Case Number: 3200211/2019

EMPLOYMENT TRIBUNALS

Claimant: **Miss R Sahin**

Respondent: **Tower Hamlets GP Care Group CIC**

Heard at: **East London Hearing Centre**

On: **11, 12, 13 May 2021 and 16,17,18 June 2021**
(In Chambers) 23 and 25 June 2021

Before: **Employment Judge Lewis**

Members: **J Clark**
M L Woods

Representation:

Claimant: **Mr J Taylor (FRU) on 11 – 13 May 2021**
Mr R Pickard (FRU) on 16 – 18 June 2021

Respondent: **Mr N Ashley (Counsel) on 11 & 12 May 2021**
Mr M Stephens (Counsel) on 13 May 2021 and 16 – 18 June 2021

RESERVED JUDGMENT

1. **The unanimous judgment of the Employment Tribunal is that the claim for**

   (i) disability discrimination,
   (ii) Harassment, and
   (iii) victimisation under the Equality Act 2010 succeed.

REASONS

A. The issues

1. The issues between the parties which fall to be determined by the Tribunal we agreed to be as follows (each 'Act' referred to is identified in the Further Information sent by the

Claimant on 24 June 2019):

Disability

2. Was the Claimant a disabled person within the Equality Act 2010 ('EQA') at all relevant times because of the following conditions:

2.1 Epilepsy;

2.2 Hypermobile type Ehlers Danlos Syndrome;

2.3 Postural Orthostatic Tachycardia Syndrome

EQA, section 13: direct discrimination because of disability

3. Has the Respondent subjected the Claimant to the following treatment:

3.1 Act 1: inviting her to a meeting on 13 August 2018 to discuss her epilepsy without warning and when this was not necessary. Leading to the Claimant feeling under pressure to agreeing to colleagues learning of her condition.

3.2 Act 2: at the 13 August 2018, Ms Warraich, her line manager, making incorrect claims about what the Claimant had said in a phone call (as to the effect of her epilepsy and whether she had a hearing problem) deliberately in order to divert attention from Ms Warraich's inadequate and hostile line management.

3.3 Act 3: at the 13 August 2018 meeting, Ms Warraich questioning whether the Claimant could manage the stress of the particular job based on an assumption about her epilepsy and in order to deflect the Claimant's complaint to a colleague about Ms Warraich's management of her.

3.4 Act 5: at the 13 August 2018 meeting, placing restrictions on the Claimant's role, purportedly prior to mandatory training but really because of epilepsy.

3.5 Act 6: On 23 August 2018 making an OH referral that was inappropriate because the Claimant had not consented to it; there had already been a pre employment OH assessment; and nothing had arisen at work to put her health in question.

3.6 Act 6: on 23 August 2018, sending an OH referral that falsely represented the Claimant's health conditions; suggested problems and appeared to be pursuing an agenda of concluding the Claimant was unfit for work.

3.7 Act 8: on 28 August 2018, suggesting that a formal risk assessment was required for an away day rather than asking the Claimant about the matter.

3.8 On 21 October 2018, constructive unfair dismissal: the Claimant relies on all acts complained of in her further Information as culminating in a fundamental

breach of contract entitling her to treat herself as dismissed.

4. Was that treatment *less favourable, detrimental treatment*, i.e. did the Respondent treat the Claimant to her detriment as alleged and less favourably than it treated or would have treated others ('comparators') in not materially different circumstances? The Claimant relies on hypothetical comparators and in respect of Act 8, Ms Anny Ash.

5. If so, was this because of the Claimant's disability and/or because of the protected characteristic of disability more generally?

EQA, section 26: harassment related to disability

6. Did the Respondent engage in conduct as follows:

6.1 Act 1 (as above);

6.2 Act 2 (as above);

6.3 Act 5 (as above);

6.4 Act 6 (as above);

6.5 Act 6 (as above);

6.6 Act 6A: on 10 September 2018 (in an email to Ms Kaur) Ms Warraich alleged that the Claimant had misrepresented and/or not disclosed her conditions to OH at her initial appointment. (The Claimant was not aware of this email until she received the documents from her data access request after she had left. But, while she was still employed, the Claimant had suspicions that this was Ms Warraich's view and that she had discussed it with others).

6.7 Act 9: on 30 August 2018 at the grievance meeting, Mr Percival, HR manager, responded to the Claimant's point that the OH referral was unnecessary, by stating that OH would need see some independent medical evidence about her condition. And by doing so, implied that her account was untrustworthy.

6.8 Act 11: between 30 August and 21 October Ms Warraich bullied and/or intimidated the Claimant by:

6.8.1 changes to working schedule without consulting her or allowing her to readjust;

6.8.2 attending many reintroduction meetings with the Claimant's clinical teams, excluding her from attendance and all communications about them;

6.8.3 arranging patient clinic dates on 1 October 2018 without consultation and disregarding training issues;

6.8.4 continuing to portray the Claimant as untrustworthy in internal emails with colleagues.

The Claimant confirmed those are the only examples of such conduct she wishes to rely on at the hearing.

6.9 Act 14: on 13 August 2018 informing the Claimant that she could not start her patient-facing work until she had attended a 'motivational interview training' even though this was not required to be done prior to the start of an operational role.

7. If so, was that conduct unwanted?

8. If so, did it relate to the protected characteristic of disability?

9. Did the conduct have the purpose of (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation

10. Has the Respondent subjected the Claimant to the following treatment;

10.1 Act 5 (as above)

10.2 Act 7: improperly and unfairly conducting the grievance (as per the Claimant's Further Information at pages 23 – 24).

10.3 Act 10: after the grievance hearing:

10.3.1 not providing all of the documents to the Claimant that were provided to the grievance hearing by Ms Warraich;

10.3.2 not giving the Claimant an opportunity to respond to Ms Warraich's statement;

10.3.3 not responding to questions asked by the Claimant.

10.4 Act 11 between 30 August and 21 October Ms Warraich bullied and/or intimidated the Claimant (as above).

10.5 Act 13: Ms Warraich stating that she and Ms Kaur had been treated disrespectfully by the Claimant 'as we are both black women'.

11. If so, did that treatment subject the Claimant to a detriment.

12. If so, was this because the Claimant had done a protected act. The Claimant relies on the following protected acts.

12.1 that the Claimant had accused the Respondent and Ms Warraich of disability discrimination at the meeting on 13 August 2018; and/or

12.2 that from 13 August the Respondent believed that she was making such an allegation or may do so.

Reasonable Adjustments

13. Did the Respondent apply the following PCPs:

13.1 Ms Warraich's management style/approach, namely that she was a new manager, who gave no clear instructions, who gave conflicting instructions, who had a short temper and was combative.

13.2 For those on induction, being required to work at home.

13.3 On 19 September 2018 requiring all administration work to be done in a designated slot.

14. If so in respect of each of those PCPs was the Claimant put to a substantial disadvantage in relation to a relevant matter as compared to non-disabled persons.

14.1 In relation to 13.1 the Claimant will say such a management style created greater work stress and that made her disabilities more unmanageable in particular by much greater fatigue; the greater risk of seizures; and that pain management was more difficult;

14.2 In respect of 13.2 the Claimant will say that the isolation put her to a substantial comparative disadvantage because of the increased stress it caused and the above impact of such stress on her disabilities;

14.3 In respect of 13.3 the Claimant will say that her disabilities required her to carefully pace and prioritise her time and tasks to take into account her fatigue and pain and the rigid administration slot and the pressure it put on organising the patient caseload made it more difficult for her to do so.

15. If so, did the Respondent have knowledge of the disability and/or the substantial disadvantages claimed and/or ought it reasonably to have known.

16. If so, would the following adjustments have been reasonable to avoid the disadvantage;

16.1 a temporary change to line manager;

16.2 at desk space at one of the GP practices the Claimant was to work at;

16.3 provision of a shadowing opportunity;

16.4 provision of internal project work;

16.5 to remove the single administration slot and/or reach a compromise about how the administration work was done

17. If so, did the Respondent fail to make them?

Time limits / limitation issues

18. Were all of the Claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")

19. Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a *"just and equitable"* basis; when the treatment complained about occurred; etc.

B. Procedural history

1. This case was the subject of a preliminary hearing on 28 August 2019 before Employment Judge Moor at which the Claimant appeared in person and Mr N Ashley of Counsel represented the Respondent. The hearing was listed for six days in April 2020. The parties agreed that the issues identified in the case management summary of Employment Judge Moor, and set out above, were the issues for this Tribunal to decide.

2. The final hearing did not take place in April 2020 as originally listed, due to the national lockdown announced on 23 March 2020 as a result of the Covid 19 pandemic. The case was relisted to take place by CVP on the 11th to 14th and 18th and 19th of May 2021; this was converted to an in-person hearing following representations made by the Respondent with particular reference to the need to cross examine the Claimant in respect of her credibility and her claims to be a disabled person within the meaning of the Equality Act 2010. At the hearing on the 11th May 2021 the Claimant was represented by Mr James Taylor of FRU and the Respondent was represented by Mr Ashley in-house Counsel at the Respondent's solicitors' firm, Robinson Paladin.

3. When the parties attended on 11 May 2020 there were still questions arising in respect of disclosure applications that had been made by the Claimant. The Tribunal spent the first day reading while the parties sought to resolve those issues.

4. On 12 May 2021 Mr Ashley requested more time to resolve the Claimant's disclosure applications, he told the Tribunal that he considered it likely that further documents would be provided to the Claimant. At 5.05 pm on 12 May 20201 the Tribunal was informed that Mr Ashley had withdrawn from the case and applied for a postponement. On 13 May 2021 the Tribunal was informed

that Mr Stevens had been instructed, at very short notice, in respect of a postponement application only. Mr Stevens applied for a postponement on behalf of the Respondents, this was opposed by the Claimant. The Tribunal decided to grant the postponement on the basis of Mr Stevens' application which included a strict timetable for the cross examination of the Claimant.

5. The Tribunal was then informed by Mr Taylor that he would not be available on the resumed hearing dates; it was acknowledged that this would cause the Claimant particular difficulties however the Claimant sensibly recognised that the Tribunal, and indeed she, had very little option and accepted that postponement on the basis of the concessions made by Mr Stevens was the only fair way forward in he circumstances. The hearing was postponed to the dates in June on the basis of an agreed timetable.

6. At the resumed hearing the Tribunal sought clarification as to whether all relevant documents had been disclosed to the Claimant and were informed categorically by Ms Robinson that they had been.

7. The Tribunal issued case management orders as agreed at the hearing in respect of supplemental statements, admission of facts and list of evidential matters to be explored.

Disability

8. By an email dated 27 May 2021 sent to the Tribunal and the Claimant the Respondent confirmed that it did not require the Claimant to prove disability and that it accepted it had knowledge of each of her conditions at the relevant time.

The resumed hearing in June

9. At the outset of the resumed hearing Mr Stevens confirmed that the Respondent was no longer pursuing its contention that the Claimant had exaggerated her claim to a disability by reason of her epilepsy and that the two lever arch files containing her medical evidence would not be referred to before the Tribunal.

10. Mr Stevens provided a list of factual disputes numbering 39 areas and facts not in dispute which listed 124 matters with a number of bullet points as sub-headings. Included in the agreed facts were: that on her application for the position with Respondent the Claimant had disclosed she had been diagnosed with epilepsy; that before commencing her employment the Claimant underwent an occupational health assessment which identified an underlying condition involving sudden medical collapse, which was currently well managed with medication and that she had not suffered any similar episodes in the last few months; that episodes were short lasting and she does not generally require medical management; and that no adjustments were recommended; reference was also made to the conditions of Ehlers Danlos Syndrome and postural orthostatic tachycardia syndrome.

11. The Tribunal heard evidence from the Claimant on her own behalf and from Ms Kaur, Ms Warraich, Mr Percival, Ms Bol and Ms Walters on behalf of the Respondent. We heard oral submissions from counsel after the evidence and

written submissions were received on 23 June 2021 before the Tribunal's in chambers deliberations commenced on 24 June 2021.

C. Relevant law

1. We have carefully considered the written and oral submissions from both parties including their submission on the law. We set out below the relevant law and authorities we have found to be most relevant in deciding this case. Whilst we have not referred below to every authority mentioned by the parties, this does not mean that we have not considered those authorities in our deliberation. The written submission on behalf of the Claimant include reference to a claim under s 15 of the Equality Act 2010 but no claim under s15 was before us.

Section 13 – direct discrimination

2. In order to establish a claim based on direct disability discrimination under EqA 2010, s 13, a claimant must show:

   (a) treatment that is less favourable than that which has or would have been accorded to others without the claimant's disability;
   (b) that such treatment has been accorded to the claimant because of his or her disability; and
   (c) that the comparison is such that the relevant circumstances in the one case are the same (or not materially different) than in the other (EqA 2010, s 23).

3. Under section 39, an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment.

4. To find a 'detriment' a Tribunal '*must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work'*, *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11* (paragraph 34). An unjustified sense of grievance cannot amount to 'detriment'. But nor is it necessary to demonstrate some physical or economic consequence.

5. *Deer v University of Oxford [2015] IRLR 481 EWCA* confirmed that the manner in which a grievance was handled could amount to a detriment even if the outcome of the grievance was justified.

6. The less favourable treatment should be judged against a comparator whose circumstances are not materially different, section 23 EqA.

7. Mummery J (as he then was) in *Neill v Governors of St Thomas More RCVA Upper School and Bedfordshire County Council [1997] ICR 33*, *[1996] IRLR 372 (EAT)* at 376 identified the correct approach to causation as follows:

   '(*b*) The relevant principles are these:
   (i) The tribunal's approach to the question of causation should be simple, pragmatic and common sense;

(ii) The question of causation has to be answered in the context of a decision to attribute liability for the acts complained of. It is not simply a matter of a factual, scientific or historical explanation of a sequence of events, let alone a matter for philosophical speculation. The basic question is: what, out of the whole or complex of facts before the tribunal is the 'effective and predominant cause' or the 'real and efficient cause' of the act complained of? As a matter of common sense not all the factors present in a situation are equally entitled to be treated as a cause of the crucial event for the purpose of attributing legal liability for consequences.

(iii) The approach to causation is further qualified by the principle that the event or factor alleged to be causative of the matter complained of need not be the only or even the main cause of the result complained of (though it must provide more than the occasion for the result complained of.) 'It is enough if it is an effective cause."

8. The correct approach to establish causation for unlawful discrimination is to ask whether the protected characteristic was the effective and predominant cause, ie to ask 'why' the disabled person was treated as he or she was. This test is set out in *Nagarajan v London Regional Transport [1999] IRLR 572 (HL); Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830 and Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285,* all of which were confirmed in *Amnesty International v Ahmed [2009] ICR 1450.*

Harassment related to disability – section 26

9. Section 212 of the Equality Act makes it clear that a 'detriment' does not include conduct which amounts to harassment; while claims may be pursued in the alternative, conduct will either amount to discrimination or harassment.

10. In *Richmond Pharmacology v Dhaliwal* [2009] ICR 724, [2009] IRLR 336 EAT, Underhill P (as he then was) presiding, stated that the approach that the Tribunal ought to take in determining a claim of harassment should be broadly the same, regardless of the particular form of discrimination in issue and that, in each context, 'harassment' is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him/her; (c) on the prohibited grounds. (Confirmed by Underhill LJ in the Court of Appeal in *Pemberton v Inwood* [2018] ICR 1291 at 88 see below).

11. In each case, there is a proviso that means that, even if the conduct has had the proscribed effect, it must also be reasonable that it did so. There is a subjective element '… having regard to … *the perception of that other person* …' ultimately the proviso can deal with cases of unreasonable proneness to take offence. Although 'purpose' is not determinative, it can be a factor: 'the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt' (*Dhaliwal* at 15). Ultimately, this is all 'quintessentially a matter for the factual assessment of the tribunal'.

Related to

12. Whether conduct is related to a protected characteristic is a question to be judged by the Tribunal by reference to all of the evidence, not simply the perception of a claimant; the knowledge or perception of the claimant's protected characteristic by the person making the comment is also relevant (see *Hartley v FCO Services* [2016] UKEAT/0033/15/LA at 23-25).

13. With regard to the conduct of the particular individual or individuals in question, the employment tribunal has to apply an objective test in determining whether it was 'related to' the protected characteristic in issue; the intention of the actors concerned might form part of the relevant circumstances but will not be determinative of the question the tribunal has to answer.

14. The context in which a comment is made will be relevant to determining whether it is related to a protected characteristic, and the tribunal must contextualise the comment appropriately (*Warby v Wunda Ground Plc* [2012] EqLR 536 at 21-24. As observed by Underhill J in *Amnesty International v Ahmed* [2009] ICR 1450 at 37 (cited in *Warb*y in the context of harassment): "The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."

15. In *Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] ICR 1225*, *[2010] EqLR 142*, the EAT adopted the questions identified in *Dhaliwal* but gave particular emphasis to the last, ie whether the conduct related to one of the prohibited grounds. When considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic.

16. It has been acknowledged that 'related to' imports a potentially very broad test, some guidance as to the scope of the test has now been given by the Court of Appeal in *UNITE the Union v Nailard [2018] EWCA Civ 1203*, *[2018] IRLR 730* (upholding the judgment of the EAT at *[2016] IRLR 906*). The employment tribunal had allowed that a failure to address a sexual harassment complaint, made against elected officials of the union could itself amount to harassment related to sex 'because of the background of harassment related to sex'. That, the Court of Appeal held, went too far. The tribunal had not made any findings as to the mental processes of the (employed) officials of the union dealing with the complaint and whether they had been motivated by sex discrimination.

17. In *Pemberton v Inwood [2018] EWCA Civ 564*, *[2018] IRLR 542*] Underhill LJ re-visited the guidance he had given in *Dhaliwal*, to address a subtle change in wording in the Equality Act 2010 s 26, as compared to the earlier formulation under the RRA 1976 s 3A. Although not considering that this gave rise to any difference of substance, Underhill LJ re-formulated the guidance to better reflect the language of the Equality Act, as follows:

"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

18. In order to constitute harassment, it is necessary that the conduct has in fact given rise to the proscribed consequences. This is an objective test, albeit the subjective perception of the Claimant is relevant (provided it is reasonable) [*Dhaliwal* at 15].As explained by Underhill LJ in *Pemberton v Inwood* [2018] ICR 1291 at 88:

"The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

19. *In Land Registry v Grant* [2011] ICR 1390, per Elias LJ at [47], the Court of Appeal emphasised the importance of not trivialising the statutory provisions:

"the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment".

20. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ, at 12, referring to the above stated:

"We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."

21. Where a series of incidents is relied on a tribunal should also have in mind the guidance in *Read and Bull Information Systems Ltd v Stedman* [1999] IRLR 299 per Morison J at 28, (in respect of a case of sexual harassment but applicable generally to other forms of harassment):
"It is particularly important in cases of alleged sexual harassment that the fact-

finding tribunal should not carve up the case into a series of specific incidents and try and measure the harm or detriment in relation to each, …
"…instead , the trier of fact must keep in mind that "each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes.""

Victimisation – section 27

22. Section 27 of the Equality Act 2010 makes it unlawful discrimination for an employer to subject a person to a detriment because the 'victimised' person does, may do or has done a 'protected act' (or the discriminator believes this to be the case). Protected acts are:

(a) bringing proceedings under the EqA 2010;

(b) giving evidence or information in connection with proceedings under the Act;

(c) doing any other thing for the purposes of or in connection with the Act; or

(d) making an allegation that the discriminator or any other person has contravened the Act.

Protection is given even where the allegation made is false, provided that such allegation was made in good faith (s 27(3)).

23. There must be a causal link between the fact that the act done was a protected act, and the detriment suffered by the complainant. The requirement of conscious motivation was rejected by the *House of Lords in Nagarajan v London Regional Transport [1999] IRLR 572,* which held that the proper question was whether the complainant was less favourably treated (now, under the EqA 2010, whether the complainant suffered a detriment) because he or she had done a protected act. The test is one of causal connection, and is the same as the test for direct discrimination. The motivation and intention of the discriminator are not therefore relevant. *St Helens Metropolitan Borough Council v Derbyshire [2007] UK HL 16* established that when considering whether or not an act has caused detriment, the question should be assessed primarily from the point of view of the victim.

Sections 20-21 - Failure to make reasonable adjustments

24. The correct approach for the Tribunal in determining a reasonable adjustments claim is set out in *Environment Agency v Rowan [2008] ICR 218* at 27 (the reference to sections are to sections of the Disability Discrimination Act 1995 "DDA"):

"In our opinion an employment tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where

appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant. … Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."

25. The burden is on the claimant to show the PCP, to demonstrate substantial disadvantage, and to demonstrate a *prima facie* case that there is some apparently reasonable adjustment which could have been made (and therefore, *prima facie*, that there has been a breach of the duty), see *Project Management Institute v Latif* [2007] IRLR 579 at 45 and 54. If the PCP contended for was not actually applied, the claim falls at the first fence: *Brangwyn v South Warwickshire NHS Foundation Trust* [2018] EWCA Civ. 2235 at 40.

26. In Nottingham City Transport Ltd v Harvey [2013] EqLR 4, [2013] ALL ER (D) 267 (Feb) EAT , The EAT held that a "Practice connotes something which occurs more than on a one-off occasion and which has an element of repetition about it".

27. In Carphone Warehouse v Martin UKEAT/0371/12 [2013] EqLR 481, per Shanks J, the EAT held that "the lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view, amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer".

Substantial disadvantage

28. The substantial disadvantage applies in respect of the disabled person compared to persons who are not disabled. The EAT has made clear that "*the function of the provision, criterion or practice within section 20(3) is to identify what it is about the employer's operation which causes disadvantage to the employee with the disability*" (see *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169 at 39). As observed by the EAT in *Sheikholeslami v Edinburgh University* [2018] IRLR 1090 at [48]:

*"*The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP."

29. In assessing substantial disadvantage, the Tribunal needs to identify what it is about the particular disability that gives rise to specific substantial disadvantage. As observed by the EAT in *Chief Constable West Midlands Police v Gardner* [2011] UKEAT/0174/11/DA at 53:

"There may be many cases in which it is obvious what the nature of the substantial disadvantage is, and why someone with the disability in question would inevitably suffer it. … But there are also cases, of which this is one, in which in our view simply to identify a disability as being a general condition –

such as "a knee condition" – does not enable any party, and more particularly a court of review, to identify the process of reasoning which leads from that to the identification of a substantial disadvantage, and an adjustment which it is reasonable to have to make to avoid that disadvantage. The conclusion remains unexplained by any description of what it is that the Claimant can and cannot do in consequence of his disability, and there is therefore no information as to the nature of any step or steps which might be taken in order to prevent that particular disadvantage. The words of *Rowan* are clear and correct. They may however insufficiently emphasise the need to show, or to understand, what it is about a disability that gives rise to the substantial disadvantage, and therefore what it is that requires to be remedied by adjustment. Without knowing that, no assessment of what is, or is not, reasonable by way of adjustment can properly be made."

Reasonableness of adjustments

30. In *Smith v Churchill Stairlifts Plc [2006] ICR 524, CA* the Court of Appeal confirmed that the test of reasonableness is an objective one. Paragraphs 6.28 of the EHRC Code of Practice on Employment sets out some of the factors (previously set out in the DDA) which may be taken into account when assessing what is a reasonable step for an employer to have to take:
"– whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer."

31. The time at which a failure to make reasonable adjustments occurs was addressed in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 at 14:
"Pursuant to section 20(3) of the Equality Act 2010, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage."

The focus of the Tribunal is on practical outcomes, as confirmed by Langstaff P in *Royal Bank of Scotland v Ashton* [2011] ICR 632 at 24:

"… so far as reasonable adjustment is concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not – and it is an error – for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reason."

Burden of proof

32. The reverse burden of proof was enacted to assist Claimants. Section 136(2) of the EqA provides: '*If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*' Section 136(2) does not apply if A shows that A did not contravene the provision. The guidance of the higher courts is that the Tribunal should follow a staged approach to determining the issue.

33. The first stage is for the Claimant to show an arguable case for discrimination. The second stage is for the Respondent to show a non- disability-related reason.

34. If the Tribunal is satisfied that the Respondent has shown the reason for any unfavourable treatment, it can go straight to the second stage, the 'reason why' question, in reaching its decision.

35. If there is more of a question-mark over the reason for treatment, it is best to follow the two-stage test as set out in the guidance in Igen v Wong [2005 IRLR 258 CA.

36. The first stage is that the claimant proves on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant, which is unlawful. These are referred to below as 'such facts'. (We pause to note 'such facts' could include evidence of a difference in status, a difference in treatment, and evidence as to whether a like for like comparison is drawn.) If the Claimant does not prove such facts, she will fail.

37. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. In some cases the discrimination will not be an intention or 'motivation' but merely based on assumption or because an employer unwittingly applies a different standard to non-disabled employees. The outcome at this stage will usually depend therefore what inferences it is proper to draw from the primary facts.

38. At this stage the question is whether the primary facts 'could' lead to the conclusion of discrimination. At this stage the Tribunal assumes there is no adequate explanation.

39. Once the Claimant has proved 'such facts', it is then for the employer to prove that it did not commit the act. It is then necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race or age. A cogent explanation is normally required.

40. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, *Madarassy v Nomura International plc [2007] IRLR 246 CA* paragraph 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient

to get to the second stage: there still must be reason to believe that the explanation could be that the behaviour was '*attributable (at least to a significant extent)*' to the prohibited ground*, B v A [2010] IRLR 400*, per Underhill P at paragraph 22. Therefore '*something more'* than a difference of treatment and a difference of race is required. (This is logical given that in some cases, a difference in treatment may merely be because of a small sample size.)

41. In *Denman v Commission for Equality and Human Rights [2010] EWCA Civ 1279* at paragraph 19 Sedley LJ observed this 'something more' did not have to be a great deal, for example a comparator treated more favourably in the absence of explanation.

Time Limits & Continuing Acts

42. By *s123 Equality Act 2010,* complaints of discrimination in relation to employment may not be brought after the end of

a. the period of three 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.

43. By *s123(3) EqA* conduct extending over a period is treated to be done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it. The leading authority is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

44. The Tribunal's discretion to extend time under s.123(1)(b) EqA is a broad one. In exercising it, the Tribunal should have regard to all the relevant circumstances, which will usually include: the reason for the delay; whether the Claimant was aware of his right to bring a claim and of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

45. Awaiting the outcome of an internal grievance procedure before making a complaint is a matter which may be taken into account by the Tribunal, although it is not determinative (*Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713 CA at 719).

Dismissal

46. In order to claim constructive dismissal an employee must establish that there was a fundamental breach of contract on the part of the employer or a course

of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); that the breach caused the employee to resign that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal (Western Excavating (ECC) Ltd v Sharp 1978 ICR 221). The final act must add something to the breach even if relatively insignificant: (Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1. Once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI) .

47. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

48. There is no general implied contractual term that an employer will not breach some other statutory right such as the right not to suffer discrimination *Doherty v British Midland Airways* [2006] IRLR 90, EAT. However, the same facts that might support a finding of unlawful discrimination or any disregard of such a statutory right may, depending on the facts, suffice to establish a breach of the implied term of mutual trust and confidence see *Green v Barnsley MBC* [2006] IRLR 98 and *Amnesty International v Ahmed* [2009] ICR 1450.

D. Findings of Fact

Disability

1. The first question for us is whether the Claimant was disabled. As noted above by an email dated 27 May 2021 sent to the Tribunal and the Claimant, the Respondent confirmed that it did not require the Claimant to prove disability and that it accepted it had knowledge of each of her conditions at the relevant time.

2. We are satisfied that the Respondent was right to make that concession. We find that the Claimant had at all material times the following conditions (1) epilepsy; (2) Ehlers Danlos syndrome and (3) postural orthostatic tachycardia syndrome

The Claimant's employment with the Respondent

3. At the time of the Claimant's employment the Respondent held a contract for Social Prescribing covering eight Primary Care Networks within Tower Hamlets. The Claimant was the first Social Prescriber to be employed directly by the Respondent, previously each Network had employed its own Social Prescriber. She was

interviewed by Dean O'Callaghan, Manager of Network 1, Wilma Bol an experienced Social Prescriber working for the Mission Practice, and Radhika Puri, Interim Social Prescribing Programme Manager employed by the Respondent, and on 14 June 2018 was offered the position of Social Prescriber in Network 1, subject to pre-employment checks. The role of a Social Prescriber is to take a holistic approach to an individual's health and well-being, connecting them to community groups and statutory services for practical and emotional support. It is not a clinical role and does not involve prescribing medication. The position offered to the Claimant was for a nine-month fixed term contract working 20 hours per week, over four days. Ms Warraich commenced employment on 18 June 2018 as social prescribing manager, prior to her appointment Radhika Puri had been the interim social prescribing manager. Between 14 June and 27 July 2018 the Respondent was waiting for a reference from the Claimant's most recent employer before confirming a start date. The Claimant had previously worked for Mind and her manager there had left the organisation which led to a delay in obtaining a reference from him.

4. On 16 July 2018 the Claimant was sent some information about the service by Radhika Puri [144]. Ms Puri also emailed Ms Warraich suggesting she liaise with Dean 'O'Callaghan to complete the Claimant's induction. As at 24 July 2018 Mr O'Callaghan was involved in helping to organise the Claimant's induction [page 174], he was about to go on leave so he informed Ms Warraich about what had been arranged so far and asked her to coordinate the induction with his colleague Petr.

5. In an email she sent on 27 July 2018 [166] the Claimant made reference to a discussion on the phone in which she said that she couldn't afford to wait to start work any longer, that she needed to be able to start her position soon or she would have to look for another job. The Claimant had by this time offered to provide an alternative referee but had not received any response to that offer. The Claimant had been told at interview that her start date would be the beginning of July but by 27th of July she had still not had a start date confirmed.

6. Ms Warraich subsequently sought to point to this communication from the Claimant as being an explanation for rushing the Claimant into post and for there being no properly thought through induction as a result.

7. On 27 July 2018 [page 185] Ms Warraich sent the Claimant a welcome pack. By this time Ms Warraich had received confirmation that the pre-employment checks had been completed, together with a copy of the occupational health report referring to adjustments. Mr Percival was also copied into the email communication.

8. By the time her start date was confirmed both Mr Percival and Ms Warraich had seen the Claimant's occupational health report, which made reference to a risk of sudden medical collapse; neither raised any issue or concern about the occupational health report or its contents. The report is dated 17 July 2018 [at 148], the notes which form the basis of the report were in the bundle at page 151. In these proceedings the Respondent maintained that as a result of the content of the report it was not clear what to do in respect of the Claimant's epilepsy.

9. The Claimant began work on 30 July 2018 and on her first day she had a long informal discussion with Ms Warraich in which Ms Warraich mentioned that she had arranged for a comfy chair for the Claimant, as that been specifically referred to in the occupational health report. The conversation moved on to a chat about the Claimant's medical history and the Claimant mentioned her epilepsy. The Claimant had thought it would make sense to inform her line manager of how her medical conditions impacted on her. She was surprised that Ms Warraich's response was to tell her about her nephew who had died from epilepsy, the Claimant felt that Ms Warraich was implying that epilepsy was a generally debilitating condition which was extremely serious, whereas in fact her condition was well-managed. The conversation was wide ranging and Ms Warraich shared details of her family's experience with disability and the Claimant spoke about the impact of her disabilities on her life, the steps she took to maintain her functional health and the impact this had had on her over the previous 10 years. The Claimant recalled Ms Warraich asking her if she had had epilepsy since birth: she explained that she had not but in the course of that conversation she mentioned that she had suffered from glue ear as a child but that this had been resolved by the time she was 10, following corrective surgery; she explained that prior to the surgery she had had some reduced hearing capability as a child.

10. We accept the Claimant's evidence in respect of this conversation. We find it is consistent with Ms Warraich's description of their first meeting in which she recalled the Claimant talking to her very openly and passionately about her life, work experiences and her illnesses, and of sharing her own experience of epilepsy, talking about her nephew, and sharing with the Claimant her own other personal experiences of disability within her family. We are satisfied that in that conversation the Claimant made reference to having had glue ear as a child and to this having been resolved at a young age, following surgery.

11. The Claimant set out in her witness statement paragraphs 23 to 50 details of her first week of employment and her criticisms of the inadequacy of the induction that had been arranged. We are satisfied that the contents of her statement accurately reflect the lack of organisation in respect of the induction and that the induction was not well organised or planned. We also find that as a result of having been interviewed by Mr O'Callaghan and his assistance in the pre-employment and early stages of her employment the Claimant understood Mr O'Callaghan to be someone with knowledge of the service and its systems who was able to assist her. Ms Warraich contacted him with queries about the service even though he was on holiday, and from the job description provided to the Claimant it appeared there was dotted line management by Mr O'Callaghan.

12. At the time the Claimant started her employment Ms Warraich had only recently started in the role and was still on probation, she was unfamiliar with the service or the requirements of the job: when she did not have the answers to the practical questions that the Claimant was asking her she referred to Mr O'Callaghan or to Kam Kaur (Ms Warraich's line manager). The Claimant had a number of questions, including what to do about inappropriate referrals, how long she could allocate to each patient and other practical matters which Ms Warraich was not able to answer.

13. On day 1 the Claimant was given a list of "Mandatory training" which included

motivational interview training. None of the training had been arranged by the time the Claimant started and she was told by Ms Warraich to arrange her own training. The Claimant identified a motivational interview training course but was then told that Ms Kaur wanted the training to be provided by a different provider to save costs.

14. Ms Warraich provided the Claimant with a 2- week induction plan in which the second week was entirely blank, telling the Claimant she was to fill that part in herself. In the first week the Claimant was to spend part of her time shadowing Wilma Boll. The Claimant was asked to sign off her induction plan on 2 August, when the Claimant queried why she was being asked to sign in advance to confirm things which were stated as taking place in the first month and first 3 months Ms Warraich accused her of being difficult and told her she did not want "backchat".

8 August 2018

15. It was not disputed that the Claimant had contacted Ms Warraich by phone before the 8 August and had been in regular contact with her by text. On 8 August, which was the Wednesday of her second week, the Claimant had arranged appointments to meet with Practice Managers at some of the GP practices in the network. The Claimant was having to use wifi connections in various cafes to access the internet and send emails. At 3pm she was chased by Ms Warraich via text message for an updated induction plan. By that time she was back working from home and was in the middle of writing an email to Ms Warraich explaining what she was doing that day and updating her plan for that week. We have seen the detailed email which was sent shortly after the disputed phone conversation. Ms Warraich responded by calling the Claimant and informing her that she should have rung her to provide her with information about her whereabouts. The Claimant's response was to tell Ms Warraich that she had not understood that to have been the instruction.

16. We have been taken to various text messages and emails between the Claimant and Ms Warraich on 7 and 8 August 2018 [from page 192] which show the Claimant informing Ms Warraich of her whereabouts and asking her for guidance as to whether she should come in to work or work from home: there is nothing rom Ms Warraich to indicate to the Claimant that she needed to keep her updated by sending her copies of any updated calendar appointments. We are satisfied that the Claimant informed Ms Warraich where she was planning to be and there was no indication that anything different was expected from her until Ms Warraich asked the Claimant for her whereabouts at 3pm on 8 August 2018 [page 326]. We find no evidence to suggest that Ms Warraich had previously chased the Claimant or was trying to get hold of her on 8 August.

17. On 8 August Ms Warraich was feeling quite tense because Kam Kaur had asked about the Claimant's whereabouts and she was unable to answer [paragraph 36 of her witness statement]. Ms Warraich suggests that she had raised concerns about the Claimant by this point, but she did not explain with any clarity why that was. She stated that she felt the Claimant was not communicating with her as she expected and was critical of the Claimant responding to her by email [page 324]; she suggested that the Claimant appeared to be avoiding giving her access to her

movements by sharing her calendar and avoiding her calls, although she acknowledged that her other social prescribers managed their own time to a large extent. She told us that she trusted them to do so but she did not at that point trust the Claimant to manage her own time.

18. We are satisfied that the Claimant responded to the text from Ms Warraich within minutes, informing her that she was in the middle of writing an email to her [321]; she then emailed a detailed account of her whereabouts and what she was doing [324]. We find that the Claimant was unaware that Ms Warraich was also expecting a call from her. We find there is no basis for Ms Warraich suggesting that the Claimant was out of contact or avoiding her, or for suggesting, as she does in her statement, that the Claimant was giving her unclear and confusing or vague information about her whereabouts.

19. There was substantial dispute as to what was said in the telephone conversation between the Claimant and Ms Warraich. We accept the Claimant's account of the events of 8 August (set out at paragraphs 56 and 57 of her witness statement). We find that following the telephone call between the Claimant and Ms Warraich, Ms Warraich reported to Kam Kaur that the Claimant had told her during the phone call that she preferred to communicate by email as she was deaf in one ear. Ms Kaur sets out her recollection of what she was told in paragraph 15 of her witness statement. Ms Warraich's account of that conversation is at paragraphs 38 and 39 of her witness statement. We have not found Ms Warraich's evidence to be an accurate account of the events that took place, for instance at paragraphs 36 and 37, we find her evidence to be inaccurate when she describes the Claimant as displaying an anti-establishment attitude or avoiding telling Ms Warraich where she was. We find that Ms Warraich criticised the Claimant in that call, telling her that she did not know where she was and accusing her of not communicating. The Claimant was baffled and frustrated, she had not been aware of any direction that she should report her whereabouts, she was in the middle of updating Ms Warraich via an email and had responded to her texts. The Claimant in turn criticised Ms Warraich and her induction and complained that she had not been given clear directions and clear communication. The Claimant accepted that she was in tears on that call, in frustration at the conflicting instructions. We find that the Claimant's evidence about the events has been consistent and is supported by the contemporaneous texts and emails and we are satisfied that she has given an accurate account of events.

20. Ms Warraich also claimed that the Claimant had said in that call that she used bullet points because of her epilepsy. We are satisfied that the Claimant did not say this and nor is this consistent with the vast majority of her written communications. We have seen in the bundle numerous emails and text messages from the Claimant written in a number of different contexts. We are satisfied that at page 324, the email sent to Ms Warraich on 8 August, the bullet points are the questions she has for Ms Warraich. A particular example of the Claimant's extended writing we considered was the notes the Claimant made for the HR meeting (starting at the 379); these notes were for her own use: the Claimant did not use bullet points, except at page 387 where she used bullet points to identify a number of points, we contrasted this to the Claimant's notes made at page 389 for instance. We do not find that the evidence suggests the Claimant has a preferred style of using bullet points. The evidence before us pointed to the Claimant working in and using full prose

extensively, and using bullet points occasionally to identify specific points, we do not find any connection between the Claimant's epilepsy and her use of bullet points.

21. The Respondent relies on the evidence of Wilma Bol and the Occupational Health Report in support of their account of that conversation to suggest that Ms Warraich's account is more accurate. However, we note that Ms Wilma Bol's account is from 14 August, the day after the meeting on 13 August in which Ms Warraich's account was put forward in front of Mr Percival and we accept that the Claimant was describing to Ms Bol what she was accused of having said and the dispute in respect of the Occupational Health Report from the discussion on 13 August.

22. We find that the Claimant did not say in the telephone call that she was deaf in one ear and therefore avoided using the telephone, or that she preferred to communicate by email and in bullet points as a result of either her deafness or her epilepsy. Ms Warraich falsely reported to Ms Kaur that the Claimant had said that she had difficulty using the phone because she was deaf in one ear. We do not find that Ms Warraich made any reference to epilepsy in her account of the conversation given to Ms Kaur at that time. We find that Ms Warraich introduced this detail later in order to attempt to justify raising the topic of the Claimant's epilepsy at the meeting on 13 August.

23. Ms Warraich told us in the context of the grievance proceedings, that she was conscious of being on probation and feared losing her job; we find that it is likely that this was also on her mind at the time of the phone call in August and that she perceived criticisms from the Claimant would negatively impact on her. Ms Warraich acknowledged that she found the Claimant to be challenging and this made her anxious, and that she was worried about failing her probation and losing her job [paragraph 32 of her witness statement]. Ms Warraich sought to paint the Claimant as difficult and acknowledged that when asked by Ms Kaur where the Claimant was, she was feeling tense because she had not been able to answer [paragraph 36 of her statement]. We find that Ms Warraich was put on the spot by Ms Kaur and felt she needed to explain why she did not know where the Claimant was at that specific point in time. When she contacted the Claimant demanding to know where she was the Claimant became upset and was critical of Ms Warraich's communications, lack of clear instructions and lack of induction. We find that Ms Warraich felt under pressure from both sides, that is from the Claimant and from Ms Kaur. Ms Warraich was aware both that the Claimant was upset and that she was making criticisms of her as a manager

24. We are satisfied that Ms Warraich used the information that she had been given by the Claimant on 30 July 2018, her first day, when they had a long discussion about the Claimant's health conditions, including epilepsy, adjustments recommended in the OH report and her childhood difficulties with glue ear, to suggest to Ms Kaur that the Claimant had said that she did not use the phone because she was deaf in one ear. We find that she did this in order to deflect from Claimant's criticism of her and the perceived or implied criticism from Ms Kaur of her not knowing where the Claimant was and not properly supervising her.

The meeting on 13 August

25. We find that the meeting on 13 August had been arranged as an induction review which was what the Claimant understood to be the purpose of the meeting. Ms Warraich had changed the time of the meeting which meant that the Claimant had to cancel appointments she had made. We do not find Ms Warraich's account [at paragraph 41 of her statement] to be an accurate reflection of the events leading up to the meeting on 13 August. Ms Warraich's evidence ignores the contents of the email of 8 August and gives the impression that it was written as though she had not seen that email. It is clear that she had seen that email as she replied to it within 15 minutes, [page 324]. We do not find that the Claimant arranged for Dean O'Callaghan to attend the meeting, it is apparent from the emails that he had thought it was the Claimant's induction review and suggested to Ms Warraich that he would attend if she thought that was appropriate [see page 346]. We are satisfied that Ms Warraich saw Mr O'Callaghan's proposed attendance as a threat and she made it very clear that he was not to attend [see the emails at 343 and 346]. We find that the Claimant had understood Mr O'Callaghan to have some line management involvement in her role and the Respondents themselves accepted it was unclear in terms of line management. In any event Mr O'Callaghan did not attend the meeting and Ms Warraich did not reply to his offer to do so.

26. The meeting on 13 August was moved from the morning to 3pm. Nick Percival attended from HR but told us he did not take any notes. Ms Warraich wrote some notes and typed them up afterwards. Ms Warraich and Mr Percival intend to discuss the Claimant's epilepsy at the meeting but had not informed her of this in advance. The meeting lasted 2 hours, the notes Ms Warraich took are at page 359 of the bundle and the typed version at page 374, the Claimant's own notes start at page 379. We accept that the Claimant's notes in darker script [379 – 380], which start 379 and continue to the top of 380, were notes prepared in advance of what she understood to be a review meeting, and set out questions she wanted to resolve in bullet points with a description of how she felt prior to that meeting, and what she wanted to express at that meeting. The rest of the notes in lighter script [380- 389] we accept were written by the Claimant during the course of the meeting: they follow the same flow of topic and use similar words to the notes produced by Ms Warraich. We are satisfied that they are notes taken contemporaneously by the Claimant and include descriptions her own feelings or responses to what was being said at the meeting, as well as things that were actually said out loud. For instance, at page 388 where she notes at the top of the page, "Nick was not listening", that is her note to herself, as is the note, "This is unbelievable" [389]. The notes finish with the agreed plan for the next two weeks and the Claimant notes that she will be conducting service shadowing, notation appointments, that she is not allowed to speak to GP practices or attend meetings, with the note, "No reason", and that she will be undergoing MI [motivational interviewing] training. We find that the Claimant was told not to speak to or contact other organisations or attend external meetings.

27. We are satisfied that Ms Warraich was offended that her induction had been described by the Claimant as a tick box exercise: the Claimant noted this at the meeting (see page 389) and Ms Warraich described herself as being surprised that it was described in this way in her witness statement.

28. We find that at that meeting Ms Warraich questioned whether the Claimant could manage the stress of the job as a result of her epilepsy. We also find that Ms Warraich and Mr Percival led the Claimant to feel under pressure to agree to her

colleagues being told about her epilepsy. We are satisfied that the first occupational health report did not suggest that there was any need to make people in general aware of the Claimant epilepsy and that there was no new information that would explain or justify changing the Respondent's position in this regard.

29. We find that restrictions were placed on the Claimant's role at the 13 August 2018 meeting and that she was informed that she would not be able to see patients until she had completed mandatory training. Prior to the meeting on the 13 August, the Claimant understood from Mr O' Callaghan and Ms Warraich that she would be able to start seeing patients before all the mandatory training elements were completed.

30. The Claimant sent an email to Mr O'Callaghan the next day, [page 395] setting out her concerns and indicating that she wished to raise a formal grievance. The Claimant also sent an email to Ms Warraich [at page 398- 400] seeking clarification of her instructions and continued expectations of what she would be doing and the restrictions that she understood that had been put in place during the meeting on the 13 August. Ms Warraich responded by referring back to her original email which she had sent to the Claimant at 6.50 that morning. We find that this was sent after she has consulted with Mr Percival as can be seen from the emails in the bundle. However, this did not answer the query raised by the Claimant in respect of the restrictions. The original email on the 14 August from Ms Warraich is silent about the contact with the GP practices, none of the actions set out refers to GP practices despite the Claimant having informed Ms Warraich of the appointments she had made the previous week in her email. We find that on 13 August the Claimant had been told not to contact GP practices directly. On the 14 August 2018 [409] in an email sent at 15:39 the Claimant repeated her request for clarification. Ms Warraich sent an email to Mr O'Callaghan at 15:24 informing him that the Claimant would not be carrying out patient facing work during the following two weeks or attending practice meetings. She also referred the need to change the JD to make clear line management and accountability [415].

Complaints relied on as protected acts

31. The protected act relied on is the matters raised by the Claimant in the meeting on the 13 August 2018. We are satisfied that the Claimant did not make an explicit allegation of disability discrimination at the meeting on the 13 August and that the Respondent did not understand her to be making such an allegation at that time. We do not find that it is likely, on the balance of probabilities, or consistent with Mr Percival approach immediately afterwards in allowing Ms Warraich to send the Claimant her work plan in the form that she did, that Mr Percival understood the Claimant to have been making an allegation of disability discrimination in what she said at the meeting. We are satisfied that he did not understand that at that time.

32. The Claimant referred in her email to Mr O'Callaghan on the 14 August 2018 [page 433], to the Respondent exploiting her vulnerability of her disability; and spelled out clearly in her email on the 20 August to Mr Percival that she considered the OH referral in relation to her disability to be inappropriate. The Claimant grievance set out in her email to Mr O'Callaghan on the 14 August, page 406-408 was forwarded on by him to Mr Percival on the same day with reference made to a breakdown to the trust. We are satisfied that this correspondence was seen by Mr Percival after

the restricted duties had been sent and approved earlier that morning.

33. The Claimant did not use the word discrimination in her email to Mr O'Callaghan on the 14 August, however she set out the substance of her complaint in her email on 14, and in her email at page 443 and page 444 on the 20 August 2018 to Mr Percival. We consider that a reasonable reading of those emails would be to take from them that the Claimant was making a complaint that she had been treated less favourably or unfavourably because of her disability, however after careful consideration we accept Mr Percival's evidence when he denies understanding that those emails contained an allegation of disability discrimination. We find that the allegation was spelled out clearly in the email to Mr Percival on the 24 August 2018, [page 477], in which the Claimant accused the Respondent, including Mr Percival, of disability discrimination in making the referral to occupational health.

Mandatory motivational interview training

34. Instructions were given by Kamaljit Kaur on the 10 August in a text message to Ms Warraich that the Claimant should undergo the mandatory motivational interview training before seeing any patients. Ms Kaur told us [paragraph 11 of her statement], that this was in accordance with a recommendation from an audit report prepared by Radhika Puri on 16 July 2018. We accept that Ms Kaur was trying to get everyone to a common baseline in terms of training and trying to take control of the service which previously had been managed in various different centres. We accept that following Ms Puri's report Ms Kaur made the decision that social prescribers were to complete the statutory/mandatory training described in that report. The time frame remained unclear, for instance the report recommended that some of the training needed to be completed within the second quarter, and some was deemed to be required urgently.

On the 23 August 2018 making an OH referral without the Claimant's consent

35. It is not disputed that the referral to OH was made. The Respondent seeks to suggest that the Claimant had consented to the referral. We find that the Claimant felt that she had no choice and was expressing her objection to the referral at the time to her line manager. The occupational health notes [page 154] record that on the 10 September 2018 'the line manager' reported to the occupational health service that 'Miss Sahin had refused to be referred to the OH department'. Ms Warraich's notes of the meeting on the 13 August 2018 record that the Claimant objected to the OH referral. Mr Percival accepted in his evidence that the Claimant had objected to the referral. We are satisfied that where the Claimant said she wanted a referral 'for the stress that she was under' that this was intended, and was understood to be, a throw away comment made to emphasise her rejection of the premise for the referral put forward by the Respondent and did not reflect the Claimant's willingness to undergo a second OH referral in respect of her epilepsy or deafness.

36. The Claimant also made it clear in the days following that meeting that she did not consider the referral to be appropriate or necessary. She expressly stated as much in her email to Mr Percival and in her grievance, sent on the 20 August, [pages 449-450] in which she stated that her condition was being "inappropriately highlighted

and exploited by Sahdia as her opportunity to question her capacity to perform her role for no discernible reason as opposed to there being a proper justification for requiring the referral". On 24 August the Claimant, in an email to Mr Percival [477] specifically on the subject of referral to a OH, again set out her position on the referral which she said was "based on fabricated, inaccurate or misleading information that was discussed, clarified and refuted on the meeting on the 13 August" and via email and in a meeting on 21 August with details of examples of why it is not appropriate or necessary to be further assessed by occupational health. The Claimant expressed her shock to discover that Mr Percival had chosen to ignore the information provided and had pursued the "intrusive assessment" which he had given no evidence to justify and "made inappropriate assumptions about her disability". In that email she explicitly stated that she believed this constituted serious disability discrimination.

37. The content on the referral to occupational health is set out at page 473 of the bundle, included at item 2,is that the Claimant said she "preferred to communicate by email rather than telephone/ mobile due to her epilepsy and she is also partially deaf in one ear". We have found that it is not something the Claimant had ever said. In evidence Mr Percival accepted that at their meeting the Claimant had explicitly denied that she had ever said she was deaf. He also told it to us that he would not have included that in the referral, but that Ms Warraich insisted.

38. The occupational health report was also asked to address the effects of stress at work on the conditions of epilepsy, postural tachycardia syndrome and Ehlers Danlos syndrome and the effects of stress of her line management on those conditions. We accept the Claimant said that she could never rule out the possibility of a collapse; she also said that it was extremely unlikely and was made much more likely by being placed under stress by her line manager and being surprised in the meeting with enquires of her epilepsy than it would ever be in a consultation with a patient. We are satisfied that nothing had arisen at work that called into question the advice already received from Occupational Health.

39. We find that the Claimant told the Occupational Health doctor that the basis of the referral was a lie, i.e what was being said by Ms Warraich was not true, and that she was told that he could not say in his report that it was a lie, and would have to say that there was a misunderstanding or a misinterpretation. We find that this explains the words that were used in the Occupational Health Report.

On the 28 August 2018, the Respondent suggested that a formal risk assessment was required for an away day

40. The arrangements for a team away day on a boat in Windsor was on the a team meeting agenda on 28 August 2018. The Claimant had previously discussed this event with Ms Warraich, in the first few days after starting the job. One of the team members at the meeting, Ms Ash, was heavily pregnant and informed Ms Warraich that she felt that it might be sensible for her place on the trip to be offered to someone else as she was not sure that she would be travelling outside of London so close to her baby's due date. The Claimant complained that at no point did Ms Warraich seek to clarify if there were any issues with her in attending the away day on the boat or make any adjustments due to her disability either during or after the meeting, nor did she contact her in relation to this by email or otherwise. However,

she later discovered that Ms Warraich had contacted Anny following the meeting to clarify her decision on the trip with regards to her pregnancy and then contacted Mr Percival via email to discuss whether a risk assessment was needed in relation to the Claimant attending due to her epilepsy. The Claimant complained that she was not consulted.

41. Ms Warraich was aware that one of her team Ms Ash was pregnant and only a couple of weeks away from her due date on the date of the planned trip and considered that going into labour on the boat would be a potential risk. She was also aware the Claimant had a relevant health condition in relation to which was 'awaiting professional guidance and that the Claimant had told her she was at an elevated level of risk because of the 'situation.' Ms Warraich spoke to her line manager, Ms Kaur, who advised her she ought to do a risk assessment in relation to both.

42. Ms Warraich told us that she was able to have a conversation to discuss the potential risks of the trip with Ms Ash however, by this point the Claimant had raised a grievance against her and appeared to be, in Ms Warraich's opinion, constantly looking to score points against her and it was difficult and awkward to speak directly with her even about normal work issues, let alone issues surrounding disability. Ms Warraich therefore emailed Mr Percival on the 28 August 2018 to ask for HR guidance on a formal risk assessment. His email is at page 491 of the bundle. She explained that she wanted to make sure that she had done everything properly and wanted to ensure that the Claimant could go on the trip. In the event Ms Ash decided not to attend the trip and the Claimant also sent an email (page 528) informing Ms Warraich that she would not be attending.

43. Ms Warraich described the suggestion by the Claimant that she should have asked her about health concerns in the team meeting on the 28 August as 'quite remarkable'. She told us that she would not have asked the Claimant about her health in a team meeting, as this is private and confidential information and that would have been totally inappropriate. She could only imagine how the Claimant would have reacted to that if she had done so in the light of her feelings towards her at the time. She also was keen to point out that the Claimant was not aware of her communication with Mr Percival at the time and that she could have gone on the trip along with the other social prescribers had she wanted to, without ever even knowing that Ms Warraich was concerned for her safety or had intended to carry out a risk assessment [paragraph 80 of her witness statement]. In her evidence to the tribunal however, Ms Warraich accepted that speaking to the Claimant directly about her disability would have been the right thing to do. It would not have been necessary to have done it publicly in the team meeting; the Claimant pointed to an opportunity to speak to her immediately before or after that meeting. We find that there were a number of occasions where Ms Warraich could have asked the Claimant directly if there was anything she needed to be made aware of in respect of the trip. Ms Warraich told us that by this time she felt scared to raise anything with the Claimant in relation to her disability. We note that she informed Mr Percival, [page 491], that if she needed to cancel the trip, she would. The Claimant [page 528] declined the invitation to attend the trip in recognition of the tension between them, and in an attempt to be diplomatic.

30 August 2018 grievance meeting

44. The Claimant sent an email to Mr O'Callaghan on the 14 August, [406-408] setting out her concerns about what had taken place at the meeting on 13 August. Mr O'Callaghan forwarded the email to Mr Percival on the same day making reference to an apparent breakdown in trust. The Claimant sent an email to Mr Percival on 20 August in which she clearly spelled out that she considered the OH referral in relation to her disability to be inappropriate [pages 443 and 444]. On 24 August 2018 the Claimant sent another email to Mr Percival in which she accused the Respondent, including Mr Percival, of disability discrimination in making the referral to occupational health [477].

45. A grievance meeting was arranged for 30 August 2018. The grievance meeting was conducted by Mr Percival and Ruth Walters. The Claimant's grievance document was sent to the panel and on to Ms Warraich the day before the hearing. Ms Warraich had therefore seen it before the meeting, it was a long and detailed document. Ms Warraich was able to respond to it at the meeting and was also allowed to send in written documents after the meeting.

46. It is alleged that at that meeting Mr Percival said that he would need to see independent medical evidence of the Claimant's conditions- thereby implying that the did not believe her. The note of the meeting at page 806 of the bundle does not record Mr Percival saying that he will need to see independent medical evidence. Mr Percival addresses this issue at paragraph 38 and 39 of his witness statement. We find that that he said '*one of the things that they (OH) can do is get advice from your medical… whoever… if you are having any medical input from anybody, with your permission they can get advice from your doctor.'*

47. We do not find that by stating this in the grievance hearing, Mr Percival was implying that the Claimant's account was untrustworthy. We are satisfied that he was simply seeking to explain one of the options open to occupational health if they need further information.

48. We find that the Claimant did not have the opportunity to see any documents sent in after the hearing by Ms Warraich (see page 593). The Claimant brought this to Mr Percival's attention on t 18 September 2018, his response was to inform the Claimant that she was entitled to produce her own additional documents in support of her complaint but did not need to respond to those provided by Ms Warraich, which were persona. He informed her that the panel would consider what was discussed at the grievance meeting and any supporting documents submitted and then write to her with the outcome. This did not address the Claimant's concern, which was that she did not know what was in the documents from Ms Warraich and was therefore unable to contest them if appropriate. Mr Percival told us that the documents provided after the hearing by Ms Warraich were the ones she referred to at the meeting and consisted of texts, emails and letters between herself and the Claimant so were much the same as those provided by the Claimant. Ms Walters described the documents submitted by Ms Warraich as being identical to those provided by the Claimant.

49. Mr Percival and Ms Walters gave evidence that in their view the Claimant had a greater allocation of the time available. They pointed to the late receipt of the Claimant's very detailed document setting out her grievance, the day before the meeting and told the Tribunal that in their view it was only fair to allow Ms Warraich

an opportunity to respond to the contents of that document and to provide them with documents which she contended would counter the Claimant's allegation. Ms Warraich provided a written statement which was given to the Claimant at the meeting and the Claimant was able to ask Ms Warraich questions about her statement and other responses. Ms Warraich was allowed to send further documents after the grievance meeting had concluded. The Claimant was also asked for any further comments [in an email on 30 August and chased on 17 September 2018, see page 559] Mr Percival and Ms Walters considered that this was in line with the Respondent's grievance policy. Having heard their evidence we are satisfied that both Mr Percival and Ms Walters acted as they did in the belief that it was in accordance with the grievance policy and did not consider that they were disadvantaging the Claimant or favouring Ms Warraich by their actions.

Ms Warraich stating that she and Ms Kaur had been treated disrespectfully by the Claimant, "we are both black women".

50. We have considered the minute of the grievance meeting [p804-805] and Ms Warraich's. witness statement [paragraph 85]. We find that during the course of the grievance hearing in response to a question by Ms Walters, Ms Warraich suggested that the Claimant was hostile towards her was because of her race. We are satisfied that Ms Warraich was seeking to deflect blame for the situation that she found herself in, onto the Claimant: she had sought to paint the Claimant as unmanageable and unreasonable. We find that Ms Warraich was on the spot and she grasped at this allegation in order to deflect from the criticisms that were made of her by the Claimant. Ms Warraich had not made any mention of this previously to either Ms Kaur or Mr Percival and this had not formed part of any complaint she had made about the Claimant's conduct: she resorted to it during the course of the grievance when she felt under pressure and had been accused of discrimination. We find that she did so because she was facing an allegation of discrimination and sought to deflect that back to the Claimant. Ms Warraich admits there was no evidence to support this allegation against the Claimant.

Mr Percival being on the grievance panel

51. We find that Mr Percival was central to the allegation raised in the grievance, the Claimant's complaints were in respect of the conduct of the meeting on 13 August and the re-referral to occupational health. The terms and content of that referral were a central part of the Claimant's complaint. This was or ought to have been clear to Mr Percival from the emails sent on 20 and 24 August. One of the complaints was that Mr Percival had allowed the referral to occupational health to go forward in the terms to which the Claimant objected, i.e. despite knowing that she denied being deaf [in one ear]. The Claimant made clear that she alleged that this action was discriminatory. In her email to Mr Percival on the 24 August, she informs him that she was shocked to discover that he had chosen to ignore the information that she had provided and to continue with an intrusive assessment for which he had been given no evidence and made inappropriate assumptions relating to her disability. The Claimant could not have made it clearer that she considered his conduct to be improper and unfair. Mr Percival sought to suggest that he was not being criticised personally but reading pages 443-444 and 477 we find it is absolutely plain that he was.

52. The Respondent suggests that it was not until the 29 August at 9:07, when the Claimant sent a clarification email shortly before her grievance hearing, that it was understood that the referral to occupational health was a central part of her grievance. This can only be explained by a selective or partial reading of the Claimant's complaints. We do not find this explanation to be supported by the evidence and are satisfied that the Claimant had spelled it out clearly before this [477]. We find that it was entirely inappropriate for Mr Percival to be on the panel hearing the Claimant's grievance.

Not responding to questions asked by the Claimant – after the grievance

53. The Claimant raised a number of queries between the grievance hearing and receipt of the outcome letter on 27 September 2018. Mr Percival was on holiday for some of this period and Ms Walters communicated with the Claimant in his absence [paragraphs 32 to 35 of his statement]. Ms Walters described her responses to the Claimant's emails at paragraphs 20 to 24 of her Supplemental witness statement. We accept that Ms Walters considered that she did her best to answer the questions raised by the Claimant as far as she was able but that she found the emails lengthy and repetitive and difficult to respond to. We accept that Mr Percival and Ms Walters considered that they had addressed the Claimant's questions in their report or in their responses to her emails. We do not find that either Ms Walters or Mr Percival deliberately failed to answer any of the questions raised by the Claimant.

10 September 2018 Ms Warraich's email to Ms Kaur

54. The email referred to is at page 572: in it Ms Warraich reported a conversation she had with OH as follows: '*concerned that everything had not been disclosed initially hence a manager referral now. A declaration is signed by the employee at the beginning of the process. That the employee has a final say in what goes into the report around adjustments. This is why we did not get any adjustments under certain headings in the first one. They would have been removed*.' We were also referred to the occupational health service's note of that conversation, at page 154, which does not record any concern on the part of the OH service.
55. The Claimant was not aware of this email until after she left, however she had suspected that this was Ms Warraich's view and that she had discussed it with others

30 August to 21 October – alleged bullying and/or intimidation by Ms Warraich

Changes to the Claimant's work schedule

56. On 19 September 2018 Ms Warraich sent the Claimant a schedule for her patient facing duties from the 1 October 2018 [page 632,634]. Miss Sahin set out her concerns about the changes to her schedule in an email to Mr Percival on the 19 September 2018, [640-641]. On 19 September 2018 Ms Warraich also sent an email to Dean O'Callaghan and Maurine Morris [page 631] in which she confirmed that she had adjusted the Claimant's timetable to give her a whole day for work that needed to be carried out in addition to patient facing work and had therefore

reduced one session at their practice. Ms Warraich addresses the changes to the Claimant's work schedule at paragraph 87 of her witness statement. Miss Sahin address this issue at paragraph 129-131 of her witness statement.

57. We find that the Claimant made Ms Warraich aware in their discussion at the start of her employment that she needed to be able to break up her administrative tasks and manage her time and that this was reflected in the original occupational health report. We are satisfied that at the start of the Claimant's employment Ms Warraich had confirmed that the Claimant would be able to spread her appointments out to allow her time in between appointments to take micro breaks, move away from her work station for 10 minutes each hour and to take regular breaks to ensure she maintained good levels of hydration as recommended by occupational health (see page 152- 153). The revised timetable provided in September grouped together all the admin tasks in one day, removing the spread of admin time previously inserted to break up the appointments and allow the Claimant time to take micro breaks and move away from her workstation. The Claimant set out clearly what the problems were with the new timetable in her email [at 640] although she does not specifically make reference to her disability and does not state that this would impinge on her ability to manage her conditions.

Re-introductory meetings with the Claimant's clinical teams

58. Ms Warraich told us that she was not excluding the Claimant from these meetings but that it was not necessary for her to attend those meetings as they dealt with administrative matters only and they were not set up in order to rebuild working relationships. The meetings were with the Practice Mangers at the GP practices where the Claimant was due to start offering the social prescribing service. Ms Warraich was unable to identify any specific administrative matters that were discussed that the Claimant, as the person providing the service, would not need to either be included in discussing or be aware of. Ms Warraich told us [see paragraph 87 c of her statement] that she remained concerned that the Claimant would be likely to undermine her and the Respondent when meeting with others if she had the opportunity., We are satisfied that the real reasons that Ms Warraich decided to attend those meetings alone was because of her concern about what the Claimant might say if she were allowed to attend, that is, her concern that the Claimant would be critical of how matters had been handled by Ms Warraich and the delays that had meant her session had been postponed. We are satisfied that Ms Warraich wanted to exert her control over the Claimant's working relationships because she perceived her as difficult.

Arranging patient clinic dates on the 1 October 2018 without consultation and disregarding training issues.

59. The Claimant complains that clinic dates were arranged without consultation and that the dates were arranged before the Claimant's MI training, which the Claimant had been told was mandatory, had been completed. We are satisfied on the evidence before us that the Claimant's MI training had been booked to take place on the 24 and 25 September 2018, which would have allowed the Claimant to complete the training before beginning to see patients, however, the Claimant was signed off work and was unable to attend the training on those dates. In the event the training had to be rearranged. We do not find that the clinic dates were arranged

without any regard to training issues.

(iv) continuing to portray the Claimant as untrustworthy in internal emails with colleagues. No evidence was put forward on this issue.

PCPs

Ms Warraich's management style

60. At the time the Claimant was employed Ms Warraich was new to the Respondent. She did not have a background in social prescribing and was not familiar with using the Respondent's IT systems. We have found that the Claimant has accurately described her lack of induction and are satisfied that there was a lack of clear instruction from Ms Warraich and that she gave the Claimant conflicting instructions. We also find that Ms Warraich reacted badly to actual and perceived criticism from the Claimant and became hostile towards her.

Working from home

61. We do not find that the Claimant was expected to work from home throughout her induction. When the Claimant started with the Respondent a desk and computer had been arranged for her at Docklands Medical Centre, although as a temporary measure, this was where the Claimant's line managers, Ms Warraich and her manager Ms Kaur were also based. The Claimant was expected to shadow other social prescribers and to visit GP practices in her network; she was allowed to work from home when she did not have other appointments but was not required to do so. There was a desk available for her at Docklands Medical Centre. We are satisfied that the reason the Claimant did not use that desk was because of the breakdown in her relationship with Ms Warraich.

From 19 September 2018 requiring all administrative work to be done in a designated slot

62. We have set out above our findings in relation to changes the Claimant's work schedule from 19 September 2018. It was not disputed that the changes were to take effect from 1 October 2018.

The Claimant's resignation

63. On 21 September the Claimant chased for a resolution of her grievance and the answers to the questions she had raised [649] On 24 September 2018 Mr Percival informed the Claimant that the outcome of her grievance would be delivered that week and that her motivational interview training was due to take place on 25 and 26 September 2018. The Claimant responded by informing Mr Percival that she had been left feeling extremely stressed and frustrated and had been signed off sick for the rest of the week [667] The Grievance Outcome letter was sent to the Claimant on 27 September 2018 [668] and she responded on 28 September objecting to the findings and indicating that she intended to appeal [675]. The Claimant attended the OH appointment on 9 October 2018. We accept the Claimant's evidence

[paragraph 137 of her witness statement] as to the discussion with the OH doctor on that date and the reasons for her decision her decision to resign, believing that her position was untenable as a result of the Respondent's actions towards her in respect of her epilepsy. The Claimant remained off sick from 4 October 2018 until her resignation on 11 October 2018. We find that the Claimant resigned for the reasons she set out in her resignation letter [page 701], namely that she believed that her position was untenable and that there was a fundamental breach of trust and confidence in the conduct of the grievance and referral to occupational health on false grounds, entitling her to resign.

E. Conclusions

1. The make the following findings in respect of the issues identified in the list of the issues.

Characteristics of the comparator

2. When considering the relevant circumstances of the comparator we considered the relevant circumstances to include that they were someone who was new to the role whose line manager was finding them to be 'difficult to manage' but who does not have the Claimant's disabilities.

Act 1

3. We find that the Respondent invited the Claimant to a meeting on the 13 August 2018 at which it intended to discuss her epilepsy without warning her that this would be a topic of discussion. We are satisfied that the meeting had been originally arranged as a review of the induction and changing the purpose and agenda of the meeting to concentrate on the Claimant's epilepsy was not necessary in the circumstances. The Claimant had not raised any concerns or issues with Ms Warraich in relation to her epilepsy or its impact on her ability to perform her role.

4. We have found that at that meeting the Ms Warraich and Mr Percival led the Claimant to feel under pressure to agree to her colleagues being told of her condition of epilepsy. We accept the Claimant's evidence that she felt under pressure in that meeting from both Ms Warraich and Mr Percival. We are satisfied that the first occupational health report did not suggest that there was any need to make people in general aware of the Claimant epilepsy and that there was no new information that would explain or justify changing the Respondent's position in this regard.

5. We are satisfied that this amounted to a detriment and that it was reasonable for the Claimant to perceive it as such. We are satisfied that Ms Warraich made alarmist assumptions or assertions about the effect of the Claimant's condition based not on an assessment or understanding of the Claimant's condition but on her perception of epilepsy as a result of past experience of someone in her family whose experience was completely different to and unrelated to that of the Claimant.

6. We find that Ms Warraich was looking for ways to deflect from her lack of organisation in respect of the Claimant's induction and the Claimant's criticisms of

her and seized on the Claimant's epilepsy and alleged deafness as an excuse to put off her patient contact and as a way of asserting her authority over the Claimant. We have found that in effect Ms Warraich "weaponised" or used the Claimant's disability as an excuse to make life difficult for the Claimant. We find that the Respondent would not have treated someone who did not have the condition of epilepsy in the same way and that this was an act of direct disability discrimination.

Act 2

7. We find that at the meeting on 13 August 2018 Ms Warraich, the Claimant's line manager, made incorrect claims about what the Claimant had said in the phone call on the 8 August as to the effect of her epilepsy and whether she had a hearing problem. We find that Ms Warraich did so in order to divert attention from criticisms of her induction, feeling under pressure as a line manager and out of fear for her own position.

8. We are satisfied that this amounted to a detriment and that it was reasonable for the Claimant to perceive it as such. We find that the Respondent would not have treated someone who did not have the condition of epilepsy in the same way, that treatment was because of her disability and was an act of direct disability discrimination.

Act 3

9. We find that Ms Warraich did question whether the Claimant could manage the stress of the particular job based on assumptions about her epilepsy at the 13 August meeting, and in order to deflect the Claimant's complaint about Ms Warraich's management, lack of satisfactory or appropriate induction, lack of clear instructions and communication.

10. We are satisfied that this amounted to a detriment and that it was reasonable for the Claimant to perceive it as such. We find that the Respondent would not have treated someone who did not have the condition of epilepsy in the same way and that this was an act of direct disability discrimination.

Act 5

11. We have found that the Claimant was required to undertake the MI training before seeing patients for the reasons explained by Ms Kaur in her witness statement and are satisfied that those reasons did not have anything to do with the Claimant's disability.

Act 6 - set out on 3.5 on the list of issues (there being two Act 6s)

On the 23 August 2018 making an OH referral that was inappropriate because the Claimant had not consented to it; there had already been a pre-employment OH assessment and nothing had arisen at work to put her work in question.

12. It is not disputed that the referral was made. We have found that the Claimant made it clear that she did not agree to the referral and as such she did not consent to it but felt she had no choice. We are satisfied that this amounted to a detriment and that it was reasonable for the Claimant to perceive it as such. We find that the Respondent would not have treated someone who did not have the condition of epilepsy in the same way and that this was an act of direct disability discrimination for the reasons set out above.

Act 6 #2 [Issue 3.6] On 23 August 2018 sending an OH referral that falsely represented the Claimant health conditions; suggestive of problems and appear to be pursing an agenda of concluding the claimant was unfit for work.

13. We find that the OH referral did falsely represent the Claimant's health conditions. We are satisfied that the suggested problems were illustrative of an agenda that was being pursued by Ms Warraich in an attempt to suggest that the Claimant was unfit for work. We are satisfied that this amounted to a detriment and that it was reasonable for the Claimant to perceive it as such. We find that the Respondent would not have treated someone who did not have the condition of epilepsy in the same way and that this was an act of direct disability discrimination.

Act 8, that on the 28 August 2018, the Respondent suggested that a formal risk assessment was required for an away day rather than asking the Claimant about the matter.

14. The Claimant's comparator in this instance is Ms Ash, who it was accepted Ms Warraich did speak to directly. We are satisfied that the reason Ms Warraich did not speak to the Claimant about any potential risk relating to epilepsy and the trip was because their relationship had broken down and she was scared of the Claimant's reaction to those enquires.

Resignation

15. We return to the issue of dismissal below.

Harassment

Acts 1, 2, 5, 6 and 6 #2 are also relied on as acts of harassment. Our findings of facts in relation to those incidents are set out above.

16. Had we not already found Acts 1, 2, 3, 6#1 and 6#2 to have been detriments we would have found them to be disability related harassment. We are satisfied that the conduct was unwanted conduct related to her disability and had the effect of creating and intimidating and hostile environment for the Claimant. We considered it was reasonable for it to have had that effect.

17. We address below the additional allegations that are relied on solely as harassment.

Act 6A - that on the 10 September 2018 in an email to Ms Kaur, Ms Warraich alleged the Claimant had misrepresented and/ or not disclosed her conditions to OH at her initial appointment.

18. Although the Claimant was not aware of this email until after she left, we accept that she had suspected that this was Ms Warraich's view and that Ms Warraich had discussed this with others. We find that the email contributed to a state of affairs in which the Claimant reasonably perceived there was a hostile environment in relation to her disability.

Act 9 30 August 2018 at the grievance meeting Mr Percival, HR manager, responded to the Claimant's point that the OH referral was unnecessary by stating that OH would need some kind of medical evidence about her condition and by doing so, implies that her account was untrustworthy.

19. We have not found that Mr Percival was implying that the Claimant's account was untrustworthy.

Act 11. between 30 August and 21 October, Ms Warraich bullied/ or intimidated the Claimant by :

(i) making changes to working schedule without consulting or allowing her to readjust;

20. We do not find that Ms Warraich deliberately decided to make it harder for the Claimant to manage her conditions, her actions were however thoughtless or careless in regard to the Claimant's ability to manage her own time and therefore her conditions. Ms Warraich accepted that she did not attempt to discuss the matter with the Claimant; due to her concern as to their relationship at the time. We do not find that this conduct was related to the Claimant's disability. We find that Ms Warraich found dealing with the Claimant difficult and wanted to assert control over her whilst not wishing to have to speak to her directly.

21. We address the reasonable adjustment complaint in respect of this conduct below.

(ii) attending many re-introductory meetings with the Claimant's clinical teams while excluding her from attendance and all communications about them.

22. Ms Warraich told us that she was not excluding the Claimant from these meetings but that it was not necessary for her to attend those meetings as they dealt with administrative matters only and they were not set up in order to rebuild working relationships. She also told the tribunal that she decided to attend those meetings alone was because she found the Claimant difficult to deal with and that she was concerned that the Claimant would undermine her and the Respondent if she had the opportunity.

23. We find this was a result of the breakdown in their relationship and Ms Warraich's insecurity about her own performance and ability in the role which led to her concern

about being criticised by the Claimant. We do not find that this conduct was related to the Claimant's disability.

(iii) arranging patient clinic dates on the 1 October 2018 without consultation and disregarding training issues.

24. The complaint was that clinic dates were arranged without consultation and that the dates were arranged before the Claimant's MI training, which the Claimant had been told was mandatory had been completed. We are satisfied on the evidence before us that the Claimant's MI training had been booked to take place on the 24 and 25 September 2018, which would have allowed the Claimant to complete the training before beginning to see patients, however, the Claimant was signed off work and was unable to attend the training on those dates. In the event the training had to be rearranged. We do not find that the clinic dates were arranged without any regard to training issues.

(iv) continuing to portray the Claimant as untrustworthy in internal emails with colleagues. No evidence was put forward on this issue.

Act 14 – *On the 13 August informing the Claimant she could not start her patient facing work until she had attended motivational interview training even though this was not required to be done prior to the start of an operational role*.

25. We set out above that we accept Ms Kaur's evidence on this point. The explanation is nothing to do with the Claimant's disability but rather a change in the requirement of the service as Ms Kaur saw it going forward, following the recommendations in the audit report and the integration of the service.

Victimisation

26. We have found the first protected act to be the Claimant's email to Mr Percival sent on 24 August 2018 [477]

Act 5 restriction on the Claimant's role, not being able to speak to or contact other organisations or attend external meetings.

27. This restriction was imposed at the end of the meeting on the 13 August and confirmed on the 14 August in the email sent at 6:50am. We find that conduct relied on as Act 5, predates the protected act and does not amount to victimisation.

Act 7 : improperly and unfairly conducting the grievance,

28. The Claimant's criticisms of the unfairness or improper conduct of the grievance included that Mr Percival was on the panel when he was involved in the meeting on the 13 August which gave rise to her grievance and an allegation disability discrimination had been raised against him directly on the 24 August, [page 447]; that he was a key player in the meeting on the 13 August and was jointly involved in drafting the referral to OH; that Mr Percival did not query the first OH report until after he had spoken to Ms Warraich; and that he had given Ms Warraich advice as

to what was appropriate in managing the Claimant and was not independent or objective.

29. We find that Mr Percival was central to the allegation raised in the grievance, the conduct of the meeting on 13 August and the re-referral to occupational health were central to the Claimant's complaints.

30. After careful deliberation we have accepted Mr Percival's evidence that he had not made the link between the content of the Claimant's complaints and the fact that he was being accused of discrimination. We accept that he considered the focus of the grievance to be directed at Ms Warraich. The Claimant did not raise any complaint or criticism at the time in respect of his being on the panel.
31. We do not find that in his conduct of the grievance Mr Percival was consciously motived by the fact that the Claimant had made allegations of disability discrimination, whether against him or the Respondent more generally. We considered whether he may have been subconsciously motived or influenced by this but have not drawn that inference. Ultimately, we have accepted Mr Percival's evidence that he was not alive to this very important issue, even though we consider that he ought to have been.

Act 10. After the grievance hearing not providing all the documents to the Claimant that were provided to the grievance hearing by Ms Warraich.

32. We do not find that this response from Mr Percival was motivated by or influenced by the fact that the Claimant had brought a complaint of discrimination but rather that this was his interpretation of the policy procedure for the grievance applicable at the time.

not giving the Claimant an opportunity to respond to Ms Warraich statement during the grievance meeting.

33. We find that there is some force to the Claimant's complaint that when she challenged or sought to query the response from Ms Warraich, she was not given a full opportunity to do so. We have to consider the question in the context of the allegation of victimisation and are satisfied that the Respondent would have conducted the hearing in the same way whatever the substance of the complaint and that they did not fail to allow her an opportunity to respond to Ms Warraich after the hearing because the allegation included a complaint of discrimination. We are satisfied that the fact that the complaints included allegations of discrimination did not play a part in that conduct. We find that the Respondent followed a process which they considered to be in accordance with its grievance policy.

not responding to questions asked by the Claimant.

34. We have found that Mr Percival and Ms Walters considered that they had addressed the Claimant's questions in their report or in their responses to her emails. We did not find that either Ms Walters or Mr Percival deliberately failed to answer any of the questions raised by the Claimant. We do not find that Mr Percival or Ms Walters would have acted any differently had the grievance not included allegations of

discrimination.

Act 11. The allegations of bullying by Ms Warraich from 30 August to 21 October 2018

(i) adjusting the work schedule.

35. Ms Warraich sought to explain her adjustments to the work schedule by suggesting that it was done for the Claimant's own good, that is for the good of her health.

36. We have found that Ms Warraich was aware the Claimant needed breaks to do her admin and that she acknowledges that revising the timetable restricted out that dedicated time and flexibility. We are satisfied that she ought to have been aware of the impact on the Claimant's disability would therefore be negative and would impact her ability to do her job and manage her conditions. We find that the changes amount to a detriment to the Claimant.

37. We do not find that Ms Warraich has provided a satisfactory explanation for making the changes as she did. We also find that Ms Warraich was deeply offended by the allegation made by the Claimant that she had discriminated against her because of her disability. We find that Ms Warraich was at least in some part motivated by retaliation for the fact the Claimant had made this allegation in revising the Claimant's timetable in the way that she did to her detriment.

(ii) excluding the Claimant from attending reintroduction meetings and communications

38. We are satisfied that the decision to exclude the Claimant from meetings was in part because of Ms Warraich's concern about what the Claimant would say in those meetings and that included that she might repeat her criticisms of Ms Warraich and the Respondent. The Claimant's allegations of disability discrimination include the insistence by the Respondent on further OH assessment in respect of her epilepsy, including seeing patients alone at GP practices and the need to inform those practices about her epilepsy. We are satisfied that at least in some part the concern about what the Claimant might say included a concern that she might repeat criticisms which amount to allegations of disability discrimination.

39. We find this allegation of victimisation to be made out.

arranging the patient clinic without regard to training.

40. We are satisfied that this was not connected to the complaint that had been brought but was as a result of timing of the training being changed.

Continuing to portray the Claimant as untrustworthy in emails with colleagues

41. We find this allegation was not made out on the evidence.

Act 13. Ms Warraich stating that she and Ms Kaur had been treated disrespectfully by the Claimant, we are both black women.

42. We are satisfied that being accused of race discrimination is a detriment.

43. We have found that the remark was said to deflect from the Claimant having accused Ms Warraich of discrimination. We are satisfied that this would not have been said if the Claimant had not accused Ms Warraich of discrimination and find this complaint of victimisation is made out.

S 20 and 21 – failure to make reasonable adjustments

PCPs

(1) Ms Warraich's management style/approach, namely that she was a new manager, who gave no clear instructions, who gave conflicting instructions, who had a short temper and was combative

44. We do not find that this amount to a PCP

(2) *For those on induction being required to work at home*

45. We do not find that this amounted to a PCP on the facts. The Claimant did work at home some of the time, but this was not a requirement or practice during induction generally. We have found that a temporary desk was arranged for the Claimant when she started and that she worked from home pending the provision of a desk in the GP practices because of the difficulties she experienced in the working relationship with Ms Warraich.

46. Insofar as the Claimant felt isolated by working from home we are satisfied that this was as a result of the poor working relationship with Ms Warraich and not as a result of any PCP (see *Carphone Warehouse v Martin UKEAT/0371/12 [2013] EqLR 481*).

(3) On the 19 September 2018 requiring all administrative work to be done in a designated slot,

47. This was set out in the Claimant's revised work schedule provided by the Respondent from the 19 September 2018 and was to come into effect from the 1 October.

48. We find that it did put the Claimant at a substantial disadvantage compare to someone without her disabilities in that in order to manage her conditions, including fatigue and pain the Claimant needed to carefully pace and prioritise her time and take regular breaks. Placing all the Claimant's administrative work in one slot reduced her ability to break up her appointments with admin time in between them.

49. We find that the Respondent ought to have known that it would put the claimant at a disadvantage; it was set out in the occupational health report, and the Claimant had discussed with Ms Warraich why she needed to have admin breaks between patient appointments at the start of her employment.

Reasonable adjustments

50. We find that it would have been reasonable to remove the single administration slot and to distribute administration time throughout the Claimant's working day. The single slot had not appeared in the original timetable and we heard from Ms Warraich breaking up patient slots with admin time was something that was done for others in the past.

51. In so far as it is necessary to do so we find that it ought to have been possible to reach a compromise on the Claimant's work schedule/timetable

52. We find that from 19 September 2018 the Respondent failed to make a reasonable adjustment in respect of the Claimant's admin time.

Dismissal

53. It was not in dispute that the Claimant lacked the requisite 2 year's qualifying service to bring a complaint of unfair dismissal. The Claimant contends that the dismissal was as a result of the Respondent's discrimination.

54. We accept the Claimant resigned for the reasons she set out in her resignation letter [page 701], namely that she believed there was a fundamental breach of trust and confidence in the conduct of the grievance and referral to occupational health on false grounds.

55. We considered whether the matters relied on by the Claimant in her resignation letter amounted to a fundamental breach of the implied term of trust and confidence. We have concluded that the following conduct of the Respondent taken together, amounted to a breach of the implied term.

56. Firstly the re-referral to occupational health, on false grounds and in the face of the Claimant's reasoned objections which damaged the Claimant's trust and confidence in the Respondent Second Mr Percival's position on the panel to hear the Claimant's grievance despite his central role in the matters about which she was complaining in her grievance. We consider this added to a breach of the implied term by undermining the Claimant's confidence in the grievance process. Thirdly the outcome of the grievance which failed to address her complaints of discrimination led the Claimant to lose confidence in the Respondent approach to discrimination complaints. Fourthly the changes to the Claimant's work schedule which took away the Claimant's ability to manage her conditions within her working day and further added to the breach of the implied term.

57. We have concluded that these matters amounted to a breach of the implied term because they seriously damaged the relationship of trust and confidence. We have found that there was no reasonable and proper cause for any of them. We therefore find that they amounted to a fundamental breach of contract entitling the Claimant to resign. We do not find that the Claimant affirmed the contract by waiting for the outcome of her grievance. She was off sick when the grievance outcome letter was received, she informed the Respondent the next day that she did not accept the

outcome and findings of the grievance and then resigned soon after without returning to work.

58. We have found that the dismissal was unlawful direct discrimination because part of the reason for it was the conduct of Ms Warraich that we have found to be unlawful discrimination.

Time limits

59. The Claimant resigned on the 11 October 2018. The Claim was brought on the 24 January 2019, following early conciliation from 25 October 2018 to 25 November 2018. There is no time limit issue in relation to the dismissal claim. We have found that there was an ongoing situation or a continuing state of affairs in which the Claimant was treated in a discriminatory manner up to the Claimant's resignation.

60. We also considered whether it would have been just and equitable to extend time to include the complaints dating back to 8 August 2018, if we had not found them to be part of a continuing act. We took into account the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; the fact that the Claimant was awaiting the outcome of an internal grievance procedure and the balance of prejudice in reaching the conclusion that it would be just and equitable to extend time.

61. We therefore find that the claims have been brought in time.

Summary of conclusions

62. In summary, the Claimant succeeds in respect of the following claims:

Direct discrimination

62.1 The claims of direct discrimination succeed.in respect of issue 3.1, 3.2, 3.3, 3. 5 and 3.6 (Acts 1, 2, 3, 6#1, 6 #2).

62.2 The Claimant's dismissal was also an act of direct discrimination

Harassment.

62.3 We have found Act 6A to be unlawful harassment related to disability.

Victimisation

62.4 We found Act 11 (i) and Act 13 to be unlawful victimisation.

Failure to make reasonable adjustments

62.5 We have found that the Respondent failed to make reasonable adjustments to the PCP applied from 19 September 2018 requiring all administrative work to be

done in a designated slot.

Remedy hearing

63. The tribunal will list a remedy hearing for one day on a date to be notified.

Preparation Time Order

64. The amount of any preparation time order to reflect the additional preparation time incurred by the Claimant as a result of the postponement of the hearing in May 2021 is also to be considered at the remedy hearing.

Employment Judge Lewis
Dated: 24 January 2022