment tribunal hearing, we are willing to accept that Ms Beston did say to PW that the claimant's days were "numbered".

81. Ms Beston's words to PW do not persuade us that Ms Beston was involved in some sort of conspiracy or that any senior managers had informed Ms Beston that the claimant was certain to be dismissed in due course. PW's own words explain the context of the remark. The claimant was shouting at Mr Chong and PW thought that the claimant was being disrespectful, and so asked Ms Beston "*How does she get away with talking to managers like that*". Regardless of the specific reason for Ms Beston's comment, it is implausible that she said it because of a secret conspiracy which she was willing to reveal to a junior member of staff. Far more plausible reasons include that Ms Beston was making her own prediction based on the fact that she regarded the claimant's behaviour as unacceptable, and/or that she knew the claimant was on a final written warning. It is also plausible that Ms Beston simply wanted PW to know that he should regard the claimant's behaviour as unacceptable and not as an example which he could follow. On the claimant's own account, the claimant and Ms Beston had been friends for many years going back to their time together working at Scotland Yard. In short, the remarks to PW do not prove that Ms Beston was involved with (or aware of) a conspiracy to dismiss the Claimant, and we find as a fact that she was not involved in such a conspiracy.

82. At the end of the 11 June 2018 meeting, Mr Williams informed the Claimant that he would speak to Ms Beston and then the hearing would resume. He spoke to Ms Beston on 21 June 2018. Ms Beston said that she was taken aback by what the Claimant had said on 5 February 2018, and had asked her about it at the time, and the Claimant had replied to say she did not know. Ms Beston said she had been "shocked" by what the Claimant had said. Mr Williams also asked Ms Beston and Mr Chong to comment on the Claimant's examples of other officers allegedly using bad language (or behaving badly) and not having action taken against them.

83. The Claimant was supplied with copies of the notes of both the 11 June 2018 meeting, and of the meeting with Ms Beston, and was given the opportunity to consider and comment on each item, and to make further written submissions

84. The disciplinary hearing reconvened on 24 July 2018, and the issues arising from Mr Williams' meeting with Ms Beston and the Claimant's further

submissions were discussed. The Claimant also wanted to use witness evidence from AD. She was given until 27 July 2018 to supply a written statement from AD, and did not do so. Mr Williams decided that he would take into account the written statement from DH, but that there was no need for a face to face meeting.

85. By a letter from Mr Williams dated 16 August 2018, the Respondent dismissed the Claimant. The letter stated the genuine reason for the decision. The reasons were that the Claimant had used inappropriate and offensive language on 5 February when Ms Beston had asked why the Claimant was not wearing the correct uniform. The decision to dismiss took account of the final written warning. The dismissal reason was not the mere fact alone that the Claimant used the word "fuck" or the phrase "fuck off", but it was the full context of the circumstances in which the words were used in reply to an SOM.

86. The Claimant was not found to have committed conduct which entitled the respondent to dismiss her without notice. She was dismissed with a payment in lieu of notice.

87. The HR officer who advised Mr Williams on relevant procedural matters was Bukola Akinjogbin. However, the decision was made solely by Mr Williams. Neither Ms Akinjogbin, nor anybody else, instructed him on what his decision must be. He reached his decision based on the evidence presented to him, and not for any reason connected to the Claimant's race, or her admitted disability or her alleged disability. He would have made the same decision if the Claimant had been of a different race, or had different medical conditions. Mr Williams was not part of a conspiracy to dismiss the Claimant.

88. The Claimant appealed and the appeal was heard by Ms Baldock. At the appeal hearing Ms Baldock was advised by an HR Officer, Ian Meechums. Prior to the appeal hearing, Ms Baldock had received a briefing from Mr Meechums and Ms Akinjogbin. There was no attempt by Ms Akinjogbin to inappropriately influence the outcome of the appeal. Ms Akinjogbin expressly stated that the decision would be one for Ms Baldock to make, exercising her own judgment as to the merits. Furthermore, and in any event, Ms Baldock did approach the matter with an open mind. She conducted a thorough and fair appeal process, which included a hearing on 6 September 2018. The appeal was not upheld, and the Claimant was informed by letter dated 20 September 2018.

89. Ms Baldock reached her decision to reject to appeal for genuine reasons based on the evidence presented to her. She did not think that the 5 February 2018 incident in itself would have merited dismissal, but in conjunction with the final written warning, it did. Ms Baldock's decision was not for any reason connected to the Claimant's race, or her gastro/gynaecological condition or her alleged mental health condition. She would have made the same decision if the Claimant had been of a different race, or had different medical conditions. Ms Baldock was not part of a conspiracy to dismiss the Claimant.

90. In relation to Mr Cameron and Mr Groves and Ms Tennet, we find in each case that they did not treat the claimant less favourably due to race or due

to disability. We find that they did not take any actions in relation to the claimant related to race or to disability. We find that they did not seek to influence the outcome of any of the proceedings which led to either Mr Hassan's informal action dated 1 March 2017, to Mr Hankins final written warning dated 10 October 2017, to Mr Williams dismissal letter dated 16 August 2018, or to Ms Baldock's appeal decision.

91. In relation to Ms McGrath and Ms Akinjogbin, we find in each case that - in relation to the respective disciplinary proceedings - they did not treat the claimant less favourably than they would have treated a person of a different race or with different medical conditions. We find that they did not take any actions in relation to the respective disciplinary proceedings which were related to race or to disability. We find that they each acted within their proper remit as HR officers which included supplying advice and guidance to investigators and decision-makers.

92. Ms Beston's complaint (dated 8 February 2018) was not related to, or motivated by, the Claimant's race or disability, and nor was Mr Chong's subsequent investigation. We take account of the fact that we did not hear live evidence from either. In the case of Ms Beston, we received a clear explanation of her circumstances from Mr Williams, which was not disputed by the Claimant, and it was plainly reasonable for the Respondent not to call her as a witness. In the case of Mr Chong, we were given no details other than that he has now retired, and no longer works for the Respondent. His role was as an investigator (in Allegation 1 and Allegation 4/5) rather than a hearing officer, and it would not necessarily have been proportionate for the Respondent to call him, in addition to the 7 witnesses it did rely on. We were satisfied that there was no basis for us to draw any adverse inferences from the fact that the Respondent did not call Ms Beston or Mr Chong as witnesses. In relation to Ms Beston, we note that on the Claimant's own account, she, the Claimant, saw fit to apologise to Ms Beston for the 5 February 2018 incident. Furthermore, in cross-examination, the Claimant stated that she had had a "slight outburst" that day. Therefore, it is far more probable than not that the only reason that Ms Beston raised the matter with Mr Chong was a genuine opinion that the Claimant had acted inappropriately. It is very improbable that Ms Beston did it because of the Claimant's race or medical condition.

93. For the avoidance of doubt, we find as a fact that there was no conspiracy to dismiss the claimant as alleged or at all.

94. Ms Young had been involved in a number of disciplinary matters throughout her career. The proportion of BAME employees who were the subject of such investigations/hearings in comparison to the proportion of white employees was not unusually high taking account of the makeup of the workforce as a whole. We reject the Claimant's allegation that Ms Young was racially motivated generally in her dealings with staff, and find that it is unsupported by any of the evidence presented to us, and is simply a bare assertion by the Claimant. Ms Young's treatment of AD was not unusually or surprisingly lenient, and the Claimant's comments in relation to JN are not supported by the evidence presented to us.

Submissions

95. The Claimant suggested that Mr Hassan had not been impartial, and also that HR had improperly influenced him. She criticised Ms Barnard's investigation, and the failure to supply her with certain items. She also suggested that Ms Barnard had been improperly influenced by others. She accused Ms Young of being motivated by race both in her dealings with the Claimant and with others. She alleged that neither Mr Williams nor Ms Baldock had made fair decisions, and suggested HR may have changed reports. She drew our attention to the case law that she wished us to consider (which we have done).

96. The Respondent set out the factual findings that it wished the tribunal to make, and referred to case law and statute, in setting out its denial of all the claims.

The Law

97. Section 6 of EA 2010 states (in part)

> (1) A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
> (2) …
> (3) In relation to the protected characteristic of disability—
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
> …

98. Schedule 1 of EA 2010 states (in part)

> **2 Long-term effects**
> (1) The effect of an impairment is long-term if—
> (a) it has lasted for at least 12 months,
> (b) it is likely to last for at least 12 months, or
> (c) it is likely to last for the rest of the life of the person affected.
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
>
> **5 Effect of medical treatment**
> (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
> (a) measures are being taken to treat or correct it, and
> (b) but for that, it would be likely to have that effect.
> (2) *"Measures"* includes, in particular, medical treatment and the use of a prosthesis or other aid.

99. In her submissions, the Claimant stated that the discrimination was because she is black. Section 9 of EA 2010 states (in part)

> (1) Race includes—
> (a) colour;

100. Section 13 of EA 2010 states (in part)

> (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.

101. Section 26 of EA 2010 states (in part)

(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.
(5) The relevant protected characteristics are—
…
disability;
…
race;
…

102. Section 123 of EA 2010 states (in part)

(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.
(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

103. Section 98 of ERA 1996 says (in part)

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
…
(b) relates to the conduct of the employee,
…
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

<u>Direct Discrimination</u>

104. Section 39 EA 2010 provides that an employer must not discriminate against an employee. The characteristics which are protected by the legislation include race and include disability.

105. When applying the definition of discrimination in accordance with section 13(1) EA 2010, it is necessary to consider how the respondent has treated the claimant and to consider whether it has done so less favourably than it has treated a comparator. The comparator can either be an actual person or a hypothetical person. Either way, the comparator's circumstances must be the same as the claimant's other than the protected characteristic in question.

106. In relation to the protected characteristic of race, the claimant indicated that she regards herself as black. Therefore, the relevant comparator would have to be somebody who is not black.

107. In relation to disability the claimant relies on the admitted gastro/gynaecological condition. Therefore, the relevant comparator would have to be somebody who did not have that condition (regardless of whether or not they had any other disabilities).

108. In addition, the claimant also relies on a mental health condition which he has described both as depression and also as stress and anxiety. Therefore, the relevant comparator would have to be somebody who did not have that condition.

109. If we are satisfied that the claimant has been treated less favourably than the comparator, then we must consider the reason for that difference in treatment. In particular, we would must consider whether it is because of the protected characteristic or not. We must analyse both conscious and subconscious mental processes and motivations for actions and decisions.

110. Section 136 EA 2010 sets out the manner in which the burden of proof operates in a discrimination case. A two stage approach is necessary.
    a. At the first stage the tribunal considers whether the claimant has proved facts (on the balance of probabilities) from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. At this stage it would not be sufficient for the claimant to simply prove that she has been treated badly, or even that she has been treated less favourably than her comparator. There has to be some evidential basis upon which the tribunal could reasonably infer that the claimant's protected characteristic (consciously or subconsciously) caused the alleged discriminator to act in the way that they did. That being said, the tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.
    b. If the claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the treatment was in no sense whatsoever because of the protected characteristic.

<u>Harassment</u>

111. It is not sufficient for a claimant to prove that the conduct was unwanted or that it has the purpose or effect described in Section 26(1)(b) EA 2010. The claimant also has to prove that the conduct was related to the particular

protected characteristic.

Unfair dismissal

112. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for misconduct. If the respondent fails to persuade the tribunal that it had a genuine belief that the claimant committed the misconduct and that it genuinely dismissed her for that reason, then the dismissal will be unfair.

113. Provided the respondent does persuade us that the claimant was dismissed for misconduct, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996. In considering this general reasonableness, we will take into account the respondent's size and administrative resources and we will decide whether the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissal. We have also had regard to the guidance in British Homes Stores Ltd v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT; Beedell v Westferry Printers Ltd [2000] IRLR 650 EAT and [2001] ICR 962 CA, and Foley v Post Office / Midland Bank plc v Madden [2000] IRLR 82 CA.

114. In considering the question of reasonableness, we must analyse whether the respondent had a reasonable basis to believe that the claimant committed the misconduct in question. We should also consider whether or not the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, we must consider whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).

115. It is not the role of this tribunal to access the evidence and to decide whether the claimant did or did not commit misconduct, and/or whether the claimant should or should not be dismissed. In other words, it is not our role to substitute our own decisions for the decisions made by the respondent.

116. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992). The following paragraphs of the Code are relevant:

> 19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.
> 20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.
> 21. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with

timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.

117. A final written warning is something that can potentially be taken into account by a reasonable employer when deciding whether to dismiss.

118. In Wincanton Group plc v Stone [2013] IRLR 178, at para 37 Langstaff P gave the following summary of the law on warnings in misconduct cases:

> We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:
> (1) The Tribunal should take into account the fact of that warning.
> (2) A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.
> (3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.
> (4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.
> (5) Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.
> (6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

119. In Bandara v BBC 2016 WL 06639476, the EAT confirmed (having considered both Wincanton and also the Court of Appeal's review in Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374) that a tribunal assessing an unfair dismissal claim can, in an appropriate case, decide that the sanction of final written warning for a prior incident was a manifestly inappropriate sanction. A tribunal should only take that step if it there is something that is drawn to the tribunal's attention which enables it to conclude that the sanction plainly ought not to have been imposed, and this requires more than simply deciding that the sanction of final written warning had been outside the band of reasonable responses.

120. Subject to the comments above, where a final written warning is live, then the issue of whether the decision to dismiss was fair or unfair requires consideration (as per Section 98(4)) of whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.

Time Limits

121. The Claim was issued on 15 November 2018, which is less than 3 months after the effective date of termination, and the unfair dismissal claim is clearly in time. To the extent that the Equality Act allegation is the dismissal, then that is also in time. The investigation of the 5 February 2018 incident is in time as a continuing act.

122. Early conciliation started on 28 September 2018, and finished on 1 October 2018, when the certificate was emailed to the Claimant. This means that there are 3 days (29 and 30 September, and 1 October 2018) which do not count for limitation purposes. Therefore, and subject to Section 123(3)(a) of EA 2010, the other Equality Act allegations relating to acts prior to 13 August 2018 were out of time, subject to the tribunal's ability to extend time in accordance with Section 123(1)(b).

123. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period (up until 13 August 2018 or later) or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed

Discussion and Analysis

Disputed Disability – Mental Health Condition

124. Our finding is that the Claimant has not proved that she has a mental health condition that falls within the definition of disability within section 6 EA 2010.

125. Even if we had been satisfied that the evidence (namely the Claimant's oral evidence only, unsupported by any documents) was sufficient to demonstrate that she had been prescribed medication, then the Claimant only started taking that medication after the end of employment. The evidence in relation to counselling was consistent with disability, but equally consistent with someone who requested counselling, but who did not have depression.

126. We were not satisfied that the Claimant had a mental impairment, at any time relevant to this claim, which had a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities.

Allegation One

127. For the purposes of direct discrimination, the relevant comparator would have the following characteristics:
    a. Be a security officer,
    b. Have similar experience and length of service to the Claimant,
    c. Have had a complaint made against them in similar terms to that made against the Claimant in December 2016

128. We were not provided with any actual comparator. We therefore constructed hypothetical comparators and found that there was no discrimination on the grounds of race or of the admitted disability.

129. We were also satisfied that the Respondent's actions were not related to race or to the admitted disability. Therefore there was no harassment.

130. For completeness, we also add that her treatment was not because of, or related to, her alleged mental health condition.

131. The events of Allegation One did not form part of a continuing act which continued until 13 August 2018 or later. The complaint was made in December 2016, the investigation took place, and the decision was made on 1 March 2017, and communicated to the Claimant shortly afterwards. Mr Hassan played no further part in relevant events, and even though Mr Chong remained the Claimant's line manager (and investigated the February 2018 incident) those things were separate to his involvement in Allegation One.

132. Therefore time began to ran from around 1 March 2017, and the normal time limit ran out around 31 May 2017.

133. Given that the Claimant has previously brought a tribunal claim and given her experience of employment issues, there is no doubt that the Claimant was aware that tribunal claims have time limits. She confirmed in her evidence that she knew about the existence of time limits. She stated that

she was familiar with the concept of a continuing act and its relevance to time limit issues, and had been since at least 2010. She also said that the reason that she had not challenged the 1 March 2017 outcome at the time was that she had been "happy" with it. Mr Chong has left employment, and Mr Hassan's memory has faded. For these reasons, we decided that it would not be just and equitable to extend time.

134. Therefore, as well as the fact that all claims related to Allegation One fail on their merits, they also fail because they are out of time.

Allegation Two

135. For the purposes of direct discrimination, the relevant comparator would have the following characteristics:
    a. Be a security officer,
    b. Have similar experience and length of service to the Claimant,
    c. Have taken a person who had no limbs (or who had a comparable disability) away from a carer in circumstances similar to the Claimant's actions on 9 March 2017

136. We were not provided with any actual comparator. We therefore constructed hypothetical comparators and found that there was no discrimination on the grounds of race or of the admitted disability.

137. We were also satisfied that the Respondent's actions were not related to race or to the admitted disability. Therefore there was no harassment.

138. For completeness, we also add that her treatment was not because of, or related to, her alleged mental health condition.

139. The events of Allegation Two did not form part of a continuing act which continued until 13 August 2018 or later. The incident took place on 9 March 2017, and the preliminary investigation continued to 13 April 2017, and the outcome letter was dated 10 October 2017. Ms Barnard and Mr Hankins played no further part in relevant events. The fact that the final written warning was subsequently relevant to the Claimant's dismissal does not make the decision to issue the warning a continuing act.

140. Therefore time began to ran from around 10 October 2017, and the normal time limit ran out around 9 January 2018.

141. In terms of the Claimant's knowledge of time limits, we addressed this in relation to Allegation One. The Claimant had the opportunity to appeal against the warning but did not pursue the matter in November 2017. On balance, we decided that it would not be just and equitable to extend time.

142. Therefore, as well as the fact that all claims related to Allegation Two fail on their merits, they also fail because they are out of time.

Allegation Three

143. We did not find that the factual assertion was proven. We did not find that Elaine Young pushed her forearm against the Claimant's chest to stop the

claimant from leaving the room on 25 April 2017 (or on any other date).

144. This alleged incident did not form part of a continuing act with any other alleged incident.

145. The normal time limit would have expired on 24 July 2017.

146. Even taking account of the fact that the report of Gaynor Scott (which addressed this allegation, as well as others) was dated 27 June 2018, on balance we decided that it would not be just and equitable to extend time.

147. Therefore, as well as the fact that all claims related to Allegation Three fail on their merits, they also fail because they are out of time.

Allegation Four

148. For the purposes of direct discrimination, the relevant comparator would have the following characteristics:
    a. Be a security officer,
    b. Have similar experience and length of service to the Claimant,
    c. Have twice said (or have been alleged to have twice said) "fuck off" to a Security Officer Manager when asked to explain why they were not in full uniform (or to some similar, work-related question)

149. We were not provided with any actual comparator. We therefore constructed hypothetical comparators and found that there was no discrimination on the grounds of race or of the admitted disability.

150. We were also satisfied that the Respondent's actions were not related to race or to the admitted disability. Therefore there was no harassment.

151. For completeness, we also add that her treatment was not because of, or related to, her alleged mental health condition.

Allegation Five

152. For the purposes of direct discrimination, the relevant comparator would have the following characteristics:
    a. Be a security officer,
    b. Have similar experience and length of service to the Claimant,
    c. Been found, after a disciplinary hearing, to have twice said "fuck off" to a Security Officer Manager when asked to explain why they were not in full uniform (or to some similar, work-related question)

153. We were not provided with any actual comparator. We therefore constructed hypothetical comparators and found that there was no discrimination on the grounds of race or of the admitted disability.

154. We were also satisfied that the Respondent's actions were not related to race or to the admitted disability. Therefore there was no harassment.

155. For completeness, we also add that her treatment was not because of, or related to, her alleged mental health condition.

Unfair Dismissal

156. We found that the reason for the dismissal was conduct. The specific factual reason for the dismissal was the respondent's opinion that the claimant had behaved inappropriately on 5 February 2018 when she was in a discussion with security officer manager Ms Gina Beston.

157. Mr Williams had reasonable grounds to form the belief that the claimant spoke inappropriately to Ms Beston. In particular he had evidence from Ms Beston to say that she was shocked by the claimant's comments. He also had the evidence of the two other security officers who witnessed the incident and who confirmed the words which were used. The claimant herself admitted which words were used, but suggested that the context was that she and Ms Beston were joking around and none of the conversation was serious. Mr Williams had reasonable grounds to reject that assertion, taking into account the lack of corroboration for it and the fact that it was directly inconsistent with Ms Beston's decision to report the incident and her later comments to him about it.

158. In relation to procedure, the claimant made no specific attacks on the procedure adopted by Mr Williams. She indicated that it was the smoothest disciplinary process that she had ever gone through. Our finding is that Mr Williams did adopt a fair approach and that he fully considered the claimant's counter arguments as well as the evidence contained in the investigation report prepared by Mr Chong. In particular, Mr Williams did investigate the claimant's list of counterexamples of alleged bad language which, according to the claimant demonstrated that she was being treated differently to other people. Mr Williams came to the view that the Claimant's examples were not similar to an officer saying "fuck off" to a manager in response to a legitimate question, and were therefore not examples of the Respondent acting inconsistently. This was not an unreasonable decision, based on the evidence he had.

159. We were also satisfied that the appeal process which the respondent followed was fair. Ms Baldock's appeal hearing was very thorough and reasonable and took into account all of the points the claimant raised during the appeal process. It was not unreasonable for Ms Baldock to put a time limit on the claimant's opportunity to submit additional evidence.

160. In relation to whether the respondent's decision to dismiss fell within the band of reasonable responses, this has to be assessed in the light of the fact that the claimant had been given a final written warning on 10 October 2017. That warning indicated that she was liable to be dismissed for any further misconduct within a two-year period. The incident on 5 February 2018 was less than four months after that warning was issued. Furthermore, the hearing before Mr Williams was less than 12 months after the warning had been issued.

161. Our finding was that the final written warning, dated 10 October 2017, had been issued in good faith and for the reasons stated in the document itself. We did not think a final written warning was a manifestly excessive sanction for the conduct in question.

162. It is not our role to substitute our opinion for the respondent's either in relation to the decision to give the final written warning, or in relation to the decision to dismiss. It was not outside the band of reasonable responses for the respondent to dismiss, based on the conduct the Claimant was found to have exhibited on 5 February 2018, and taking account of the existence of the final written warning.

163. The dismissal was not unfair.

164. For the reasons stated above, all of the claims failed.

Employment Judge **Quill**

Date 07/08/2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

09/08/2019

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FOR THE TRIBUNAL OFFICE