EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112166/2019

Final Hearing in person held in Glasgow on 29 and 30 November 2021; and 1 (hybrid Hearing, partly by CVP), 2, 3 and 6 December 2021; Further written representations from parties on 8 and 16 December 2021; and Members' Meeting in chambers on 17 January 2022

Employment Judge Ian McPherson
Tribunal Member Ijaz Ashraf
Tribunal Member Vernon P Alexander

Ms Muawana McCollin	**Claimant** **In Person** **Supported by:** **Ms Marigold Ahomade**
Telecom Service Centres Ltd t/a Webhelp UK	**Respondents** **Represented by:** **Mr Rory Byrom** **Solicitor** **Instructed by:** **Ms Lisa Nicol** **HR People & Change Manager**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that: -

(1) The breach of contract (failure to pay notice pay) head of complaint against the respondents is dismissed as time-barred.

(2) In any event, the claimant having been dismissed by the respondents, on 11 July 2019, for gross misconduct, no notice pay would have been payable to the claimant.

(3) The discrimination heads of complaint, insofar as time-barred, are allowed to proceed, on the basis that it is just and equitable to allow them to proceed, although not presented in time, and the Tribunal grants the claimant an extension of time in terms of **Section 123 of the Equality Act 2010**.

(4) The claimant's complaint of unlawful direct discrimination on the grounds of race, in respect of her Afro-Caribbean ethnicity, as her protected characteristic, is not well-founded, and her complaint that the respondents discriminated against her contrary to **Section 13 of the Equality Act 2010** is dismissed.

(5) By concession of the respondents, the Tribunal finds that, at all relevant times, the claimant was a disabled person, within the meaning of **Section 6 of the Equality Act 2010**, on the basis of her physical impairments of Carpal Tunnel Syndrome, Anaemia, and Fibroids.

(6) In respect of her other asserted physical impairments of Back pain, and Dry eyes, the Tribunal finds that the claimant has not established that, at all relevant times, she was a disabled person, within the meaning of **Section 6 of the Equality Act 2010**, on the basis of those physical impairments, as she has not shown them to be substantial, and / or of long-term effect, on her normal day to day activities.

(7) The claimant's complaint of direct discrimination on grounds of disability, contrary to **Section 13 of the Equality Act 2010**, is not well-founded, and it is dismissed.

(8) The claimant's complaint of discrimination arising from disability, contrary to **Section 15 of the Equality Act 2010**, is not well-founded, and it is dismissed.

(9) The claimant's complaint of the respondents' failure to make reasonable adjustments, contrary to **Section 20 of the Equality Act 2010**, is not well-founded, and it is dismissed.

(10) The claimant's complaint of harassment on grounds of disability, contrary to **Section 26 of the Equality Act 2010**, is not well-founded, and it is dismissed.

(11) The claimant's complaint of victimisation by the respondents, contrary to **Section 27 of the Equality Act 2010**, is not well-founded, and it is dismissed.

(12) In these circumstances, the claimant's claim against the respondents is dismissed in its entirety.

REASONS

Introduction

1. This case first called before the full Tribunal, on Monday, 29 November 2021, for a 5-day Final Hearing in person, as per Notice of Final Hearing issued to both parties by the Tribunal on 17 August 2021, for full disposal, including remedy, if appropriate. Before us, however, it was to assess the respondents' liability (if any) for the claimant's various unlawful disability and race discrimination heads of complaint, as also wrongful dismissal / breach of contract, remedy having been severed off during earlier case management by another Employment Judge, as well as addressing some reserved, preliminary issues relating to disability status and time-bar. Amended Notice of Final Hearing in person, to determine liability only, was issued by the Tribunal to both parties on 30 September 2021.

Claim and Response

2. The claimant, then acting through her legal representative, Lucy Neil at Livingstone Brown, solicitors, Glasgow, presented her ET1 claim form in this case to the Tribunal, on 4 November 2019, following ACAS early conciliation between 18 October and 2 November 2019. It was accepted by the Tribunal

administration, and served on the respondents by Notice of Claim issued by the Tribunal on 6 November 2019. Their ET3 response was due by no later than 4 December 2019.

3. On 5 December 2019, an ET3 response, defending the claim, was lodged by Mr Andrew Maxwell, solicitor with Harper Macleod LLP, making application under **Rules 5 and 20** for an extension of time to lodge that ET3 response. That application for an extension of time was objected to by the claimant's solicitor, Ms Neil, on 16 December 2019.

4. Thereafter, on 24 December 2019, Employment Judge Muriel Robison, having considered the application and objection, and without a Hearing, extended the time within which to present a response until 30 December 2019, and both parties were so advised by letter from the Tribunal dated 24 December 2019. Further, at Initial Consideration by Employment Judge Mary Kearns, on 27 December 2019, she ordered that the case proceed to the already listed Case Management Preliminary Hearing on 12 March 2020. Livingstone Brown withdrew from acting for the claimant on 3 March 2020.

Case Management Preliminary Hearings

5. The case thereafter called before Employment Judge Ian McPherson, on 12 March 2020, for a first Case Management Preliminary Hearing, in private, where his written Note & Orders dated 17 March 2020, as issued to both parties under cover of a letter from the Tribunal dated 18 March 2020, listed this case for a 2-day in person Preliminary Hearing on disability status, and time-bar. In the event, that 2-day Preliminary Hearing, listed for 29 and 30 June 2020, did not proceed, as, in line with ET Presidential Guidance relating to the Covid-19 Pandemic, it was converted into a Case Management Preliminary Hearing by telephone conference call, taken on 29 June 2020 by Employment Judge Muriel Robison.

6. Judge Robison's written Note & Orders dated 29 June 2020, as issued to both parties under cover of a letter from the Tribunal dated 6 July 2020, listed the

case for an in-chambers Preliminary Hearing before her, to deal with parties' written submissions on time-bar, and an application to amend made by the claimant, as well as appointing a further Case Management Preliminary Hearing by telephone conference call, to be held on 25 August 2020.

7. After a Preliminary Hearing in chambers, on 7 and 12 August 2020, Judge Robison, having considered parties' written submissions, decided that the respondents' time-bar pleas would be reconsidered, if remade, after the hearing of evidence at a Final Hearing, and she refused the claimant's application to amend her claim to include a claim in regard to breach of the **Flexible Working Regulations 2014**. Her Order and Reasons, dated 12 August 2020, was issued to both parties by the Tribunal on 17 August 2020, and so were available when the case called again before Judge McPherson on 25 August 2020.

8. The case called again before Judge McPherson, on 25 August 2020, for a second Case Management Preliminary Hearing, in private, where his written Note & Orders dated 26 August 2020, as issued to both parties under cover of a letter from the Tribunal dated 1 September 2020, had listed the case for a 5-day in person Final Hearing. In the event, that 5-day Final Hearing, listed for 14 / 18 December 2020, was postponed, on account of the claimant's ill-health, and the case was thereafter sisted until it was relisted on 17 August 2021 to be heard by a full Tribunal on 29 November / 3 December 2021.

Lead up to the Final Hearing

9. In the 2-week period prior to the start of this Final Hearing, the case had called before Employment Judge Ian McPherson sitting alone, on Thursday, 18 November 2021, for a 30 minute in person arrangements ("IPA") telephone conference call Case Management Preliminary Hearing, in private, resulting, exceptionally, after a one-hour Hearing by telephone conference call, in the Judge issuing a detailed, 11-page, written Note & Orders dated 18 November 2021.

10. The claimant was then acting as an unrepresented, party litigant. Her solicitor, Mr Brzoom Kadirgolam from the Ethnic Minorities Law Centre, Glasgow, withdrew from acting for her on 14 September 2021, when he intimated his withdrawal from acting to the Glasgow ET, Mr Byrom, and the claimant. He re-affirmed that, on 1 November 2021, after Notice of the IPA PH had been wrongly sent to him, rather than the claimant direct, as it then was re-sent to her. The respondents were, at that IPA Hearing, represented by a Ms Deborah Rookes, solicitor at Harper Macleod LLP, Glasgow, standing in for the respondents' principal agent, Mr Rory Byrom.

11. While a certain timeline of case management had been intimated to the Tribunal, on 11 May 2021, by Mr Byrom, after liaison with Mr Kadirgolam, then solicitor for the claimant, after a Case Management PH by conference call on 8 April 2021, before Employment Judge Shona MacLean, her written Note & Orders being issued on 16 April 2021, it was to emerge at this IPA Hearing that matters had not progressed as then indicated, with Joint Bundle by 18 June 2021, and exchange of witness statements by 9 July 2021, and that parties' previously declared positions about witnesses to be led had also changed, from what had been intimated to Judge McPherson at the Case Management PH on 25 August 2020, yet neither party had brought these changes to the Tribunal's attention, lest there was any impact on the duration needed for the listed Final Hearing.

12. In particular, it emerged at this IPA that the claimant would be calling herself and a Callum Sinclair as witnesses on her behalf, but not a Karen Walker, as previously indicated on 25 August 2020. The respondents, instead of leading 3 witnesses, previously identified as Ian McIntyre, investigation officer, Jade Bradley, chair of disciplinary hearing, and Jamie Farwell, chair of appeal hearing, would no longer be calling Ms Bradley or Mr Farwell. They would still be calling Mr McIntyre, and the respondents would in addition be calling Alexander Thomson and Stephen Murdoch, note-takers at the disciplinary

and appeal hearings, along with Paul Tausney, initial investigator, pre-Mr McIntyre, Scott Stevenson, note taker at the investigation, and Callum Dougan, respondents' planning team, i.e. 6 witnesses in total, rather than the 3 as before.

13. With the proximity of the listed Final Hearing starting on 29 November 2021, the claimant expressed her concern, and the Judge expressed his concern about the fact that while there had been attempts to agree a Joint Bundle, and agree a final List of Issues, that had not happened, the claimant was proposing her own Bundle, and witness statements had not yet been completed and exchanged between the parties. The claimant, while keen to "***crack on***" and get her case heard, stated that it was unfair to her, as an unrepresented, party litigant, she had not seen the respondents' witness statements, and that she had prepared her own witness statement, but not yet exchanged it with Mr Byrom, as she was waiting on him to facilitate the exchange of witness statements.

14. Ms Rookes emailed the Tribunal on the Friday afternoon, 19 November 2021, to set out the respondents' position on a number of matters discussed at the IPA PH, including Joint Bundle, witness statements, scheduling of 6 witnesses for the respondents, and an application for Mr Sinclair's evidence to be given by CVP. She also confirmed that the respondents had no objection to their evidence being heard first, with the claimant thereafter, and no objection to closing submissions on day 5 being dealt with by way of a respondents' written skeleton argument.

15. While Ms Rookes' reply referred to a response to come from Mr Byrom that did not happen, until later the following week. The Tribunal, on the Judge's instructions, wrote to both parties on 23 and 24 November 2021, seeking updates on progress with their respective preparations, and as witness statements, etc, had not been received by the Tribunal by Monday, 22 November 2021, being the due date 7 days before the start of the Final

Hearing, a further email from the Tribunal, on 24 November 2021, reminded both parties that the Tribunal was seeking production of both parties' witness statements (as there was an allocated reading day for the Judge on Friday, 26 November 2021), as otherwise there was a breach of the Tribunal's Orders from 25 August 2020.

16. Mr Byrom emailed the Tribunal, on the afternoon of Wednesday, 24 November 2021, enclosing the respondents' 6 witness statements, and stating that hard copies of them, and the respondents' Bundle (x 4) should arrive at the Tribunal by courier. His email also stated: "***We would like to highlight to the Tribunal that witness statement exchange was due to occur yesterday at 3pm as had been agreed in advance by the parties. The respondent sent their witness statements to the claimant by email at 3pm. There was no response from the claimant nor has there been since then. We have emailed the claimant on several occasions asking for the claimant's witness statements to be produced (see attached), or an explanation for why they have not been produced. Our IT department have checked our emailing system and confirmed that no emails attaching witness statements have been received from the claimant (in fact, no emails at all during that time). We do not have the claimant's telephone contact number as this was not included on the ET1 form. This position is cause for grave concern on the basis that there was agreement for contemporaneous exchange of the witness statements. We have had no explanation for why the claimant's witness statements have not been received nor when they are due to be expected. If this position continues then we may be at the point that we cannot proceed with the hearing next week, especially if we do not have the claimant's witness statements in advance of commencement on Monday. We do not consider it correct at this time to seek a postponement of the hearing but are merely expressing our concern to the Tribunal about the current situation."***

17. On the morning of Thursday, 25 November 2021, an email from the Tribunal was sent at 08:36 to both parties, on the Judge's direction, with a response to Mr Byrom's email, and with further orders and directions by the Tribunal. By email sent at 10:48, the claimant then asked for a postponement of the Final Hearing, and the respondents did not object to that, as per Mr Byrom's email at 11:12. However, following consideration by the Judge, the postponement was refused, for the detailed reasons given then by Judge McPherson, as set forth in the refusal letter issued by email from the Tribunal to both parties that afternoon.

18. The reading day on 26 November 2021 was cancelled, and a further email was sent to both parties, at 11:23, on Friday, 26 November 2021, with further directions and orders by the Judge, including intimation that the Final Hearing would start at 11am on Monday, 29 November 2021, rather than 10am, so that the Judge could brief the lay members of the Tribunal on the case, and on Mr Byrom's Strike Out application intimated at 08:31 that morning, which the Judge directed would be addressed at the start of the Final Hearing on the Monday morning, 29 November 2021, giving the claimant an opportunity to respond, following which, after a reply by Mr Byrom, the full Tribunal would adjourn to consider the respondents' application.

19. The respondents sought a Strike Out of the claim, in its entirety, on the grounds that (1) the claimant had not complied with an Order of the Tribunal, by not exchanging her witness statement, as previously ordered, and (2) that the manner in which the claimant had conducted proceedings was unreasonable. In the alternative, Mr Byrom sought a postponement of the Final Hearing, as the claimant's omission in failing to provide her witness statement placed the respondents at considerable prejudice in being unable to explore the precise terms of her evidence, in circumstances where the claimant had the advantage of knowing what the respondents' witnesses evidence is, their witness statements having been released to the claimant.

Final Hearing before this Tribunal

20. The claimant appeared at this Final Hearing as an unrepresented, party litigant. She was accompanied by a friend, Ms Marigold Ahomade, as a supporter, but not as a witness. While, on day 1, Monday, 29 November 2021, the Tribunal suggested to the claimant that she might wish to consider Ms Ahomade acting as her representative in these Tribunal proceedings, the claimant advised us the next day that she would continue to represent herself, supported by Ms Ahomade, but not representing her.

21. The claimant had lodged no witness statement with the Tribunal, nor any documents, prior to the start of this Final Hearing. She produced her witness statement during day 1, and we allowed her to amend it on day 5. Notwithstanding its late production by the claimant, Mr Byrom, the respondents' solicitor, advised the Tribunal that the respondents insisted upon their Strike Out application. By way of an observation, and not a criticism, we note and record that the claimant was very quietly spoken, and the Judge had to frequently ask her to speak up so everybody in the Hearing room could hear her, proceedings were being recorded, and everybody present had to be able to hear what she had to say.

22. The claimant's witness statement was provided by her on the morning of day 1, Monday, 29 November 2021. She advised us that she was now the only witness being led on her behalf, Callum Sinclair no longer being called as a witness by her. The respondents' application for Strike Out, which failing postponement, was the subject of oral submissions from both parties before the full Tribunal, on that date, when both applications were refused by the Tribunal, via an oral interlocutory ruling, given by the Judge, on the Tribunal's behalf, for the reasons given orally at the time, and later confirmed in writing.

23. The respondents were represented at this Final Hearing by their solicitor, Mr Rory Byrom from Harper Macleod LLP. He was instructed by Ms Lisa Nicol, the respondents' HR People & Change Manager. It was confirmed that she

was not being led as a witness for the respondents. The respondents had lodged, and we had available to us, and the claimant, a large white A4 lever arch folder containing the respondents' Bundle of 69 documents, extending to 324 pages.

24. As a preliminary matter, we allowed the claimant to produce a confidential medical report from her GP, Dr Kirsty Brown, dated 20 August 2020, addressed "***to whom it may concern***". It was added to the respondents' Bundle, as page 325, without objection by Mr Byrom, the respondents' solicitor, this GP report having previously been disclosed to the Tribunal and the respondents' solicitor on 6 October 2020 in the course of correspondence with the Tribunal.

25. Further, we all had a separate A4 lever arch folder containing the respondents' 6 witness statements from (1) Paul Tausney; (2) Iain McIntyre; (3) Scott Stevenson; (4) Alexander Thomson; (5) Callum Dougan; and (6) Steven Murdoch. Later, we received a witness statement from Jamie Farwell, which we allowed in on day 2, when we allowed the respondents to lead evidence from him, and Ms Jade Bradley, although no witness statement was provided from Ms Bradley.

26. Proceedings before the Tribunal on day 1 (Monday, 29 November 2021) having been impacted by time spent by the full Tribunal and parties addressing the disputed Strike Out and postponement applications, no evidence was heard that first day. In the event, over the next 3 days of this Final Hearing, the Tribunal heard evidence from the respondents' 8 witnesses, as they turned out to be, two additional witnesses (Ms Jade Bradley, dismissing officer, and Mr Jamie Farwell, appeal officer) being allowed by the Tribunal.

27. The claimant's evidence was heard on day 5, being Friday, 3 December 2021. While it had been intended to conclude the evidence, along with closing submissions, within the 5 allocated days, in the event, that did not happen, and closing submissions from both parties required to be assigned to a further

6th Hearing date, arranged, with their co-operation, and assistance from the Tribunal administration, for the immediately following Monday, 6 December 2021, again in person.

Interlocutory Rulings by the Tribunal in the course of the ongoing Final Hearing

28. Despite earlier case management of the claim, including Judge McPherson conducting the second Case Management Preliminary Hearing on 25 August 2020, and the In Person Arrangements Case Management Preliminary Hearing on 18 November 2021, this Final Hearing was the subject of many contested interlocutory applications, as follows:

- Claimant's application to allow her witness statement, although late, granted by the Tribunal on 29 November 2021, as per Note (1).
- Respondents' application to Strike Out the claim, which failing, postpone the listed Final Hearing, refused by the Tribunal on 29 November 2021, as per Note (1).
- Respondents' application to amend their ET3 response, granted by the Tribunal on 29 November 2021, as per Note (1).
- Respondents' application to lead 2 additional witnesses, Ms Jade Bradley and Mr Jamie Farwell, granted by the Tribunal on 30 November 2021, as per Note (3).
- Claimant's application of 30 November 2021 to lodge further document, being the document "***M.McCollin – Trace.XLXX File"*** attached to her email of 23 November 2021 to the Glasgow ET, refused by the Tribunal on 1 December 2021, as per Note (3).
- Respondents' application of 1 December 2021 to lodge further documents, to examine Mr Dougan, granted by the Tribunal on 1 December 2021, as per Note (3).

- Respondents' application of 1 December 2021 to lodge further documents, relating to evidence from Mr Murdoch, granted by the Tribunal on 1 December 2021, as per Note (3).

- Claimant's application of 3 December 2021 to lodge additional document, being GP medical certificate dated 1 December 2021, granted by the Tribunal on 3 December 2021, as per Note (5).

- Final, revised agreed Joint List of Issues allowed by the Tribunal on 3 December 2021, as per Note (5).

- Claimant's application of 3 December 2021 to amend her witness statement allowed by the Tribunal on 3 December 2021, as per Note (5).

- Claimant's application of 3 December 2021 to amend her ET1 claim form to allow her race discrimination claim to proceeded on the basis of her black colour, as well as her Afro-Caribbean ethnicity, refused by the Tribunal on 3 December 2021, as per Note (5).

- Claimant's application of 6 December 2021 to postpone the closing submissions, and relist to a future date, refused by the Tribunal on 6 December 2021, as per Note (5).

29. For the sake of brevity, we refer to the Judge's written Notes & Orders issued to both parties. In all, over those first 5 days, we issued 4 separate written Notes and Orders of the Tribunal, the first dated 30 November 2021, and copied to both parties on that date, relating to proceedings on 29 November 2021 (day 1); the second, dated 1 December 2021, and copied to parties on that date, relating to proceedings on 30 November 2021 (day 2), and containing our **Rule 45** Timetabling Order ; the third, dated 2 December 2021, and copied to parties on that date, relating to proceedings on 30 November and 1 December 2021 (days 2 & 3); along with our fourth Note, dated 3 December 2021, and copied to parties on that date, which related to

proceedings on 2 December 2021 (day 4) and included our updated Timetabling Order for day 6 (closing submissions).

30. A fifth Note and Orders, recording proceedings on Friday 3, and Monday 6, December 2021, was issued on 9 December 2021. In issuing all of those Notes and Orders, in an ongoing Final Hearing, we did so to place on record, and make available to both parties in a written format, the precise terms of our Orders and our Reasons, as we considered it appropriate to do so, for the good and orderly conduct of the Final Hearing, and so that the Tribunal, and both parties, could refer back to them, for ease of reference, should any further need arise.

Issues before the Tribunal

31. At the start of the Final Hearing, on Monday, 29 November 2021, the full Tribunal took, as jointly agreed, the respondents' List of Issues provided at pages 62 to 64 of the Bundle. The claimant did not demur from that, until, on Thursday, 2 December 2021, she indicated that she wished to amend item F (Reasonable Adjustments), and she followed that up with an email to the Tribunal late that evening at 23:52 which the Tribunal considered the following morning, day 5, Friday, 3 December 2021, having heard from her, and Mr Byrom, solicitor for the respondents, before the Tribunal heard her sworn evidence.

32. Having heard from both parties, on day 5, we allowed a revised agreed Joint List of Issues to be substituted, and it is that revised version that constitutes the issues before us for judicial determination, as follows: -

Joint List of Issues (final revised by claimant, 3 December 2021)

A) Time limits

1) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2) If not, was there conduct extending over a period?

3) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

4) If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

   a) Why were the complaints not made to the Tribunal in time?

   b) In any event, is it just and equitable in all the circumstances to extend time?

B) Disability status under section 6 of Equality Act 2010

For each of the asserted conditions of back pain and dry eyes:

1) Is there a physical or mental impairment?

2) If so, does the impairment affect the Claimant's ability to carry out day to day activities?

3) Does the impairment have an adverse effect?

4) Is this adverse effect substantial (i.e. more than trivial)?

5) Is the condition long term?

C) Direct discrimination under section 13 of the Equality Act 2010 on grounds of race

1) Did the Respondent investigate and discipline the claimant for her conduct in the way she handled calls?

2) Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than “Nathan”, who was white and Scottish.

3) If so, was it because of race?

D) Direct disability discrimination under section 13 of the Equality Act 2010 on grounds of disability

1) Did the Respondent do the following:

a. conduct an investigation into the Claimant's conduct rather than to make a decision regarding her reasonable adjustments request (date unknown as well as persons responsible);

b. view the Claimant's dropped calls as a conduct matter rather than a matter relating to performance;

c. limit assessment of the Claimant's calls to June 2019 only;

d. predetermine the decision to dismiss the Claimant;

e. dismiss the Claimant;

f. failure to provide fair notice to the Claimant's first scheduled appeal hearing;

g. deny knowledge of the Claimant's disability at her appeal meeting; and

h. require the Claimant to disclose her medication at the appeal hearing.

2) Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant will confirm the identities of the relevant comparators.

3) If so, was the treatment because of disability?

E) Discrimination arising from disability under section 15 of the Equality Act 2010

1) At the applicable time did the Respondent know, or should reasonably have known, that the Claimant had the disability?

2) Did the Respondent treat the Claimant unfavourably by (a) dismissal; and/or (b) failure to uphold appeal to dismissal?

3) Was this treatment because of poorer performance arising in consequence of the Claimant's disability?

4) If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The legitimate aim was that the Respondent treated the termination of customer calls as a conduct issue as the Respondent has service level requirements to meet in its contract with clients, failure of which can result in financial penalties. The Respondent sets disciplinary rules and enforces disciplinary sanctions concerning employees' breaches of rules imposed regarding service level standards, to ensure compliance with its policies and procedures, and to take appropriate action if standards of conduct are not met.

F) Failure to make reasonable adjustments under section 20 of the Equality Act 2010

1) Did the Respondent apply a provision, criterion or practice to the Claimant of the expectation for employees to work shift patterns between 7:30am and 11:30pm each day placed the claimant at a substantial disadvantage due to her fatigue?

2) Did any such provision, criterion or practice put the Claimant at a substantial disadvantage of:

- the length of her shifts meant that she was more likely to make errors; and/or exacerbating her carpal tunnel syndrome due to more typing.

- The type of calls claimant handled was more likely to make errors.

3) What adjustments does the Claimant say that the Respondent was under an obligation to make? 3.1 The Claimant relies upon flexible working, specifically reduced hours ; and 3.2 The Claimant relies upon changes in the type of calls handled to technical calls.

4) Were such steps reasonable?

5) Did the Respondent fail to take such steps?

G) Harassment on grounds of disability under section 26 of the Equality Act 2010

1) Did the Respondent require the Claimant to disclose the medication she was on during her appeal hearing on 8 August 2019?

2) Did the act have the purpose or effect of (a) violating the Claimant's dignity; or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3) Was the Claimant subjected to that unwanted conduct on the grounds of the Claimant's disability?

H) Victimisation under section 27 of the Equality Act 2010

1) Did the Claimant make requests for reasonable adjustments in association with her fibroids and carpel tunnel syndrome?

2) Was that a "protected act" or did the Respondent believe that the Claimant had done or might do a protected act?

3) Did the Respondent subject the Claimant to a detriment of (a) dismissal; and/or (b) failure to uphold appeal to dismissal?

4) If so, was this because the Claimant did a protected act and/or because the Respondent believed the Claimant had done, or might do, a protected act?

l) Wrongful dismissal/Breach of contract (pursuant to the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994)

1) Did the Respondent wrongfully dismiss the Claimant?

2) If so, what is the Claimant's contractual entitlement to notice if properly served?

J) Remedy [Not for determination by the Tribunal at this stage – liability only Final Hearing]

1) If the Claimant is successful with any head of claim, what is the appropriate remedy, taking into account the heads of compensation under the Equality Act 2010?

Findings in Fact

33. We have not sought to set out every detail of evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are as set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

34. The Tribunal has found the following essential facts established: -

Background

(1) The claimant, who is a black woman, of Afro-Caribbean ethnicity, and aged 49 at the date of the Final Hearing, was formerly employed by the respondents as a Customer Service Representative at their Glasgow site.

(2) The respondents, trading as Webhelp UK, is a business providing outsourced services to major businesses located throughout Great Britain.

(3) In her role as a Customer Service Representative, working on the Sainsbury's account, the claimant was responsible for handling inbound telephone calls from customers in relation to a variety of customer service issues.

(4) The claimant's employment with the respondents commenced on 14 May 2018, and terminated on 11 July 2019 when she was summarily dismissed by the respondents for gross misconduct.

(5) As at that date, she had less than two years' continuous employment with the respondents, and her line manager was a Mr Jordin Adams.

(6) As at the date of this Final Hearing, the claimant was unemployed, and she had been unemployed since the effective date of termination of her employment with the respondents on 11 July 2019.

(7) Neither party produced to the Tribunal, as part of the Bundle before us at this Final Hearing, a copy of the claimant's contract of employment with the respondents, nor any written statement of employment particulars.

(8) That said, it was explained to the Tribunal in evidence that the claimant's employment, originally with Teleperformance, from 14 May 2018, had TUPE transferred to the respondents on or about 13 October 2018.

Claimant's Work with the Respondents

(9) Following her TUPE transfer, the claimant received certain training from the respondents, on 11 February, and 4 and 20 March 2019,

as vouched by an email of 29 October 2020 from Steven Inglis, the respondents' Training Delivery Manager, to Callum Dougan, Planning Delivery Manager, copy produced to the Tribunal at pages 245 to 247 of the Bundle.

(10) There were also produced to the Tribunal, as part of the Bundle used at this Final Hearing, some of the respondents' internal policy and procedure documents, specifically their Absence & Wellbeing Policy (at pages 136 to 142) ; Absence & Wellbeing Procedure (at pages 143 to 155); Conduct and Capability Policy (at pages 156 to 168); Conduct and Capability Procedure (at pages 169 to 178) ; Equality and Diversity Policy (at pages 179 to 183), and Flexible Working Policy (at pages184 to 186).

(11) Of these respondents' policy and procedure documents, not all were spoken to in evidence, and the Tribunal was referred, in the main, to the Conduct and Capability Policy and Procedure, the Equality and Diversity Policy, and the Flexible Working Policy.

(12) There were also produced to the Tribunal, and spoken to in evidence at this Final Hearing, the claimant's DSE record of 30 November 2018 (at pages 187 and 188 of the Bundle), signed off by the claimant on 25 October 2019, and reviewed by Jordan Adams, welfare meeting note of meeting with Jordin Adams on 11 December 2018 (at pages 189 to 192), and Cascade notes by Jordin Adams of 11 and 22 April 2019, 4 and 14 May 2019, and 6, 12 and 28 June 2019 (at pages 193 to 199).

(13) These show information, recorded by the claimant's line manager, Jordin Adams, about the claimant's interactions with her line manager, and actions agreed. Cascade is an internal computer system used by the respondents, and accessible by relevant managers, viewing on screen.

(14) While employed by the respondents, the claimant had raised various matters with her line manager, Jordin Adams, from time to time. In particular, in her DSE , on 25 October 2018, which he reviewed on 30 November 2018 (copy produced to the Tribunal at pages 187 and 188 of the Bundle), the claimant stated that she had medical conditions that required adjustments to be made, and she detailed that, in 2018, she was diagnosed with ovarian fibroid and as a result she was experiencing severe backpains and tummy ache, and she also suffered from fatigue, tiredness and headache.

(15) Further, at a welfare meeting with Mr Adams, on 11 December 2018 (copy notes produced to the Tribunal at pages 189 to 192 of the Bundle),the claimant raised her then current health, that she was suffering fatigue and headaches, with pain in the back, and an eye problem, and reasonable adjustments were identified to support her at work, including seat next to the window, and a possible different shift pattern, through a flexi-work agreement ("FWA")

(16) Thereafter, at meetings with Mr Adams, on 11 and 22 April 2019, as per copy cascade notes produced to the Tribunal at page 193 of the Bundle, the claimant's performance at work was discussed, and at a subsequent meeting with her, on 4 May 2019 (copy cascade note produced at page 195 of the Bundle), Mr Adams and the claimant had a discussion about her contract, and a possible FWA to try and address her medical conditions.

(17) Further, at a meeting with Mr Adams, on 14 May 2019, as recorded in the cascade note produced to the Tribunal (at page 196 of the Bundle), the claimant had advised Mr Adams that she was in talks with her GP to obtain a medical letter which would state why she needed to work between 8am and 8pm.

(18) In a subsequent cascade note, of 6 June 2019, copy produced to the Tribunal at page 197 of the Bundle, Mr Adams recorded that the claimant had approached him that day with a GP letter to highlight her conditions, and how he had supported her, through her DSE, which included her chair and mouse, and how Alex Thomson had provided her with a wrist rest to alleviate pain.

(19) At a further meeting with Mr Adams, on 12 June 2019, as recorded in the cascade note produced to the Tribunal (at page 198 of the Bundle), the claimant and Mr Adams discussed her then current health and how that was impacting her average handling time. She was awaiting approval of her FWA.

(20) At a meeting with Mr Adams, on 28 June 2019, as per the cascade note produced to the Tribunal (at page 199 of the Bundle), it is recorded that Victoria (Loudon) had spoken with the claimant and advised her that her current FWA did not support the respondents' business hours, and the claimant reported that she was asking for additional information from her GP to support her FWA to work 8am to 5:30pm because of her fatigue, and so she could take her pain medication early in the day.

(21) No copy of the claimant's FWA request was provided to the Tribunal by either party, although the claimant, in her evidence, stated she gave it to Jordin Adams in between May and June 2019, and she discussed it with Ms Loudon.

(22) From the evidence available to the Tribunal, it seems that from October 2018 onwards, following her TUPE transfer in from Teleperformance, the claimant continued to work rotational shifts between 8am and 8pm, whereas the Webhelp UK shift pattern was between 07:30am and 11:30pm.

(23) The claimant admitted, in her evidence to this Tribunal, that she did not work that extended shift pattern whilst in the employment of the respondents. A copy of her timesheets for March 2019 to July 2019 were produced to the Tribunal at pages 253 to 258 of the Bundle.

(24) Further, and again from the evidence available to the Tribunal, it seems that the claimant was, for all but one day in June 2019, on the shift pattern that she requested between 8am and 5:30pm. A copy of her shifts, worked in June 2019, from 27/05/19 to 30/06/19, was produced to the Tribunal in the Bundle at pages 259 to 263.

(25) As an additional document for the respondents, inserted in the Bundle as page 326 et seq, the Tribunal, on 1 December 2021, allowed the full 40-page document "***Teleopti WFM***" showing the claimant's shifts from 08/10/18 to 26/05/19, and this was spoken to in evidence by Mr Callum Dougan.

Investigation Meeting

(26) On 4 July 2019, the claimant attended an investigation meeting with Iain McIntyre, a Team Manager with the respondents, to discuss concerns about the number of calls which the claimant had terminated on customers.

(27) From a review of the claimant's calls, listened to by Mr Paul Tausney, a Team Manager with the respondents, it was found that, in the month of June 2019, 62 of 129 calls were terminated early when customers were upset or unhappy.

(28) There was produced to the Tribunal, at pages 248 to 250 of the Bundle, the respondents' Call History Trace report, showing the 62 calls of concern to the respondents, between 1 and 30 June 2019, showing calls by date and time, exit reason, routing point and contact ID, as also a brief description of the cause for concern.

(29) The investigation meeting was chaired by Mr McIntyre with Scott Stevenson attending as a note taker. A copy of the respondents' notes of that investigatory / fact finding meeting with Mr McIntyre on 4 July 2019 were produced to the Tribunal at pages 201 to 208 of the Bundle.

(30) During the investigation meeting, Mr McIntyre talked through the company's concerns, advising the claimant that it was an investigatory interview, and not a disciplinary hearing, and explaining that, as a result of the discussions, he would review what was discussed, and a decision would be made on whether there was any need to address the matter formally via a disciplinary hearing.

(31) The claimant stated that she would not be answering much or signing anything. She admitted that she understood that she shouldn't disconnect calls on customers. The claimant explained that she did not disconnect calls on customers and these were due to system issues and a problem with the phone system. She claimed that someone had been tampering with the phone system 'to make her look bad', and 'trying to set me up'.

Suspension pending Further Investigation

(32) After an adjournment, when the investigatory meeting reconvened, the claimant was suspended by Mr McIntyre pending further investigation. The claimant declined to sign a copy of the meeting notes as being an accurate record of the investigatory meeting.

(33) A copy of Mr McIntyre's letter confirming the claimant's suspension, wrongly dated 5 July 2018, was issued to the claimant on 5 July 2019. A copy of this suspension letter was produced to the Tribunal at page 214 of the Bundle.

Conduct Hearing

(34) Following the investigatory meeting, the claimant was sent a letter by Mr McIntyre on 4 July 2019 inviting her to a conduct hearing at 11:30 on Tuesday, 9 July 2019 for allegations of 62 instances of her terminating calls on customers.

(35) In that letter, a copy of which was produced to the Tribunal at pages 209 and 210 of the Bundle, the claimant was advised that the conduct hearing would be chaired by Ms Jade Bradley, a Manager, and that Alexander Thomson, a Team Manager, would also be in attendance to support and take notes of the hearing.

(36) The claimant was provided with a copy of all of the relevant documentation relating to the investigation and she was referred to the Conduct and Capability Policy and Procedure used by the respondents, a copy of which was sent to her with the invite.

(37) The claimant was informed that, if proven, the allegations against her could constitute gross misconduct under the respondents' Code of Conduct and that a possible outcome of the hearing, if the allegations were proven, might result in her summary dismissal from her employment at Webhelp UK. The claimant was informed of her right to be accompanied by a colleague or trade union representative.

(38) By a further letter from Mr McIntyre to the claimant, also dated 4 July 2019, the claimant was advised in identical terms, but for the conduct hearing would now be chaired by Ms Bradley on Thursday, 11 July 2019 at 11:30. A copy of this further letter was produced to the Tribunal at pages 211 and 212 of the Bundle.

(39) The reason for issue of this further letter to the claimant was recorded by Mr McIntyre, in a cascade note, copy produced to the Tribunal at page 213 of the Bundle, stating that the invite letter was

re-issued for 11 July 2019, as the claimant had called saying she only received the 9 July invite letter on 8 July, and therefore she had not had 48 hours' notice.

(40) The claimant duly attended the conduct hearing on 11 July 2019, and she was accompanied by a Thomas Momoh, a work colleague. He was in attendance as a companion, and not as the claimant's representative. The conduct hearing was chaired by Jade Bradley, Team Leader and Alexander Thomson, Team Leader, attended as a note taker.

(41) A copy of the respondents' notes of that conduct hearing with Ms Bradley on 11 July 2019 were produced to the Tribunal at pages 215 to 223 of the Bundle. They were signed, on 11 July 2019, by Ms Bradley, Mr Momoh, and Mr Thomson.

(42) The footer to the printed pages stated: "***These notes are not intended to be a verbatim account of the conversation which have taken place at this hearing but to capture the main points of the hearing."***

(43) Ms Bradley recorded, on page 9 of 9 of those notes of that conduct hearing, that the claimant ***"has declined to sign any notes today, as she feels they are inaccurate. We have offered to amend what is incorrect, however Muawana cannot advise currently what is incorrect."***

(44) At the conduct hearing, the claimant gave a different explanation for the termination of calls, explaining that she did not wilfully terminate the calls on purpose, but that due to her medical condition with an eyesight issue she sometimes struggled to press the correct button and may have terminated calls in error. She also referred to being on medication for pain.

(45) The claimant stated that she would never deliberately and wilfully end calls, and that she had a problem with her health, and she knew she was not working to her ability. She stated that she was sorry, and she was not performing well in June.

Summary Dismissal for Gross Misconduct

(46) Following an adjournment for Ms Bradley to speak with PAS (People Advisory Service) / HR for advice, when the conduct hearing restarted, Ms Bradley advised the claimant that as her dismissal was as a result of an act of gross misconduct, her dismissal was a summary dismissal, and therefore she would not receive notice pay. Her final date of employment with the company would be that day, 11 July 2019, and she would be paid any outstanding overtime and annual leave accrued but not taken.

(47) Ms Bradley also advised the claimant that her decision to summarily dismiss her would be confirmed in writing, and that she would receive a copy of the notes taken during the hearing. If she wished to appeal against her decision, Ms Bradley advised the claimant that she would need to put the reasons for her appeal in writing to the Senior People Advisor, within 7 calendar days of receiving her outcome letter, clearly stating her grounds of appeal.

(48) After giving the claimant those gross misconduct, and right of appeal, statements, Ms Bradley then asked the claimant whether she felt the meeting had been carried out in a fair manner. The claimant replied stating she could not comment upon that matter, and saying (sic): "***I believe this is a performance issue, and due to my health. I don't believe this has been taken into account. I would not deliberately end calls. I have issues with my hands and eyes. I cannot perform to best of ability."***

(49) Ms Bradley sent to the claimant a letter dated 11 July 2019, entitled "***Notice of Summary Dismissal***", a copy of which was provided to the Tribunal at pages 224 and 225 of the Bundle, confirming the outcome of the conduct hearting held that day, namely "***the decision to summarily dismiss you from your post of Customer Service Representative with immediate effect from 11th July in accordance with Webhelp UK's Conduct and Capability procedure."***

(50) In particular, the claimant was advised: ***"This Hearing was on the grounds that you released calls without reason or permission to do so, constituting therefore as Call Avoidance. I have taken into account all answers given at the hearing & all mitigation discussed or presented by yourself. The main points considered included correct processes not being followed, outside factors such as health, impact on customers & assessing future risks. (This list is not exhaustive)."***

(51) Further, Ms Bradley's outcome letter to the claimant stated that the incidents highlighted "***do constitute a breach of Webhelp UK's Conduct and Capability rules as outlined below***:

Gross Misconduct

1. Deliberately and wilfully cutting the customer off calls or other forms of call avoidance, including misuse of Company intranet or inappropriate use of Webhelp UK's time.

2 Actions which either bring or could potentially bring the Company or any of its clients into disrepute.

(52) Finally, the outcome letter of 11 July 2019 sent to the claimant advised her of her right of appeal, within five working days, and that she would get at least 48 hours' notice of the appeal hearing.

(53) Enclosed with the letter were minutes of the meeting, and the claimant was advised that if she had any dispute with the content of these notes (not intended to be a verbatim account of the meeting, but rather a summary of the main points discussed), she should mark any proposed changes clearly and return to Ms Bradley signing and dating the minutes.

(54) If not received within 5 working days of the date of the letter, it was stated that Ms Bradley would assume that the claimant agreed with the content of the minutes. However, by letter to Ms Bradley, dated 17 July 2019, a copy of which was produced to the Tribunal at page 228 of the Bundle, the claimant stated: "***My decision not to sign the handwritten meeting notes from the meeting held on 11/07/2019 remains the same. The handwriting is also not clear and it's very difficult to read."***

(55) The notes of the conduct hearing on 11 July 2019 had been signed by the 3 other persons present, on the same day, but the claimant had then declined to sign, as per Ms Bradley's handwritten annotation on page 9 of 9.

(56) At this Final Hearing, the Tribunal was able to read, without any difficulty, those notes, partly typewritten, and partly handwritten, mainly by Mr Thomson, the note taker, and with Ms Bradley's handwritten annotation on page 9 of 9.

Appeal against Dismissal

(57) The claimant appealed against the decision to dismiss her in writing with a letter dated 17 July 2019, addressed to the

respondents' Senior People Adviser, a copy of which was produced to the Tribunal at page 229 of the Bundle.

(58) In her typed letter of appeal, the claimant intimated that the conduct hearing "***did not take into account relevant factors that affected my performance, including lack of training, technical issues with the call handling system and my experience of harassment by colleagues."***

(59) Further, the claimant also stated that: "***I believe I am being discriminated against on the grounds of disability – I have previously requested reasonable adjustments from my employer for a medical condition for which I am receiving treatment and recovering from, which have not been met, which has impacted on my ability to perform."***

Appeal Hearing

(60) The claimant's appeal hearing was originally scheduled by Victoria Loudon, the respondents' Operations Manager, for 1 August 2019 at 13:00, for an appeal hearing to be chaired by Ms Loudon, and with Jamie Farwell also to be in attendance to take notes of the meeting. A copy of this invite letter dated 25 July 2019 was produced to the Tribunal at page 230 of the Bundle.

(61) In that invite letter, Ms Loudon advised the claimant that she could, if she so wished, be accompanied by a workplace colleague or a trade union representative, and it was noted that the appeal is not a re-hearing of the initial conduct hearing, but the opportunity for the claimant to raise her concerns in relation to the initial decision to dismiss her on 11 July 2019. A copy of the appeal process as detailed in the respondents' Conduct and Capability Procedure was enclosed for the claimant's perusal.

(62) The claimant did not attend the appeal hearing on 1 August 2019, as she was unaware that it had been fixed. While Ms Loudon's invite letter had been posted to her, the claimant did not receive it, as the respondents had posted it to her home address but without the appropriate postage paid.

(63) There was produced to the Tribunal, at pages 232 to 235 of the Bundle, a Royal Mail unpaid postal slip and postal stamps receipt dated 30 July 2019. The respondents, as sender, had not paid the full postage due of £2.00.

(64) When the claimant did not appear, on 1 August 2019, Mr Jamie Farwell contacted the claimant who advised she had not received notification of the appeal hearing date. The respondents agreed to reschedule the hearing for the 8 August 2019 at 13:00 to hear the claimant's appeal.

(65) A fresh invite letter from Mr Farwell, Operations Manager, was sent to the claimant on 1 August 2019, a copy of which was produced to the Tribunal at page 236 of the Bundle. It stated that the appeal hearing would be chaired by him, with Steven Murdoch in attendance to take notes of the meeting. Otherwise, the terms of the invite, and enclosure, were as per Ms Loudon's original invite letter of 25 July 2019 to the appeal hearing then scheduled for 1 August 2019.

(66) The appeal hearing was held on Thursday, 8 August 2019, when the claimant attended, unprepared, and she had not arranged for a companion to attend along with her. After discussion, she was thereafter accompanied by Karen Walker, a work colleague. She was in attendance as a companion, and not as the claimant's representative. Jamie Farwell, Operations Manager, heard the claimant's appeal and Steven Murdoch attended as a note taker.

(67) A copy of the respondents' wholly typewritten notes of that appeal hearing with Mr Farwell on 8 August 2019, prepared by Mr Murdoch on the day, were produced to the Tribunal at pages 237 to 243 of the Bundle. They were not signed by any of the 4 attendees at that appeal hearing.

(68) At the appeal hearing, the claimant offered additional explanations for termination of customer calls which were not offered at the conduct hearing or the investigation meeting. The additional explanations offered by the claimant were that there was a lack of training on the functionality of the phone, due to medication she experienced drowsiness, on occasions she couldn't hear the customer on the other end of the phone and that she was sensitive to lights. She stated that she would like to appeal based on her disability.

(69) Mr Farwell found it a difficult meeting, as the claimant jumped from point to point, and often ignored the questions being asked, or responded saying she could not recall. The claimant was asked a series of questions about her disability and medical conditions, and what impact it had on her hanging up on customers. She did not present any new evidence to the appeal hearing that put Mr Farwell in a position where he felt it was appropriate to investigate any further.

Appeal not Upheld

(70) Mr Farwell considered the claimant's points of appeal but, on balance, he believed that the claimant had hung up calls deliberately, so he decided to uphold the original decision made by Ms Bradley. He stated that he would not uphold the claimant's appeal, as "***I feel that the information provided was correct. The investigation was handled with integrity. The breaches***

were far too extensive for us to put this down to any medical condition considering how sporadic and spread out they are."

(71) His decision was confirmed in a letter sent to the claimant dated 12 August 2019. In her ET1 claim form, the claimant asserted that she had not received the outcome or minutes from her appeal meeting, until she received a copy from Mr Byrom, the respondents' solicitor, after having raised her ET claim against the respondents.

(72) In his outcome letter to the claimant, dated 12 August 2019, a copy of which was produced to the Tribunal at page 244 of the Bundle, Mr Farwell confirmed to her the outcome of her appeal hearing held on 8 August 2019 as delivered to her at that hearing.

(73) Mr Farwell's appeal hearing outcome letter stated his decision very briefly: ***"After listening to the points raised by yourself and having given them careful consideration, I now confirm the decision taken following the Appeal Hearing, namely that the decision to Dismiss will be upheld. You have now exhausted all internal appeal procedures, therefore this decision is final."***

(74) Mr Farwell's letter of 12 August 2019 enclosed minutes of the appeal meeting, and the claimant was advised that if she had any dispute with the content of these notes (not intended to be a verbatim account of the meeting, but rather a summary of the main points discussed), she should mark any proposed changes clearly and return to Mr Farwell signing and dating the minutes.

(75) If not received within 5 working days of the date of the letter, it was stated that Mr Farwell would assume that the claimant agreed with the content of the minutes. As the claimant states she did not receive Mr Farwell's letter of 12 August 2019, the notes of that

meeting, taken by Mr Murdoch, were never reviewed, or amended, by the claimant.

(76) Mr Farwell, in his evidence to the Tribunal, stated he understood the notes of the appeal hearing, and his confirmatory outcome letter, had been posted first class to the claimant by the respondents on or about 12 August 2019.

ACAS Early Conciliation and Tribunal Proceedings

(77) After the termination of her employment with the respondents, on 11 July 2019, the claimant, with the benefit of legal advice from a Ms Lucy Neil, solicitor with Livingstone Brown, solicitors, Glasgow, notified ACAS on 18 October 2018 of a prospective claim against the respondents.

(78) It is not known by the Tribunal when the claimant first instructed those solicitors, nor what legal advice she may have received from them.

(79) Thereafter, on 2 November 2019, ACAS emailed the claimant with an Early Conciliation Certificate **R586999/19/17** confirming that she had complied with the requirement under **Section 18A of the Employment Tribunals Act 1996** to contact ACAS before instituting proceedings against the respondents in the Employment Tribunal. A copy was produced to the Tribunal at page 36 of the Bundle.

(80) On 4 November 2019, Ms Neil, as the claimant's representative, presented her ET1 claim form to the Glasgow ET. A copy was produced to the Tribunal at page 5 to 21 of the Bundle.

(81) The claimant stated that she was discriminated against on the grounds of race and disability, and that she was owed notice pay,

as per the boxes ticked at section 8.1 of her ET1 claim form detailing the type of claim she was making.

(82) While, in the course of the respondent's internal proceedings, the claimant had referred to being discriminated against on grounds of disability, and she expressly raised that matter in her internal appeal against dismissal, she had not alleged any racial discrimination, until her ET1 claim form was presented.

(83) As per the detailed 5-page, 27 paragraph, paper apart to the ET1 claim form, being the details of her claim sought at section 8.2 of the ET1 claim form, the claimant stated that she brought claims under **Section 13** (direct discrimination); **Section 15** (discrimination arising from disability), **Section 21** (failure to make reasonable adjustments), **Section 26** (harassment), and **Section 27** (victimisation) of the **Equality Act 2010**. The legal basis of the claim for failure to pay notice pay was not expressly pled there.

(84) The claimant sought an award of compensation only against the respondents, in the event that her claim was to be successful, but she did not detail the amount of compensation she was seeking, other than to state that she was seeking compensation for financial loss and injury to feelings.

Claimant's Disability Status

(85) In her ET1 claim form, the claimant stated that, at all material times, she had suffered from a range of physical conditions, specifically (a) Carpal Tunnel Syndrome; (b) Back pain; (c) Anaemia; (d) Fibroids; and (e) Dry eyes.

(86) She further stated that conditions (a), (b), (c) and (d) caused her to suffer from significant fatigue, and that conditions (a), (b), (d) and (e) all caused her to suffer from pain, and that both the fatigue and pain contributed to a significant impact on her concentration.

(87) The claimant relied upon conditions (a), (b) and (d) as disabilities in their own right, and she further averred that each of those conditions had a substantial long-term adverse effect upon her ability to carry out normal day-to-day activities, and that the adverse impact, in her case, was on her concentration.

(88) While she did not seek to prove that condition (c) is a qualifying disability, the claimant did contend that her anaemia interrelates with and exacerbates the impact caused by conditions (a), (b) and (d).

(89) The claimant obtained a confidential medical report from her GP, Dr D Kerr from the Castlemilk Group Practice. A copy of the GP's report of 27 March 2020 was produced to the Tribunal at pages 268 and 269 of the Bundle. A further GP report, by Dr Kirsty Brown, was prepared on 20 August 2020, and a copy of that report was produced to the Tribunal at page 325 of the Bundle.

(90) The claimant's disability impact statement, provided to the Tribunal on 10 April 2020, and copy produced at pages 265 and 266 of the Bundle, stated as follows:

> *I started work for Webhelp UK on 14 May 2018 as a Customer Service Representative.*
>
> *I went to my GP and explained my symptoms also expressed my desire to change my shift pattern to support my health and well-being.*
>
> *Subsequent to that, in November 2018 I contacted my former managers Alexander Thomson and Jordin Adams about the possibly of working flexi shift because I find it very difficult to concentrate due to extreme pain and excessive tiredness, experienced during shift schedule between 11:00 am – 20:00pm. I advised both managers about the symptoms I was*

experiencing at that time fibroids, headache, back pain and fatigue. I requested to work shifts during day in order to access natural day light also to ensure that I start and finish work early to get adequate rest to alleviate the symptoms of pain and excessive tiredness.

Towards the end of November 2018, the headaches became worse, as my condition worsened, in December 2018, I went to my Optician and I was advised that my eyes were healthy and the headache was unlikely do with my eyes and recommended that my GP conduct further tests.

As a result of the painful headaches I became disoriented at work. I felt pain while handling calls also found it very difficult to concentrate, handle calls and to type case notes.

In December 2018, the extreme pain and fatigue continued both at work and home as a result of symptoms of uterine fibroids. I experienced sudden sharp pains in lower back, pelvis and adnominal whilst speaking to customers. I also found it very difficult to communicate and listen to customers clearly whilst operating the telephone system.

I found it very difficult to take toilet breaks to avoid incontinence due to fibroid pressing on bladder and felt extremely tired and used the toilet frequently. I also had difficulties with the phone system as on many occasions the phone system was overriding after calls and hold procedure.

The prolonged and heavy menstrual bleeding made me feel tired and fatigued at home and work. It also affected my concentration and performance. Sometimes I feel down and irritable and find it hard to visit and socialise with friends. I am always tired and exhausted. I mostly wake up feeling very tired.

As a result, I am required to take naps during the day. I also found it very hard to start a shift very early in the morning and finish late in the evening.

My GP and hospital did various tests and I was prescribed tranexamic acid to prevent excessive blood loss and co-codamol to treat the pain.

I always carry my medications with me so I can take them regularly. If I am too busy and forget to take the tranexamic acid and co-codamol tablets within one hour I could feel the effects and find it very difficult to concentrate and also experience severe pain.

I began to feel very tired and my symptoms were progressively getting worse. I had painful headache, back pain, weakness in legs and arms, and lack of energy.

It had become apparent that I was also suffering with anaemia due to excessive blood loss. Sometimes I find it very difficult to walk short distances. One day on my way to GP surgery I felt breathless and was feeling tightness in my chest. My doctor put me on iron medication. After a while I am required to stop taking the medication when my iron level is back to normal. The moment I stopped taking the medication my iron level tends to dropped dramatically.

When I am feeling fatigued, it affects my ability to focus and perform task correctly. The symptom makes me very forgetful and I find it very difficult remembering and organising task. I sometimes use to seek assistance from a colleague to remind me to call back a customer or to follow up with their enquiry.

In March 2019 I advised Mr Adam that I was feeling pain in wrist and also, I had a swollen wrist. I experienced weakness in my

hand and I found it very painful and difficult to type case notes. The pain later travelled to my upper arms shoulder and neck, therefore, typing for long hours was very challenging.

On many occasions my hand froze and refused to move while I was speaking to a customer over the telephone. This led me to sometimes use a wrist splint to help alleviate pain in my wrist.

All of the impairments listed at section 2.2.1 of PH agenda except for dry eyes had a substantial and long-term effect on my ability to carry out day-to-day activities. I do not wish to remove any of the complaints.

(91) On 24 April 2020, the claimant having provided the Tribunal, and Mr Byrom, the respondents' solicitor, with a GP report dated 27 March 2020, and her disability impact statement, the respondents conceded disability status in respect of Carpal tunnel syndrome, anaemia, and fibroids, but disputed disability status in respect of back pain and dry eyes.

(92) A copy of Mr Byrom's email of 24 April 2020 was produced to the Tribunal at pages 83 to 86 of the Bundle. The respondents sought further information and / or supporting documentation in respect of the substantial and long-term effect on the claimant's day-to-day activities as a consequence of back pain and dry eyes.

(93) On 11 June 2020, the claimant provided the Tribunal, and Mr Byrom for the respondents, with an email giving further information, about back pain and dry eyes, a copy of which was produced to the Tribunal at page 267 of the Bundle. So far as material for present purposes, in that email the claimant stated as follows: -

"The back pain started in June 2018. I advised Manager Jordin Adams at a welfare meeting on 11/12/18.

I also advised my GP in March and May 2019 I was experiencing lower back pain.

Towards the end of May 2019 the LBP became worse. I felt sudden sharp pain especially during my menstrual cycle. I took co-codamol pain tablets to treat the LBP and other parts of my aching body. Sometimes found it very difficult to move / come out of bed when I'm in pain. It is very important I take my medication on time. If I missed a dose the symptom returns and I find it very difficult to move quickly and to concentrate. I also experienced severe pain / stress at home and at work.

In 2018 I went to my optician because I was suffering from severe headaches and was advised that my eyes were healthy.

At work I noticed that my eyes were very sensitive to artificial lighting and requested to work during the day also to be seated next to a window in order to access natural lighting.

In April / May 2019 I also noticed that the computer I was designated to use the screen was flickering constantly. I advised Mr Adams in May 2019 and it was fixed June 2019.

On many occasions I had to place customers on hold or transfer customer to another representative because I found it very difficult to read the information on the computer screen when the screen was flickering.

I went back to my optician on 5 July 2019 and I was diagnosed with Dry eyes / Flick Blinker and was advised to use eye gel.

(94) The further GP report of 20 August 2020, by Dr K Brown, copy produced to the Tribunal at page 325 of the Bundle, did not repeat the information provided in Dr Kerr's report of 27 March 2020, but Dr Brown did report that the claimant reported symptoms of

mechanical back pain on 12 March 2019, and it was felt that this could have been due to sitting at a desk all day and it was recommended that the claimant try and improve her desk and work chair.

(95) Dr Brown also reported that the claimant suffered with significant back pain due to her uterine fibroids, which was discussed during a consultation on 24 May 2019, when the claimant complained of finding the pain worse in the mornings until her pain relief had taken effect. To try and accommodate this, a Med 3 doctor's statement was issued on 24 May 2019 advising of altered hours and the claimants' inability to start work before 8am due to back pain, and it was noted that she took co-codamol as required for pain.

(96) As part of the claimant's medical documentation produced to the Tribunal, there were also produced letters from the claimant's GP dated 12 March, 31 May and 3 July 2019 (at pages 273 to 275 of the Bundle), the latter from Dr D Kerr addressed to the employer saying: "Ms ***McCollin has been experiencing profound fatigue for which she is having medical investigation and medical care. I would stress to you that the details of this are confidential without patient consent. Furthermore, I recommend that Ms McCollin is referred to an Occupational Health service if a resolution cannot be made because it is outwith the remit of me as her GP."***

(97) The respondents did not refer the claimant to an Occupational Health service for any assessment, despite the claimant giving that GP letter of 3 July 2019 to her line manager, Jordin Adams, on 4 July 2019, and him then returning it to her.

(98) Instead, the claimant was called to the investigatory meeting with Iain McIntyre, at which she was suspended pending further

investigation, leading to her conduct hearing, and summary dismissal, by Ms Bradley on 11 July 2019, as upheld by Mr Farwell at the appeal hearing on 8 August 2019.

Tribunal's assessment of the evidence heard at the Final Hearing

35. In considering the evidence led before the Tribunal, we have had to carefully assess the whole evidence heard from the various witnesses led before us, and to consider the many documents produced to the Tribunal in the Bundle lodged and used at this Final Hearing, so far as spoken to in evidence, which evidence and our assessment we now set out in the following sub-paragraphs: -

(1) Mr Paul Tausney: respondents' Team Leader

(a) Mr Tausney (aged 41, and with 3 years' employment with the respondents) was the first witness for the respondents to be heard by the Tribunal on day 2 of the Final Hearing, on Tuesday, 30 November 2021. After affirming, he confirmed, without amendment, the terms of his 7-page, written witness statement, extending to 26 paragraphs, which he dated and signed as being true to the best of his knowledge and belief.

(b) In giving his evidence to the Tribunal, Mr Tausney did so explaining his role, and involvement in the claimant's case, including his involvement in the Quality Team process investigating concerns about the claimant's calls. He stated, at paragraph 23 of his witness statement, that the claimant's calls, which he listened to, were "***amongst the most blatant unreasonable disconnects that I have ever heard"***, and he could not see any reason for her calls

dropping off other than the claimant was trying to avoid taking the full call.

(c) Mr Tausney gave his evidence clearly and confidently, under reference to the relevant productions contained within the Bundle used at the Final Hearing, and he was fairly clear and articulate in answering supplementary questions put to him in examination in chief by Mr Byrom, solicitor for the respondents, when he was asked about certain paragraphs within the claimant's own witness statement produced to the Tribunal.

(d) Further, Mr Tausney was subject to cross-examination by the claimant, but his evidence in chief was not undermined. Overall, Mr Tausney's evidence satisfied us that he was giving the Tribunal a full recollection of events, as best he could remember them, and he came across to the Tribunal as a credible and reliable witness.

(2) <u>Mr Iain McIntyre: - respondents' Team Leader</u>

(a) Mr McIntyre (aged 51, with 2 years' employment with the respondents) was the second witness led on behalf of the respondents, and he too gave his evidence on Tuesday, 30 November 2021. After affirming, he confirmed, without amendment, the terms of his 4-page, written witness statement, extending to 21 paragraphs, which he dated and signed as being true to the best of his knowledge and belief.

(b) In giving his evidence to the Tribunal, Mr McIntyre did so under reference to the various documents contained within the Bundle, identifying those which he had access to at the time of his involvement in the claimant's case, and he generally explained his role, as chair of the investigatory /

fact finding meeting held with the claimant, on 4 July 2019, and why he felt it was appropriate, following that investigation, for the claimant to be called to a Conduct Hearing under the respondents' Conduct and Capability Procedure. His evidence was generally in accord with the contemporary records taken at the time, and produced to the Tribunal in the Bundle.

(c) Mr McIntyre was fairly clear and articulate in answering supplementary questions put to him in examination in chief by Mr Byrom, solicitor for the respondents, when he was asked about certain paragraphs within the claimant's own witness statement produced to the Tribunal.

(d) Further, Mr McIntyre was subject to cross-examination by the claimant, but his evidence in chief was not undermined. Overall, he was a witness who satisfied us that he was recounting events as best he could recall, and he came across to the Tribunal as a credible and reliable witness speaking clearly, and confidently, to his role as a decision maker at the investigatory meeting held with the claimant on 4 July 2019.

(3) <u>Mr Scott Stevenson: - respondents' Team Leader</u>

(a) Mr Stevenson (aged 37, with less than one years' employment with the respondents in his current role) was the third witness led on behalf of the respondents, and he also gave his evidence on Tuesday, 30 November 2021. After affirming, he confirmed, without amendment, the terms of his 4-page, written witness statement, extending to 15 paragraphs, which he dated and signed as being true to the best of his knowledge and belief.

(b) In giving his evidence to the Tribunal, Mr Stevenson did so under reference to the various documents contained within the Bundle, identifying those which he had access to at the time of his involvement in the claimant's case, specifically the investigatory meeting with the claimant, chaired by Mr McIntyre, on 4 July 2019, where the witness was note-taker at that meeting.

(c) He recalled that the claimant refused to sign the notes taken at that meeting, albeit he had not annotated the notes to record that fact. His evidence was generally in accord with the contemporary records taken at the time, and produced to the Tribunal in the Bundle. He was not asked any supplementary questions by Mr Byrom, solicitor for the respondents.

(d) However, Mr Stevenson was subject to cross-examination by the claimant, where his evidence in chief was not undermined. Overall, he was a witness who satisfied us that he was recounting events as best he could recall, and he came across to the Tribunal as a credible and reliable witness speaking clearly, and confidently, to his role as note-taker at the investigatory meeting held with the claimant on 4 July 2019.

(4) <u>Mr Alexander Thomson: - respondents' Team Leader</u>

(a) Mr Thomson (aged 50, with 3 years' employment with the respondents) was the fourth witness led on behalf of the respondents, and he gave his evidence on day 3, Wednesday, 1 December 2021. After being sworn, he confirmed, with a minor amendment to paragraph 20, to correct the typographical error of "***now***", and replace it with "***not"***, the terms of his 9-page, written witness statement,

extending to 38 paragraphs, which he dated and signed as being true to the best of his knowledge and belief.

(b) In giving his evidence to the Tribunal, Mr Thomson did so under reference to the various documents contained within the Bundle, identifying those which he had access to at the time of his involvement in the claimant's case, and he generally explained his role, as note-taker at the Conduct Hearing with the claimant, on 11 July 2019, chaired by Ms Jade Bradley. His evidence was generally in accord with the contemporary records taken at the time, and produced to the Tribunal in the Bundle.

(c) Mr Thomson was fairly clear and articulate in answering supplementary questions put to him in examination in chief by Mr Byrom, solicitor for the respondents, when he was asked about certain paragraphs within the claimant's own witness statement produced to the Tribunal.

(d) Further, Mr Thomson was subject to cross-examination by the claimant, but his evidence in chief was not undermined. Overall, he was a witness who satisfied us that he was recounting events as best he could recall, and he came across to the Tribunal as a credible and reliable witness speaking clearly, and confidently, to his role as a note-taker at Ms Bradley's Conduct Hearing held with the claimant on 11 July 2019.

(5) <u>Mr Callum Dougan: - respondents' Planning & Delivery Manager</u>

(a) Mr Dougan (aged 34, with 3 years' employment with the respondents) was the fifth witness led on behalf of the respondents, and he also gave his evidence on Wednesday, 1 December 2021. After being sworn, he

confirmed, with a minor amendment to paragraph 17, to correct the typographical error of "***manger***", and replace it with "***manager***", amendment, the terms of his 4-page, written witness statement, extending to 21 paragraphs, which he dated and signed as being true to the best of his knowledge and belief.

(b) In giving his evidence to the Tribunal, Mr Dougan did so under reference to the various documents contained within the Bundle, identifying those which he had access to at the time of his involvement in the claimant's case, and he generally explained his role, as being limited to being asked to supply different pieces of data, for the disciplinary investigation into the claimant, including shifts worked by the claimant, calls handled on specific days, and the number of calls terminated. His evidence was generally in accord with the contemporary records taken at the time, and produced to the Tribunal in the Bundle.

(c) Mr Dougan was fairly clear and articulate in answering supplementary questions put to him in examination in chief by Mr Byrom, solicitor for the respondents, when he was asked about certain paragraphs within the claimant's own witness statement produced to the Tribunal.

(d) Further, Mr Dougan was subject to cross-examination by the claimant, but his evidence in chief was not undermined. Overall, he was a witness who satisfied us that he was recounting events as best he could recall, and he came across to the Tribunal as a credible and reliable witness speaking clearly, and confidently, to his investigative / data gathering role in the claimant's case.

(6) <u>Mr Steven Murdoch: - respondents' Operations Manager (by CVP)</u>

(a) Mr Murdoch (an employee with 2 years' employment with the respondents) was the sixth witness led on behalf of the respondents, and he too gave his evidence on Wednesday, 1 December 2021. He gave his evidence remotely, joining the in person Final Hearing through use of CVP. He had available to him, at his home, a full set of the Bundle, and witness statements, as he would have had had he been in attendance personally and giving his evidence from the witness table in the Glasgow Tribunal Centre.

(b) After being sworn, Mr Murdoch confirmed, without amendment, the terms of his 10-page, written witness statement, extending to 35 paragraphs, which he confirmed as being true to the best of his knowledge and belief. As he was not present in person, he did not date or sign the copy of his own witness statement included in the respondents' folder of witness statements.

(c) In giving his evidence to the Tribunal, Mr Murdoch did so under reference to the various documents contained within the Bundle, identifying those which he had access to at the time of his involvement in the claimant's case, and he generally explained his role, as note-taker at the Appeal Hearing taken by Mr Jamie Farwell, with the claimant, on 8 August 2019. His evidence was generally in accord with the contemporary records taken at the time, and produced to the Tribunal in the Bundle.

(d) Mr Murdoch was fairly clear and articulate in answering supplementary questions put to him in examination in chief

by Mr Byrom, solicitor for the respondents, when he was asked about certain paragraphs within the claimant's own witness statement produced to the Tribunal.

(e) Further, Mr Murdoch was subject to cross-examination by the claimant, but his evidence in chief was not undermined. Overall, he was a witness who satisfied us that he was recounting events as best he could recall, and he came across to the Tribunal as a credible and reliable witness speaking clearly, and confidently, to his role as note-taker at the Appeal Hearing chaired by Mr Farwell with the claimant on 8 August 2019.

(7) <u>Mr Jamie Farwell: - formerly respondents' Operations Manager</u>

(a) Mr Farwell (aged 32, who left the respondents' employment in April 2021, and he is currently an Operational Support Manager with the Macmillan Cancer Trust) was the seventh witness led on behalf of the respondents, and he gave his evidence on day 4, Thursday, 2 December 2021. He was attending in response to a Witness Order granted by the Tribunal, on the respondents' application, on 30 November 2021.

(b) His evidence was taken out of the previously arranged running order, as Ms Jade Bradley, as the respondents' dismissing manager, was not in attendance for the 10am start, and so the Tribunal proceeded to hear from Mr Farwell first, varying our Timetabling Order accordingly.

(c) After being sworn, Mr Farwell confirmed, without amendment, the terms of his 4-page, written witness statement, dated 25 November 2021, and extending to 19

paragraphs, which he signed as being true to the best of his knowledge and belief.

(d) In giving his evidence to the Tribunal, Mr Farwell did so under reference to the various documents contained within the Bundle, identifying those which he had access to at the time of his involvement in the claimant's case, and he generally explained his role, as chair of the Appeal Hearing held with the claimant, on 8 August 2019, and why he felt it was appropriate, following that meeting, to uphold Ms Bradley's earlier decision terminating the claimant's employment on 11 July 2019. His evidence was generally in accord with the contemporary records taken at the time, and produced to the Tribunal in the Bundle.

(e) Mr Farwell was fairly clear and articulate in answering supplementary questions put to him in examination in chief by Mr Byrom, solicitor for the respondents, when he was asked about certain paragraphs within the claimant's own witness statement produced to the Tribunal.

(f) He clarified that the respondents' notes of the Appeal Hearing, taken by Mr Murdoch were accurate, and that it had never been suggested otherwise by the claimant, until this Tribunal Hearing, and he spoke to the appeal process having been handled "***with integrity.***"

(g) Mr Farwell was subject to cross-examination by the claimant, but his evidence in chief was not undermined, despite the Tribunal allowing the claimant additional time, over and above her allocated ½ hour to cross-examine him.

(h) Overall, Mr Farwell was a witness who satisfied us that he was recounting events as best he could recall, and he came across to the Tribunal as a credible and reliable witness speaking clearly, and confidently, to his role as the decision maker at the Appeal Hearing held with the claimant on 8 August 2019.

(8) <u>Ms Jade Bradley: - formerly respondents' Team Manager</u>

(a) The final, and eighth, witness for the respondents heard by the Tribunal was Ms Bradley, and her evidence was taken on the afternoon of Thursday, 2 December 2021, when she was examined in chief by the respondents' solicitor, Mr Byrom and thereafter cross-examined by the claimant. There was no witness statement provided to the Tribunal for this witness.

(b) She was attending in response to a Witness Order granted by the Tribunal, on the respondents' application, on 30 November 2021. Cited to attend at 10am, she failed to appear, as the postal copy had gone to her last known address known to the respondents, not her current home address, and the email copy sent to her private email address had gone to junk mail.

(c) On account of her failure to appear, Ms Bradley had to be contacted by the Tribunal clerk. She appeared thereafter, but, on account of her late arrival at the Tribunal, she had to await Mr Farwell's evidence concluding, before the Tribunal could hear her evidence.

(d) Ms Bradley advised the Tribunal that she had left the respondents' employment in September 2019, having had 2 years' employment with them by that time, and, after

another job taken up in the interim, she has, since November 2020, been employed as an Operations Manager with Go-Centric.

(e) In giving her sworn evidence to this Tribunal, Ms Bradley did so under reference to the various documents contained within the Bundle, identifying those which she had access to at the time of her involvement in the claimant's case, and she generally explained her role, as chair of the Conduct Hearing held with the claimant, on 11 July 2019, and why she felt it was appropriate to summarily dismiss the claimant so terminating the claimant's employment with the respondents. Her evidence was generally in accord with the contemporary records taken at the time, and produced to the Tribunal in the Bundle.

(f) Ms Bradley was subject to cross-examination by the claimant, but her evidence in chief was not undermined, despite the Tribunal allowing the claimant additional time, over and above her allocated ½ hour to cross-examine her.

(g) Overall, Ms Bradley was a witness who satisfied us that she was recounting events as best she could recall, and she came across to the Tribunal as a credible and reliable witness speaking clearly, and confidently, to her role as the decision maker at the Conduct Hearing held with the claimant on 11 July 2019.

(9) <u>Ms Muawana McCollin: claimant</u>

(a) The claimant was the ninth, and last, witness to be heard by the Tribunal on day 5, Friday, 3 December 2021. After

being sworn, she confirmed her own 21-page witness statement signed on 29 November 2021, extending to 47 paragraphs, which she had then signed as being true to the best of her knowledge and belief. She confirmed that she understood that it would be taken as her evidence in chief to the Tribunal, and that its contents were to be taken as read.

(b) Thereafter, on day 5, she sought, and the Tribunal granted an adjournment for her to consider making amendments to her witness statement, in light of the Tribunal's interlocutory rulings earlier in the week. When proceedings resumed, she signed her revised witness statement, dated 3 December 2021, containing many manuscripts, handwritten amendments, and she confirmed that revised version to be true to the best of her knowledge and belief.

(c) While the claimant's revised witness statement was then taken as read, she was, as agreed by the Judge with both parties, then asked a series of supplementary questions by the Employment Judge, designed to clarify certain matters not included by her, in her own witness statement, but relevant and necessary for the Tribunal to adjudicate upon the agreed List of Issues.

(d) In giving her evidence to the Tribunal, and being further examined in chief by the Judge, the claimant did so under reference to the various documents contained within the Bundle, and cross-referenced in her own witness statement, including her 19 February 2020 PH Agenda (at pages 40 to 55 of the Bundle); her disability impact statement, as attached to her email of 10 April 2020 to the Tribunal (at pages 265 & 266); and her email of 11 June

2020 (at page 267) with further information about back pain and dry eyes.

(e) Generally speaking, the claimant did so in a relatively calm and relaxed manner, albeit it was clear to the Tribunal, and the respondents' solicitor, that she was not at ease with the Tribunal evidence giving process, sometimes crying and upset, until re-assured by the Tribunal, and comforted and re-assured by her supporter, Ms Ahomade. As we detailed earlier, at paragraph 21 above of these Reasons, the claimant was very quietly spoken, and often had to be asked to speak up so everybody present. could hear her.

(f) When the claimant came to be cross-examined by Mr Byrom, solicitor acting for the respondents, her answers to his questions in cross-examination were more difficult to comprehend, and it appeared to the Tribunal that, from time to time, the claimant was evasive, sometimes ambiguous, and, at other times, seeking to embellish her pled case before the Tribunal.

(g) By way of example, we note and record that, on 3 December 2021, when cross-examining Mr Farwell, she put it to him that the appeal outcome had been pre-determined As we have recorded, in our fifth Note & Orders, at paragraphs 15 and 16, in the course of her cross-examination, at around 15:47, the claimant stated that the respondents' manager, Mr Farwell, was reasonable in asking her about her medications, and the claimant stated that her concern was that he asked in the presence of the her work colleague, Karen Walker.

(h) The claimant then stated that her appeal outcome was pre-determined, as nobody was supporting her, and it was just

a formality, and going through a process. When the Judge observed that her ET1 claim form does not say her appeal was pre-determined (only her dismissal), and likewise no such complaint in her witness statement, the claimant accepted that she had not put that point to Mr Farwell, when she cross-examined him, and, as such, the claimant stated, at around 15:51, that she withdrew that allegation of her appeal being pre-determined.

(i) As an example of the claimant's confusion, we note and record how, in her own witness statement, at paragraph 40, referring to the appeal hearing with Jamie Farwell, on 8 August 2019, she stated: "***The appeal against the decision to dismissed*** (sic) ***me was upheld. Please see bundle doc no:239)"***. In fact, of course, her appeal against dismissal was not upheld – as per Mr Farwell's oral decision to her, at the close of the appeal hearing on 8 August 2019, and his confirmatory letter of 12 August 2019 (copy produced at page 244 of the Bundle) it was Ms Bradley's decision to dismiss that was upheld. Even in reviewing her witness statement, and making amendments on 3 December 2021, the claimant did not amend that paragraph 40.

(j) In advance of her cross-examination of the respondents' witnesses, the claimant, as an unrepresented party litigant, was given some standard guidance by the Employment Judge (consistent with his duty to further the Tribunal's overriding objective under **Rule 2**, and ensure parties are on an equal footing) as to how to cross-examine witnesses being led on behalf of the respondents, putting her case to them, and of the importance of not making statements, while asking questions, but asking bite

sized questions of witnesses to allow the witness time to answer that question, before going on to the next question.

(k) While not previously experienced in asking cross-examination questions of witnesses in a formal, legal setting, such as this Final Hearing, it was clear to the Tribunal that, with practice, over several days, her confidence increased, and the claimant's ability to cross-examine witnesses improved, and she was asking them questions pre-prepared, and noted in her notebook that she referred to when questioning witnesses led by the respondents.

(l) However, the claimant often, in the course of giving her answers to the Tribunal, and particularly in the course of cross-examining the respondents' witnesses, sought to raise new matters, which had not been pled in the original ET1 claim form, nor foreshadowed in her own, revised witness statement provided by her to the Tribunal. She did not always put to them points from her own case.

(m) Further, despite the Judge's clear, and often repeated, guidance to the claimant, as an unrepresented party litigant, that she needed to cross-examine the respondents' witnesses on the terms of their evidence in chief, as per their witness statements provided to her, and raise with them matters that she disputed, and put to them points in her pled case, the claimant frequently disregarded the judicial guidance offered to her, as an aid to trying to put her on an equal footing with the respondents' solicitor.

(n) We also note and record here that the claimant often ignored the oft repeated guidance from the Judge for her

to ask bite size questions of the respondents' witnesses, not give her own evidence, or make statements, and to refer the witness to the relevant document, and the relevant page number, in the Bundle, if she was asking them a specific question, and to clarify with the witness whether they had, in fact, seen the document in question before giving evidence to the Tribunal.

(o) Where her questions of witnesses were irrelevant to the issues before the Tribunal, the Employment Judge had occasion, from time to time, to advise her to ask relevant questions only, and to recall the guidance about cross-examination previously given to her for her assistance.

(p) Generally, as regards the claimant`s evidence, we had an issue with the credibility and reliability of her evidence. Her evidence was an unrealistic view of what she believed had happened to her, and she did not understand why others could not see matters as she saw them. In our considered view, the claimant had a skewed perception of events, and she felt so wronged by the respondents' actions that she did not seem to understand why they had to follow procedures to investigate their management concerns about her calls being terminated.

(q) Overall, we found the claimant to be a confused, and confusing witness, who despite having a deep passion for her cause, and a resolute self-belief that she has been the victim of unlawful disability and racial discrimination by the respondents, lacked objectivity, and this impacted on the credibility and reliability of her evidence given to the Tribunal.

(r) The claimant`s evidence was sometimes given in circumstances where she was upset and crying. The Tribunal made reasonable allowances to allow her the opportunity to have comfort breaks, and/or to proceed, and Mr Byrom's conduct as the respondents` representative was fair and reasonable in all the circumstances. Neither the claimant, her supporter, nor the Tribunal, indicated that they had any cause for concern that the cross-examination was unfair, or not appropriate.

(s) There was a need, during the course of the ongoing, timetabled Final Hearing, for the Tribunal to adjourn proceedings to go off and consider, in chambers, certain contested interlocutory matters, before then returning with an oral ruling, and in those instances the Tribunal had to hear competing arguments before the Employment Judge delivered an agreed decision reached by members of the Tribunal in chambers. While this interrupted the flow of proceedings, it was not disruptive to the proceedings, or the good and orderly presentation of evidence from witnesses before us.

(t) Having listened to the claimant`s cross-examination of the respondents' witnesses, over several days before the Tribunal, and her own evidence thereafter, we were satisfied that the claimant genuinely believed what she was saying, and that her evidence reflected her perception of events as they had occurred in the course of her employment with the respondents.

(u) However, it was equally clear to us that, when the claimant`s perception of events was challenged by Mr Byrom, as the respondents` representative, in his cross-examination of the claimant, her evidence then became

confused and confusing, she did not answer the question as asked, and went off on tangents, and this cast a real and substantial doubt in our minds over her overall credibility and reliability as a witness.

(v) After Mr Byrom, the respondents' solicitor, had concluded his reply to the Judge, at the end of closing submissions on day 6, Monday, 6 December 2021, the claimant raised a further matter as we have recorded at paragraphs 65 to 67 of our fifth Note & orders issued on 9 December 2021. She asked the Judge whether she could make an application to the Tribunal about the respondents' breach of policies?

(w) In answer to the Judge's request for her to clarify what she was saying, the claimant stated that she was not suggesting that she wanted to amend her case after the close of evidence at this Final Hearing. The Judge stated that while any party can make any case management application at any time in the course of the case being ongoing, and before judgment, it would be unusual for a party to apply to lead further evidence, after the evidence had closed the previous Friday, and also unusual for a party to seek to amend their ET1 claim form (or ET3 response) after closing submissions had been delivered and closed.

(x) The claimant noted the Judge's comments and asked if the case was now over. The Judge stated judgment was reserved, and so parties were not required to attend further. The claimant, clearly relieved, and with a bright smile on her face, she thanked the Tribunal for their patience. The Judge stated there would need to be a Members' Meeting for private deliberation by the full

Tribunal only, in chambers, and parties would be updated on that in early course.

(y) We do not consider that the claimant deliberately told lies in the course of the Final Hearing before us, nor that she was dishonest in her evidence to the Tribunal, but her undoubtedly skewed perception of events suggested to us that the claimant as an employee was expecting a perfect working environment, with a perfect employer, whereas the law requires us to assess the respondents' actions and omissions against the benchmark of a reasonable employer running a business with the administrative resources appropriate to the size of its undertaking.

(z) While the claimant was often critical of the respondents' note-taking records of meetings, she was never that clear to us, in her evidence, or her cross-examination questions to witnesses from the respondents, or in her correspondence with the respondents after meetings, what it was that she regarded as being inaccurate, or incomplete.

(aa) On the evidence available to us, the claimant did not take her own notes at these meetings, nor was there any evidence before us that her companions at her meetings with the respondents took any contemporary notes either.

(bb) The respondents' witnesses led before us were all clear and consistent that the respondents' contemporary notes taken at the investigatory, disciplinary and appeal meetings, were a fair and accurate reflection of what was discussed at those meetings, capturing the main points, and not in any way a *verbatim* record of all that was said.

(cc) In the absence of any reasoned challenge to the respondents' notes by the claimant, at or around the time they were issued to her, we are satisfied with the accuracy of the respondents' notes of those meetings, as produced to us at this Final Hearing.

(dd) Finally, we note and record here that, in her cross-examination of Mr Farwell, the claimant commented that her line manager, Mr Jordin Adams, was not at the Tribunal giving evidence.

(ee) The Judge had to remind her that the respondents had previously stated that they were not going to call him as a witness on their behalf, and there had never been any application, by either party, for a Witness Order to be granted by the Tribunal to compel Mr Adams' attendance to give evidence to this Tribunal, if the Tribunal were to be satisfied that he was a relevant and necessary witness for a fair hearing of this case before the Tribunal.

Case Law Authorities before the Tribunal

36. The respondents' solicitor, Mr Byrom, intimated a list of 14 authorities to the claimant on the evening of Friday, 3 December 2021, with hyperlinks, and copied to the Glasgow ET office, and he increased that list to 17 when intimating his written skeleton argument on the morning of Monday, 6 December 2021, being as follows:

1. **Igen v Wong [2005] ICR 931**

2. **Laing v Manchester City Council [2006] UKEAT 0128_06_2807**

3. **Essex County Council v Jarrett UKEAT/0045/15/MC**

4. **Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN**

5. **Glasgow City Council v Zafar 1997 SLT 281**

6. **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 Paragraph 11**

7. **Malik v Birmingham City Council, CLLR L Trickett [2019] UKEAT 0027_19_2105 Paragraph 59, 60**

8. **Madarassy v Nomura International Plc [2007] EWCA Civ 33 Paragraph 54-56**

9. **Swiggs and Others v. Nagarajan [1999] UKHL 36**
LORD NICHOLLS OF BIRKENHEAD – "Thus so far…"
P881 – "Approaching the matter…"

10. **Tesco Stores Ltd v S UKEATS/0040/19/SS Paragraph 36**

11. **Secretary of State for the Department of Work and Pensions v Alam [2009] UKEAT 0242_09_0911 Paragraph 17, 18**

12. **City of York Council v Grosset [2018] EWCA Civ 1105 Paragraph 36-38**

13. **Griffiths v The Secretary of State for Work and Pensions [2015] EWCA Civ 1265 Paragraph 29**

14. **Grant v HM Land Registry [2011] EWCA Civ 769 Paragraph 17, 18, 47**

15. **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam (Debarred) and anor UKEAT/0039/19/JOJ Paragraph 20, 21**

16. **Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48 P 29**

17. **Enable Care and Home Support Ltd v Pearson [2010] UKEAT 0366_09_2605 Paragraph 27, 28**

37. Along with his written closing submissions, Mr Byrom attached a copy of **Zafar**, but it was the Court of Session, Inner House, judgment, rather than the subsequent appeal judgment from the House of Lords. The Judge provided both parties with copies of the House of Lords judgment in **Zafar [1997] UKHL 54; [1998] IRLR 36; [1998] ICR 120.**

38. The Judge also provided both parties with copies of the Employment Appeal Tribunal's judgment (on wrongful dismissal) in **British Heart Foundation v Roy [2015] UKEAT/49/15.**

39. Mr Byrom did not include in that updated list all of the authorities referred to in his written skeleton argument; in particular, he did not include hyperlinks, or paper, hard copy judgments, in the following cases:

- **Commissioner of Police of the Metropolis and anor v Osinaike EAT 0373/09**
- **South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley EAT 0341/15**

40. The EAT judgment by Mr Justice Mitting in **Billingsley** was produced later in the day by Mr Byrom, after the lunchtime break, and after an apology for an admin error on his part, and he informed us that he was not relying on **Osinaike,** as while he described it as good law, he did not have a copy to hand up. The Judge noted that he had found it on ***Bailli***, during the

lunchbreak, but Mr Byrom replied saying he had sufficient other case law cited, and he was not relying on **Osinaike**.

41. He also produced, prior to the start of the Hearing on Submissions on 6 December 2021, two further hard copy judgments, not included in his list of 17 intimated to the claimant, being:

- **Barclays Bank plc v Kapur & others [1991] ICR 208 (HL)**
- **Robertson v Bexley Community Centre t/a Leisure Link {2003] IRLR 434; [2003] EWCA Civ. 576**

42. In reply to the Judge's query why those 2 cited cases, about time-bar, were not included in his list of authorities, Mr Byrom explained that that was an oversight, on his part, and he explained that they had been cited in previous correspondence to the Tribunal, copied to the claimant, on 28 July 2020, as included in Bundle of Documents lodged with the Tribunal, at pages 96 and 97 of the Bundle, and available to Employment Judge Robison at the Preliminary Hearing before her on time-bar and amendment on 7 and 12 August 2020.

43. In closing his oral submissions to us, Mr Byrom referred us to the EAT's judgment in **Scottish & Southern Energy plc v Innes UK/EATS/0043/10**, and he later provided hard copy of that judgment by Lady Smith, after the lunchtime break.

44. While he had a copy to hand up to the Judge, he did not have a copy for the claimant, so the Judge handed her the only copy then available. Mr Byrom apologised, stating that the **Innes** case was identified late in his preparation the previous night. It was noted that it was the same case referred to by Lord Fairley, in **Tesco Stores Ltd v S**, but wrongly called **Ness**, rather than **Innes**.

Parties' Closing Submissions to the Tribunal

45. The Tribunal heard oral closing submissions from both parties at the Hearing on Submissions held on Monday, 6 December 2021. Scheduled to start at 11am, proceedings commenced at 11:21am, with opening remarks by the Judge, and clarification that the Tribunal, and both parties, all had the same material available to them, and then clarification of the procedure and timetabled running order to be followed.

46. Matters then progressed into a discussion with the claimant about her fitness to proceed with closing submissions, resulting, after clarification with the Judge, in a request by her that the listed Hearing on Submissions be postponed, and relisted.

47. After an adjournment, from 11:36 to 11:48, for Mr Byrom to take instructions, we heard from him with his objections to any postponement of the listed Hearing, and then from the claimant in reply, followed by a further response from Mr Byrom. After questions to the claimant from members of the Tribunal, the full Tribunal adjourned for private deliberation in chambers at 12:07.

48. On resuming, in public Hearing, at 12:29, the Judge read *verbatim* from a written Note, written in chambers, and agreed by both members, refusing the postponement, and giving further directions as to procedure to be adopted. Its full terms are set forth in our written Note & Orders dated 9 December 2021, to which we refer. Thereafter, we proceeded to hear both parties' closing submissions.

49. Firstly, from 12:34, Mr Byrom spoke to his detailed written closing submissions. As a full copy is held on the casefile, and it was made available to all at the Hearing before us, in paper, hard copy, we do not reproduce its full terms, but, in our Discussion and Deliberation section of these Reasons, we take note of Mr Byrom's submissions, as also the claimant's submissions,

as recorded below, in coming to our final decision and determination of the issues before the Tribunal.

50. While he followed the specific wording of the finalised List of Issues, for sections C to I, Mr Byrom did not do so for sections A (time limits) and B (disability status). Further, no case law was cited to us by him in regard to disability status in terms of **Section 6 of the Equality Act 2010**. As such, the Judge required to give the Tribunal appropriate direction at the Members' Meeting, as recorded later in these Reasons under "**Relevant Law"**.

51. Meantime, we think it is sufficient to note and record here the summary of Mr Byrom's closing submissions to us, as reproduced from the relevant paragraphs of his full written submissions, there being no paragraph 15, reading as follows:

> ***13. In review of the evidence overall it is respectfully submitted that there is insufficient proof to substantiate the claimant's allegations of disability and race discrimination. It has been apparent during the hearing that there have been many inconsistencies and unsubstantiated points in the claimant's witness statement and oral evidence.***
>
> ***14 Albeit the Tribunal must assess each allegation on its own merit, the position set out by the claimant overall is that there has been an orchestrated campaign of disability discrimination against her, and attempts to cover that up, such as by not recording matters during her employment and disciplinary process.***
>
> ***16 On the balance of probabilities, what is the most likely – the claimant's position or the respondent's?*** (sic) ***It is respectfully submitted that without the claimant providing evidence of something more, there is no less favourable treatment on the grounds of disability or race or any other form of disability***

discrimination. Neither is there a causal link between any alleged detriments and the protected acts relied on. On that basis the respondent invites the Tribunal to make a finding that the respondent's position is preferred, there is no less favourable treatment, unwanted conduct or otherwise on grounds of disability or race or victimisation and the claims should be dismissed in their entirety.

52. Further, we consider it appropriate to note and record here what Mr Byrom stated to us on the matter of credibility of witnesses led before us at this Final Hearing, as follows:

"*The respondent submits that the respondent's witnesses' evidence were fairly consistent, which is of credit considering the passage of time and that some of the key witnesses for this case are no longer in the respondent's employment, being away from the familiarity of the respondent's work environment, processes and policies that were relevant to this complaint.*

In contrast it is submitted that the claimant's evidence was by and large inconsistent, which was a theme identified by the respondent's witnesses' involved throughout the disciplinary process. The claimant often jumped between different grounds relied upon in her evidence, or went round in circles on a specific point; again reflective of the theme identified by the respondent's witnesses' involved throughout the disciplinary process (appeal minute [p241], Steven Murdoch statement [para 10], Jamie Farwell statement [para 9]). One noticeable point was the claimant's position on her ability to cope with her disabilities before and after 5pm, with there being an inconsistent answers (sic) ***provided on several occasions. The claimant also suggested that the majority of the respondent's witnesses, especially the note-takers, were not truthful in their recording of events in documentary evidence, which***

was suggesting an orchestrated campaign; there was no such evidence of the same.

It is respectfully submitted that on the balance of probabilities, the respondent's evidence should be preferred in this case."

53. Suffice it to say here, Mr Byrom's views on credibility matched our own, as can be seen from the Tribunal's assessment of the evidence heard at the Final Hearing, as detailed, earlier in these Reasons, at paragraphs 35(1) to 35(9) above.

54. As Mr Byrom spoke to the terms of his detailed written submissions, it is not necessary that we repeat all that here, for we have the written record, and we refer to it later, but it is appropriate that we refer to his final, and an additional, point, at the close of his oral submissions, when Mr Byrom submitted to us that there was perhaps a suggestion that an Occupational Health report on the claimant may have made a difference.

55. Specifically, Mr Byrom argued that that was not the case here on the legal tests relevant to the claims before the Tribunal, as this case is not an ordinary, unfair dismissal claim, where the reasonableness of the employers' procedures are in question. Even if that were the case, he added, the law is clear, and where there is no causal link identified between the claimant's disability and her conduct, then there is no obligation on the respondents to investigate further on that point.

56. Having heard from Mr Byrom, within his allocated one hour, we had an extended adjournment for lunch, from 13:21 to 14:45, to allow the claimant time to gather her thoughts, and consider her own closing reply, and when we resumed at 14:56, she addressed the Tribunal, making several points. She stated that she wished to make oral comments on what Mr Byrom had produced, and to refer us to some of the documents in the Bundle.

57. At the suggestion of the Judge, adopted by her as a way to do so, she made her points in relation to each of the 9 bullet points in Mr Byrom's executive summary. For ease of reference, we have reproduced them in bold, below, before then recording the claimant's oral submissions.

58. In the following paragraphs, we have specifically noted what the claimant had to tell us, in relation to each of those 9 bullet points made by the respondents' solicitor, and her answers to the Judge, when he sought, as and when necessary, to get her to clarify, or expand her answer, to address the detailed points made in Mr Byrom's written submissions to the Tribunal.

- **(1) Parts of the claimant's complaint were submitted about** (sic) **of time, those being events prior to 18 July 2019. It would not be in the interests of justice for the Tribunal to extend time limits in this instance.**

59. The word "***about***" is a clear typographical error for the word "***out***". Under reference to paragraph 46 in her witness statement for the Tribunal, the claimant submitted that her claim was not time-barred, and that her former solicitor, Lucy Neill, at Livingstone Brown, had advised her that her claim, presented to the Tribunal on 4 November 2019, after ACAS early conciliation, was in time.

60. She relied upon that legal advice, and she submitted that discrimination had continued up to and after her appeal hearing on 8 August 2019, following her dismissal for gross misconduct on 11 July 2019. She had presented her ET1 claim form to the Tribunal on 4 November 2019.

61. If it was time-barred, the claimant stated that she left it to the Tribunal to decide whether it should grant her an extension of time on just and equitable grounds, notwithstanding Mr Byrom's arguments that there were no

continuing acts, as per **Kapur**, and that there were no exceptional circumstances, as per **Robertson v Bexley**, to merit an extension of time.

- **(2) The respondent disputes that back pain meets the test for disability; it is a reaction, possibly caused by an impairment (fibroids), rather than an impairment in its own right. The respondent also disputes that the claimant has led sufficient evidence as to the substantial and long-term effect of dry eyes.**

62. The claimant submitted that she was a disabled person within the meaning of the legislation, and stated that she had provided additional information in her witness statement at paragraphs 10 and 11, referring to medical documents included in the Bundle, at pages 268 to 273, 276 to 284, and 285 to 303, including the GP report dated 20 August 2020, missing from the Bundle, but added as page 325.

- **(3) Direct race discrimination – the respondent accepts the claimant was dismissed for her conduct in the way she handled calls. It does not accept that this was the some conduct as was the case for Nathan, nor is he an appropriate comparator on that basis. The claimant has failed to evidence or support an inference of any causal link between the respondent's conduct and her race. The respondent's conduct was not because her race.**

63. The claimant submitted that she still believed she was the subject of direct race discrimination by the respondents. She stated that it was based on her ethnicity, not her race, as she is black, Afro-Caribbean. If she was Scottish and white, she stated the treatment she got from the respondents would not have been the same.

64. Further, the claimant stated that the investigation conducted by the respondents from its inception was mis-handled, and she had been treated differently because of her race. She was removed from her desk and floor, at

the time she was suspended on 4 July 2019, and she believed she was the subject of direct race discrimination.

65. The claimant submitted that Nathan was an appropriate comparator because he was disciplined also for placing customers on hold for a long time, and she was accused of disconnecting calls, and Nathan was treated differently.

66. She drew our specific attention to the respondents' notes of the Conduct Hearing, before Ms Bradley, on 11 July 2019, at pages 215 and 216 of the Bundle, stating that we should not place reliance on these notes, as all that is recorded there is not all correct. They show: "***JB – Aware of why you are here. MM – Gross misconduct – Disconnection of calls. JB – Explained meeting is specifically call avoidance which is gross misconduct."***

- **(4) Direct disability discrimination – the respondent accepts that certain alleged events occurred, by the factual evidence does not support the others occurring. For all alleged incidents the claimant has failed to evidence or support an inference of any causal link between the respondent's conduct and her disability. The respondent's conduct was not because her disability.**

67. The claimant submitted that she had advised the respondents that she had medical conditions, and that the managers were all aware of her disabilities, as they were all listed on the respondents' Cascade system, and managers had access to that system.

68. She added that it was her disability, that she was drowsy and cannot recall what she was doing. She invited the Tribunal to find that her dismissal was due to her disability, as the respondents saw her as a liability to their company.

- **(5) Discrimination arising from disability – the something arising from (performance) was not the cause of the unfavourable treatment; the respondent's decision were** (sic) **based on the claimant's conduct, not her performance; the evidence supports**

the same. Even if performance was the cause of the unfavourable treatment, the respondent's conduct was a proportionate means to achieve a eliminate aim, that being upholding conduct standards to avoid serious as to risk the reputation of it and its client's businesses, as well as to the potential commercial and financial damage also.

69. The claimant submitted that she received unfavourable treatment from the respondents, and she stated that they had no regard to her health and well-being. They had focused on her conduct, and not her performance, and her performance was not at its best because of her disabilities. She stated that there were many occasions when she requested assistance and asked for directions.

70. Further, the claimant added, the respondents say she is a risk to their reputation, but they had no regard or consideration given to her disabilities. They had not referred her to Occupational Health, after she submitted her GP's letter of July 2019, copy produced at page 275 of the Bundle. Instead, she was told to attend an investigatory meeting.

- **(6) Failure to make reasonable adjustments – the alleged PCP was found in evidence not to apply to the claimant; she admitted she never worked that shift pattern. The claim must fail. In the alternative, there is no evidence to support that the adjustments sought could have been effective; therefore they were not reasonable.**

71. The claimant submitted that there had been a failure to make reasonable adjustments, as she was expected to work between 07:30am and 11.30pm, and she had not always worked between 08:00am and 5:30pm. She accepted that, except for the first week, 27 May to 2 June 2019, she had worked between 08:00 and 17:30.

72. Further, she added, she had not been given the opportunity to have her job role altered, after she made application to her manager, Mr Adams, and she asked why is it that she was not given the opportunity to perform under different circumstances doing technical calls, which the respondents argued were more difficult, but she submitted they were very simple. By way of new evidence, rather than submission, she asserted that she had studied computer technical, and she is a qualified computer technician.

- **(7) Harassment – the respondent accepts that the conduct occurred, but it did not have the purpose of, or could reasonably be seen to have the purpose of, causing harassment. The claimant admitted the conduct was reasonable but for her companion being there, a situation she had created and had control over.**

73. The claimant stated that she was not quite sure why Jamie Farwell, the respondents' Appeals Manager, assumed that her support person, Karen Walker, was aware of the claimant's medical conditions, as the claimant stated that she did not discuss it with Karen.

74. Further, the claimant stated that she told Mr Farwell to check with her GP, and check what was on the respondents' Cascade system. She asserted that all her medical conditions are on Cascade. She further stated that Mr Farwell did not give her the option to ask her companion, Karen Walker, to leave the appeal hearing, when she was asked about her medication.

75. While the claimant accepted that she did not ask for Karen to leave, she stated that did not expect the manager would expect her to discuss such matters in the presence of a work colleague. She submitted that was harassment.

- **(8) Victimisation – it is accepted there was a protected act (asking for shift change), but there is no evidence to support that this influenced the decisions as to the disciplinary and appeal**

outcomes; such decisions were based on the claimant's conduct alone.

76. The claimant submitted that she made several applications for reasonable adjustments, so why did the respondents not want to comply? She had asked for a shift change, and for technical calls, and other adjustments, but she submitted that the respondents did not want to accommodate her requests, and that it was much easier for them to let her go.

- **(9) Wrongful dismissal/breach of contract – the claimant was found, following thorough and reasonable investigation and disciplinary process, to have committed gross misconduct. This was a repudiatory breach of contract; no notice pay is due.**

77. The claimant submitted that the respondents did not follow the correct procedure for dismissing her. She has asked, via her GP, to be referred to Occupational Health, on the same day that she was removed from her desk, and she submitted that it was obvious that it was pre-determined to sack her, and that, she submitted, was wrongful.

78. Also, she added, the process was not fair at all, as at the investigation meeting, she was accused of gross misconduct, and likewise at the conduct / disciplinary meeting, it was pre-determined that she was guilty of gross misconduct. She did not get paid notice pay. If it was wrongful dismissal, she agreed with Mr Byrom that she is due one month's pay.

Clarification sought by the Tribunal

79. After hearing from the claimant, she summarised her position as follows:

- **The claimant invited the Tribunal to uphold her claim in all parts, and to reject Mr Byrom's arguments that her case should be dismissed in whole.**

- **After discussion with her supporter, Ms Ahomade, the claimant stated that she had nothing further to add.**

80. Thereafter, at 15:52, the Tribunal adjourned for private deliberation, before returning, at 16:01, and the Judge then engaging Mr Byrom in discussion about matters arising from his closing submissions, and the claimant's reply. Mr Byrom stated, in reply to the claimant's closing submissions, particularly on victimisation, that she had said several things that she had not led in evidence, and that the claimant had accepted, under cross-examination, that the respondents had made several adjustments for her, including desk, chair and mouse.

81. In particular, at the close of both parties' oral submissions, presenting their respective closing submissions to the Tribunal, the Judge dealt with the case law authorities cited, and those raised directly by the Judge, with both parties, being:

- **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**
- **Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913**
- **Bahl v The Law Society & Anor [2004] EWCA Civ 1070**

82. The Judge stated that the Tribunal members had no questions of clarification for either party, but, on the Tribunal's behalf, he wished to raise several legal points with Mr Byrom about the case law authorities provided, or not, against certain, well-known cases known to the Tribunal, so that both parties might be able to comment on any such further caselaw at this Hearing, without the need to recall parties and / or invite written representations.

83. He thereafter raised several such points. Mr Byrom stated that he was aware of the Court of Appeal's judgment in **Adedeji**, but not its content, but he would be happy to reply to any points that the Tribunal might ask him to reply upon. The Judge stated this judgment, by Mr Justice Underhill, a former President of the EAT, had been issued in January 2021, and it was now the leading

case on time-bar extensions under **Section 123 of the Equality Act 2010**, yet Mr Byrom had not referred to it in his list of authorities, or written submissions, but he had only referred to the EAT's 2001 judgment in **Robertson v Bexley.**

84. Likewise, while Mr Byrom had included in his list the **Malik** judgment from Mr Justice Choudhury, current President of the EAT, in 2019, the respondents' submissions had not referred the Tribunal to the EAT judgment in **Efobi**, overruled by the Court of Appeal in 2017 in **Ayodele**. Both cases were cited in **Malik**, and the Judge enquired whether Mr Byrom had anything to add to his existing submissions on the burden of proof under **Section 136 of the Equality Act 2010**.

85. After discussion, and to allow both parties to consider their position, the Judge ordered that Mr Byrom confirm, by no later than 4.00pm on Wednesday, 8 December 2021, with the claimant to reply by no later than 4.00pm on Friday, 10 December 2021, whether they have any further written representations go make on the additional cases cited at this Hearing by the Judge. A separate written set of Orders and directions was issued to both parties in this regard on 7 December 2021.

86. When the Judge enquired why Mr Byrom had cited **Tesco Stores Ltd v S**, Mr Byrom's first response was to ask did he quote from that, which he had done at page 8 of his written submission, to which the Judge referred him. As that was an unfair dismissal case, the Judge enquired of its relevance to the present discrimination claims.

87. In reply, Mr Byrom acknowledged that the current case is not a case of unfair dismissal, but he felt it would be helpful for the Tribunal to look at Lord Fairley's judgment in **Tesco**, as the respondents were inviting the Tribunal to make a finding in fact that the actual reason for the claimant's dismissal was her conduct, and not any protected characteristic of race or disability.

88. When the Judge asked of Mr Byrom whether he had anything to say to the Tribunal about the **Roy** EAT judgment, handed up to him and the claimant by the Judge before the lunchbreak, Mr Byrom stated that he had read it, and he referred the Tribunal to paragraphs 7 and 8 by Mr Justice Langstaff, then EAT President in 2015. If an employee is guilty of repudiatory conduct, he submitted that an employer is entitled to dismiss without notice. The employer, by so doing, is not in breach of contract, as it is the employee's breach which causes the termination.

89. Further, Mr Byrom added, the respondents dispute any failure to follow proper procedure, as set out in their own policies and procedures, as alleged by the claimant in her closing submissions, and he further stated that the respondents' witnesses had been consistent in their evidence that they were guided by, and followed, the respondents' own procedures throughout the process. In any event, he added, there was no evidence led before the Tribunal that the respondents' policies and procedures were contractual, and, he submitted, nor is it the case that they are.

90. At this stage, the Judge referred to the productions provided to the Tribunal in the Bundle, and he asked Mr Byrom to indicate where does it say that policies and procedures are non-contractual.

91. In reply, Mr Byrom referred the Tribunal to page 156 of the Bundle, being the respondents' Conduct & Capability Policy, full copy produced at pages 156 to 168, stating, albeit in very small writing, that: "***This policy is non-contractual and may be varied, altered or replaced from time to time and the company reserves the right not to apply certain aspects of the policy if it is appropriate to do so."***

92. Mr Byrom stated that he understood that the claimant's contract of employment says non-contractual but, as the Judge had properly noted, that contract of employment was not produced as part of the evidence in the Bundle. Mr Byrom added that he could not recall any evidence led by the claimant about breach of the respondents' policies and procedures. As such,

he submitted, there is no evidentiary basis for the claimant's complaint of wrongful dismissal / breach of contract.

93. Mr Alexander, lay member of the Tribunal, then observed that the Conduct & Capability Procedure, produced at pages 169 to 178 of the Bundle, had no such similar text. In reply to that observation, Mr Byrom pointed out, under reference to page 169 of the Bundle, that the Policy had to be read alongside the Conduct & Capability Procedure.

94. Mr Byrom confirmed that he had nothing further to say about **Zafar**, and that Lord Morrison, in the Court of Session, had been upheld by the House of Lords. When the Judge mentioned **Bahl v The Law Society**, often cited alongside **Zafar**, Mr Byrom stated that he had not referred to that in his submissions, and so the Judge allowed him to make any further written representations, if so advised, by 4pm on Wednesday, 8 December, with the claimant allowed to reply by 4pm on Friday, 10 December 2021.

95. Closing submissions concluded at 16:28, with the Tribunal reserving its judgment to be issued in due course, after a Members' Meeting on a date to be arranged.

Parties' Further Written Representations

96. As agreed with both parties, the Tribunal allowed parties the opportunity to make any further written representations on those 3 cases cited by the Judge, and Mr Byrom did so for the respondents, by email sent on 8 December 2021, at 14:06, and copied to the claimant, stating that:

> *We act for the respondent in the above matter. We refer to the Tribunal's correspondence below with respect to any representations the respondent may have as to the following authorities:*
>
> ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 (15 January 2021) (bailii.org)***

The respondent has no specific representation to make on this case, save for it considers the case supports the respondent's submissions on the matter of time limits and the legal basis for those submissions.

Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913 (24 November 2017) (bailii.org)

The respondent has no specific representation to make on this case, save for it considers the case supports the respondent's submissions on the matter of burden of proof and the legal basis for those submissions.

Bahl v The Law Society & Anor [2004] EWCA Civ 1070 (30 July 2004) (bailii.org)

With reference to paragraphs 98 to 101, the respondent considers that this case supports its submissions on the matter of less favourable treatment (direct discrimination complaints on disability and race) and the legal basis for those submissions [sections C and D of the respondent's submission]. As per the quote from Lord Browne-Wilkinson at paragraph 98, whether or not the claimant was treated unreasonably by the respondent "casts no light whatsoever on the question whether he has treated the employee 'less favourably'". Save for the sections 20/21 complaint [section F of the respondent's submission], this case does not involve an assessment of reasonableness. A respondent does not have to prove it acted reasonably to the claimant or equally unreasonably to everybody in order to avoid the finding of an inference of less favourable treatment.

As per the quote of Elias J's at paragraph 101, such an inference of less favourable treatment can be rebutted by a respondent "leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct". It is respectfully submitted that such evidence was lead of the respondent's witnesses (that being the disciplinary process as to the claimant's conduct being the genuine reason), as was noted in the

respondent's submissions at sections C and D. As per paragraph 102 of the Bahl case, part of the Tribunal's assessment of less favourable treatment is "the reason why". As noted in the respondent's submissions, the evidence supports that the reason why was the claimant's conduct, not the claimant's protected characteristic (disability or race).

We thank the Tribunal for the opportunity to make representations on the above cases.

We have copied the claimant into this correspondence, and therefore have complied with rule 92. We remind the claimant that any written representations she wishes to make to the Tribunal in reply to the above comments must be submitted to the Tribunal by no later than 4.00pm on Friday, 10 December 2021.

97. The claimant, while offered the opportunity to reply to Mr Byrom's representations, by no later than 4pm on Friday, 10 December 2021, did not do so, despite a reminder issued to her by the Tribunal, by email sent on 16 December 2021@ 12:33, instructing that she reply by no later than 4pm on Monday, 20 December 2021.

98. There being no reply from her, by that extended time for compliance, or at all, a further email was sent to both parties, on the Judge's instructions, on 22 December 2021, @ 14:29, stating that the Judge had directed that he was taking the claimant's unexplained failure to reply as being indicative that she has nothing further to say to the Tribunal in response to Mr Byrom's email of 8 December 2021 @ 16:37. As such, the claimant was advised that the Tribunal would proceed on that basis when it met for its Members' Meeting on Monday, 17 January 2022.

99. The Tribunal has noted, however, that on 16 December 2021, by email sent @ 10:17 to the Glasgow ET, with copy to Mr Byrom, the claimant stated that

: ***Dear Sirs, Further to our conversation during the final hearing regarding I was suffering from anxiety, depression, fatigue and pain in knee during the final hearing and was finding it very difficult to concentrate, please find attached a copy of a Med certificate I received from my doctor. I would also send a copy of this document by post. I have copied the respondent representative this correspondence, and therefore have complied with rule 92.***

100. The attached Med 3 certificate by her GP, at Castlemilk Group Practice, dated 16 December 2021, stated that, having assessed her case, on 29 November 2021, because of "***anxiety with depression, fatigue, pain in knee***", the GP had advised the claimant that she was not fit for work, from 29/11/2021 to 17/12/2021.

101. In the course of the Final Hearing before us, on 3 December 2021, the claimant produced, and we added to the Bundle as an additional document, a Med 3 certificate by her GP, at Castlemilk Group Practice, dated 1 December 2021, which stated that, having assessed her case, on 19 November 2021, because of "***anxiety with depression",*** and noting "***pain in knee***", the GP had advised the claimant that she was not fit for work, from 19/11/2021 to 29/11/2021.

102. In her evidence to us, at day 5 of this Final Hearing, the claimant described herself as currently unemployed, and she stated that she had not been in employment since her employment with the respondents terminated on 11 July 2019.

103. We note the terms of those Med 3 certificates provided by the GP, but observe that they say nothing about the claimant's fitness to participate in these Tribunal proceedings. We did, however, take into account what she had to say to us in the course of the ongoing Final Hearing, in particular when she sought, and we refused, to postpone proceedings on Monday, 6 December 2021. We did not consider it to be in the interests of justice to postpone, as

we explained in our oral interlocutory ruling given on that date, and confirmed in our written Note & Orders dated 9 December 2021.

104. With reasonable adjustments, including breaks, put in place by the Tribunal, and in person support from Ms Ahomade, the claimant was able to meaningfully participate in the 6 day Final Hearing, including her own cross-examination of the respondents' witnesses, on days 2 to 4, as well as give her own sworn evidence, via some supplementary questions asked of her by the Judge, further to her witness statement, then being cross-examined by the respondents' solicitor, on day 5, and delivering her closing submissions, and replying to his written closing submissions, on day 6.

105. Throughout the Final Hearing, the Tribunal had regard to its overriding objective under **Rule 2** to deal with the case fairly and justly, and we had regard to the **Equal Treatment Bench Book**, and its guidance to Tribunals about how to deal with litigants in person, including those asserting a disability, and we recognised the difficulties faced by the claimant as an unrepresented party litigant.

Reserved Judgment

106. When proceedings concluded, on the afternoon of Monday, 6 December 2021, at 16:28, the claimant and Mr Byrom were advised that Judgment was being reserved, and it would be issued in writing, with Reasons, in due course, after private deliberation by the Tribunal. With no opportunity that afternoon, further private deliberation has only taken place recently, by the in-person Members' Meeting held in chambers on Monday, 17 January 2022. This unanimous Judgment represents the final product from our private deliberations, and reflects our unanimous views as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

Issues for the Tribunal

107. This case called before the full Tribunal not for full disposal, including remedy, if appropriate, but only to consider the respondents' liability, if any, for the

claimant's various heads of complaint. The finalised, revised agreed Joint List of Issues before us for judicial determination are those settled on 3 December 2021, and recorded earlier in these Reasons, at paragraph 32 above.

Relevant Law

108. While the Tribunal received detailed written closing submissions from Mr Byrom, with some statutory provisions and some case law references cited by him on the respondents' behalf, the Tribunal has nonetheless required to give itself a self-direction on all aspects of the relevant law. In particular, the Judge has specifically directed us on the law relating to time limits, and disability status, as these matters were not fully addressed by Mr Byrom in his written submissions, nor were any relevant statutory provisions, or applicable case law authorities, cited by him in that regard.

109. As an unrepresented, party litigant, the claimant did not understandably address us on the relevant law, and, indeed, we had no expectation that she should so address us on the relevant law. The Judge had explained to her that she was entitled to comment on the law, as presented to us by Mr Byrom, as an officer of the Court, and in accordance with his professional duty as a solicitor, but the Judge would be addressing us on the relevant law to apply to the facts of the case as we might find them to be after assessing the whole evidence led before us at this Final Hearing. The claimant made no submissions to us on the legal basis of any of her claims against the respondents.

110. The **Equality Act 2010** covers unlawful discrimination both in employment, and other fields, and the key concepts are to be found in Part 2 of the Act, while for present purposes, Part 5 of the Act is relevant, as it deals with work and employment, with Part 9 dealing with enforcement, including complaints to Employment Tribunals.

111. In this case, the claimant brings various discrimination complaints against the respondents as her former employer, alleging various contraventions of the **Equality Act 2010**.

112. There is also one further complaint alleging breach of contract, by failing to pay notice pay on termination of employment, and that proceeds as a complaint under the **Employment Tribunals Extension of Jurisdiction Scotland Order 1994** (SI 1994 No.1624).

113. In terms of **Article 7 of the 1994 Order**, an Employment Tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented within the period of 3 months beginning with the effective date of termination of the contract giving rise to the claim, or, where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within that period, within such further period as the Tribunal considers reasonable.

114. The time limit in **Article 7** is, however, subject to **Article 8B**, which provides for an extension of the time limit to facilitate conciliation before institution of Tribunal proceedings.

115. **Day A** is the day on which the worker concerned complies with the requirement of **Section 18A of the Employment Tribunals Act 1996** to contact ACAS in relation to the matter in respect of which the proceedings are brought, and **Day B** is the day on which the worker receives or is treated as receiving the ACAS certificate issued under **Section 18A**.

116. In working out when the time limit expires, the period beginning with the day after Day A and ending with Day B is not to be counted. If the time limit set would, if not extended, expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

117. Disability is one of the protected characteristics identified in **Section 4 of the Equality Act 2010.** It is further defined in **Section 6(1):** *A person (P) has a disability if-(a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-today activities.* **Section 212(1)** defines "*substantial*" as meaning "*more than minor or trivial"*; while **Schedule 1, paragraph 2**, further defines "*long-term effects*".

118. The effect of an impairment is long-term if – (a) it has lasted for at least 12 months; (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. The word "*likely*" has been interpreted by the House of Lords to mean "*could well happen":* **SCA Packaging Ltd v Boyle [2009] IRLR 746.**

119. The time at which to assess the disability is the date of the alleged discriminatory act (**Richmond Adult Community College v McDougall [2008] ICR 431** (para 24) and **Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT**). In **Goodwin-v-Patent Office [1999] IRLR 4**, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken. A tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a substantial impairment. The focus ought to be on what the claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.

120. It is not always possible or necessary to label a condition, or collection of conditions. The statutory language always had to be borne in mind; if the condition caused an impairment which was more than minor or trivial, however it had been labelled, that would ordinarily suffice. In the case of mental impairments, however, the value of informed medical evidence should not be underestimated. Appendix 1 to the EHRC Code of Practice of

Employment states that there is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment and not the cause: **Ministry of Defence v Hay [2008] ICR 1247**.

121. In **Aderemi v London and South Eastern Railway Limited [2013] ICR 591**, the EAT held that the Tribunal "*has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."*

122. An impairment can vary in its effects over time, and it is a matter for the Tribunal, having regard to all the evidence, to consider whether it has been established that there has been a substantial adverse effect over the relevant period (**Sullivan v Bury Street Capital Ltd UKEAT/0317/19/BA**).

123. Likelihood of the effect lasting 12 months or more is to be assessed at the time of the alleged contravention as confirmed by the Court of Appeal in **All Answers Ltd v W & R [2021] EWCA Civ 606** at paragraph 26: "*The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case*

involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood"."

124. Race is another one of the protected characteristics identified in **Section 4 of the Equality Act 2010**. Race is further defined at **Section 9(1)** as including (a) colour; (b) nationality, and (c) ethnic or national origins.

125. In terms of **Section 39(2) of the Equality Act 2010,** an employer (A) must not discriminate against an employee of A's (B) – (c) by dismissing B; (d) by subjecting B to any other detriment.

126. Further, In terms of **Section 39(4) of the Equality Act 2010,** an employer (A) must not victimise an employee of A's (B) – (c) by dismissing B; (d) by subjecting B to any other detriment. Victimisation is further defined in **Section 27**, as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

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

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

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

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

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

127. **Section 39(5) of the Equality Act 2010** provides that a duty to make reasonable adjustments applies to an employer. Where there is a duty to make reasonable adjustments for disabled persons in work, **Sections 20 to 22** apply, along with **Schedule 8.**

128. Where a provision, criterion of practice of A (the person on whom the duty to make reasonable adjustments is imposed) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, **Section 20(3)** provides that A requires to take such steps as it is reasonable to take to avoid the disadvantage. **Section 21 (2)** provides that A discriminates against a disabled person if A fails to comply with the duty to make reasonable adjustments in relation to that person.

129. Also, in terms of **Section 40(1) of the Equality Act 2010,** an employer (A) must not, in relation to employment by A, harass a person (B) who is an employee of A. Harassment is further defined in **Section 26**, as follows:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

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

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

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

130. Further, direct discrimination is defined at **Section 13(1) of the Equality Act 2010** as follows: -

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

131. In terms of **Section 23(1) of the Equality Act 2010**, on a comparison of cases for the purposes of, amongst others, direct discrimination, contrary to **Section 13**, there must be no material difference between the circumstances relating to each case.

132. Discrimination arising from disability is defined in **Section 15,** as follows:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

133. **Section 120 of the Equality Act 2010** provides that an Employment Tribunal has jurisdiction to determine a complaint relating to a contravention of Part 5 (work) of that Act and, subject to the time limit provisions of **Section 123,** as detailed below, are subject to the remedies set forth in **Section 124**, if an Employment Tribunal finds that there has been a contravention of the **Equality Act 2010**.

134. In that event, the Tribunal may, as per **Section 124(2),** (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; (b) order the respondent to pay compensation to the claimant; and (c) make an appropriate recommendation, as defined in **Section 124(3)**.

135. In her ET1 claim form, at paragraph 27, the claimant stated that she sought compensation for financial loss and injury to feelings.

136. In terms of **Section 124(6) of the Equality Act 2010**, the amount of compensation which may be awarded under **Section 124(2)(b)** corresponds to the amount that could be awarded by the Sheriff under **Section 119** and, as per **Section 119(4),** an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

137. **Section 123 of the Equality Act 2010** deals with time limits. **Section 123(1)** provides that proceedings on a complaint under **Section 120** may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.

138. **Section 123(3)** provides that (a) conduct extending over a period is to be treated as done at the end of the period, and (b) failure to do something is to be treated as occurring when the person in question decided on it.

139. The time limit in **Section 123** is, however, subject to **Section 140B**, which provides for an extension of the time limit to facilitate conciliation before institution of Tribunal proceedings.

140. **Day A** is the day on which the worker concerned complies with the requirement of **Section 18A of the Employment Tribunals Act 1996** to contact ACAS in relation to the matter in respect of which the proceedings are brought, and **Day B** is the day on which the worker receives or is treated as receiving the ACAS certificate issued under **Section 18A**.

141. In working out when the time limit expires, the period beginning with the day after Day A and ending with Day B is not to be counted. If the time limit set would, if not extended, expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

142. The burden of proof provisions in relation to discrimination claims are found in **Section 136 of the Equality Act 2010**. **Section 136(2)** provides that 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.

143. However, **Section 136(3)** goes on to provide that: "*But sub section (2) does not apply if A shows that A did not contravene the provision."* Finally, in terms of **Section 136(6)**, a reference to "the court" includes a reference to an

Employment Tribunal. The burden of proving facts lies with the claimant. Only if that is satisfied does the burden then shift to the respondents to show that they did not discriminate against the claimant.

144. The Court of Appeal, in **Igen Limited v Wong** [2005] ICR 931 (CA), set out the position with regard to the drawing of inferences in discrimination cases. In the later Court of Appeal Judgment, in **Madarassy v Nomura International Plc** [2007] ICR 867 (CA), the Court of Appeal found that the words "could conclude" must mean "a reasonable Tribunal could properly conclude" from all the evidence before it, meaning that the claimant had to "set up a prima facie case". That done, the burden of proof shifted to the respondent (employer) who had to show that they did not commit (or is not to be treated as having committed) the unlawful act

145. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on balance of probabilities, the respondent had committed an unlawful act of discrimination.

146. The Supreme Court, in **Hewage v Grampian Health Board** [2012] ICR 1054 (SC), held that Tribunals should be careful not to approach the **Igen** guidelines in too mechanistic a fashion, and the Court of Appeal has confirmed that approach under the **Equality Act 2010** in its Judgment in **Ayodele v Citylink** [2018] IRLR 114 (CA).

Discussion and Deliberation

147. In coming to our final decision in this case, the Tribunal has carefully reviewed and analysed the whole evidence led before it, both orally in sworn evidence, and within the various documents spoken to in evidence at the Final Hearing.

148. During the course of this Final Hearing, the claimant was from time to time informed by the Judge of the guidance from the then President of the Employment Appeal Tribunal, Mr Justice Underhill, in **Chandhok v Tirkey [2015] IRLR 195**, about the importance of the ET1 claim form, where each

party requires to know in essence what the other party is saying, so they can properly meet that case, and that the giving of fair, advance notice is at the heart of the Tribunal system. The essentials of the claim need to be in the ET1 claim form, and not elsewhere, for example in a document, in a Bundle, or in a witness statement.

149. While "*pleadings"* are relatively informal in this Tribunal, as compared to the civil courts, the ET1 should set the parameters of the dispute before the Tribunal. It is not appropriate to allow a claimant, even an unrepresented, party litigant, to build a case on shifting sands, and raise the case which best seems to suit the moment from their perspective. In conducting this Final Hearing, we were conscious of that, and that there is always a balance to be struck between avoiding unnecessary formalism and ensuring the fairness of the Tribunal process to both parties.

150. We declined to allow the claimant to further expand her pled case, into new matters not previously foreshadowed by her, the Judge reminding her to stick to her pled case, unless she was seeking to further amend it, which she did not seek to do. Even in her own, oral closing submissions to us, on Friday, 6 December 2021, the claimant tried to introduce new evidence, rather than refer to evidence already led before us. Mr Byrom, quite properly, drew that to our attention, albeit the Judge had recognised it, and spoke to the claimant about the matter.

151. We note this as an observation, and not a criticism of the claimant, as we were fully aware that she was doing her best, as an unrepresented, party litigant, to present her case to the Tribunal. It is well-known, and within the Tribunal's own knowledge, that self-representing parties often have this difficulty, and lack the objectivity and independence that comes from being represented by another person, rather than themselves.

152. We turn now, and address each of the separate issues before us for judicial determination:

A) Time limits

153. In their ET3 response, the respondents (at paragraph 14, and repeated again at paragraph 39) submitted as follows:

> *Under Section 123(1) of the Equality Act 2010, any alleged act of discrimination that took place more than three months before the Claimant notified this claim to ACAS on 18 October 2019 should be dismissed as they are being brought outwith the relevant time period.*

154. In his written submissions for the respondents, Mr Byrom stated that the respondents relied upon his application made on 28 July 2020, which is pages 96-97 of the Bundle, being his response to the claimant's application for just and equitable extension to time limits, together with the narrative on time limits at pages 83-85 of the Bundle, being his email of 24 April 2020.

155. In that email of 24 April 2020, Mr Byrom had stated as follows:

> ***Time Limits***
>
> *Notwithstanding that the claimant's comments on time bar do not appear themselves to be an application for the Tribunal to consider it just and equitable to extend time limits in this instance, we set out the respondent's position on the matter as follows:*
>
> *The relevant timeframe for this claim are as follows:*
>
> - *11 July 2019 – The claimant was dismissed from her employment with the respondent.*
> - *17 July 2019 – The claimant submitted an appeal to the decision to dismiss.*
> - *1 August 2019 – Original date for Appeal Hearing as notified to the claimant.*

- *8 August 2019 – Rescheduled Appeal Hearing attended by the claimant following the claimant's request for rescheduling due to postal delay in receipt of original Hearing invite.*

- *12 August 2019 – Date of outcome letter of appeal issued to the claimant.*

- *18 October 2019 – The claimant contacts ACAS to enter Early Conciliation.*

- *2 November 2019 – The claimant is issued with an Early Conciliation Certificate number R58699/19/17.*

- *4 November 2019 – The claimant submits her ET1 complaint.*

In accordance with section 123(1)(a) of the Equality Act 2010 any events three months prior to 18 October 2019 will be time barred (therefore on or before 18 July 2019). In terms of schedule 1, section 4 of the claimant's Agenda for Preliminary Hearing, the respondent considers the following allegations of less favourable treatment for the direct discrimination complaint are time barred:

a. *the decision to conduct an investigation into the claimant's conduct rather than to make a decision regarding her reasonable adjustments request (date unknown as well as persons responsible);*

b. *the decision to view her dropped calls as a conduct matter rather than a matter relating to performance (this was confirmed to the claimant on 4 July 2019 by Iain Macintyre – persons responsible unclear);*

c. *the decision to limit assessment of her calls to June 2019 only (again this was confirmed to the claimant on 4 July 2019 by Iain McIntyre, date of decision and persons responsible unclear);*

d. *the predetermined decision to dismiss the claimant as evidenced at the investigation meeting. This was confirmed to the claimant at the investigation meeting by Iain MacIntyre on 4 July 2019; and*

e. *the claimant's dismissal (11 July 2019 – decision made by Jane Bradley, team leader).*

The respondent considers the following allegations are time barred:

1. *Section 8 of schedule 1 in relation to victimisation, so far as in the detriment complained of is the act of dismissal;*

2. *D5 of schedule 2 in relation to discrimination arising from disability, so far as in the unfavourable treatment complained of is the act of dismissal; and*

3. *D6 of schedule 2 in relation to a failure to make reasonable adjustments as all the alleged failures refer to matters during the course of the claimant's employment and prior to her dismissal.*

For the avoidance of doubt, the respondent does not dispute that the following allegations of less favourable treatment narrated in section 4 are in time:

f. *the failure to provide fair notice to the claimant's first scheduled appeal hearing (between 11 July 2019 and 8 August 2019 – persons responsible unknown);*

g. *the denial of knowledge of the claimant's disability at her appeal meeting (8 August 2019 – Jamie Farwell, manager and appeal officer); and*

h. *the requirement for the claimant to disclose her medication to her former colleagues (8 August 2019 by Jamie Farwell).*

In addition, the respondent does not dispute that the allegations of harassment at section 7 are in time.

In her comments on time bar the claimant states that "an agreement was made between claimant and former solicitor Miss Lucy Neil from Livingstone Brown to contact ACAS within three months after I was dismissed. Miss Neil failed to comply for reasons unknown to claimant". No additional information is provided in relation to these events.

As such, the respondent will be relying upon the following:

1 The claimant had instructed a legal representative.

2 The claimant was aware of the three month time limit.

3 The claimant has not stated that the appeal process resulted in any delay in the submission of her claim.

4 The respondent will rely upon the fact that the appeal was dealt with timeously notwithstanding the rescheduling of the Appeal Hearing as a consequence of postal issues.

5 Knowing of the three month time limit, the claimant has not raised with the tribunal to date any issues regarding time limits and her claim beyond the comment referred to above.

The respondent respectfully suggests that in the circumstances the Tribunal should not exercise its discretion under section 123(1)(b) of the Equality Act 2010 and consider it just and equitable to extend the time limit for those parts of the claimant's complaint that are otherwise out of time. The respondents will point to the hardship that would be caused by the exercise of discretion in this instance due to the fact that delay in these claims being raised timeously has and will present difficulties in obtaining supporting evidence to dispute the claims, which will be elaborated on at the Preliminary Hearing on 29 and 30 June 2020.

Finally, we note that the claimant seeks in her ET1 and schedule of loss a damages payment for alleged failure to pay notice pay. Notwithstanding that the claimant was dismissed for gross misconduct and has no entitlement to

such payment, the claim itself is time barred as it is brought out-with 3 months from the effective date of termination. As such the claim should be struck-out. The respondent respectfully suggests that the Tribunal should not exercise its discretion under article 7© of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 to consider the complaint in time on the basis that:

1. *The claimant was aware there was a 3 month time limit;*

2. *The claimant at the relevant times had instructed a legal representative. Any liability for failure to submit the claim in time should be with the claimant's former representative; and*

3. *No application on the matter of time limits for this claim has been submitted timeously by the claimant.*

It is the respondent's position that it was reasonably practicable for the claimant to submit her complaint in time.

156. In his written closing submissions to the Tribunal, Mr Byrom stated as follows:

For the avoidance of doubt, the respondent consider the following are time barred:

1. *less favourable treatment for the direct discrimination complaint are time barred:*

    a. *the decision to conduct an investigation into the claimant's conduct rather than to make a decision regarding her reasonable adjustments request;*

    b. *the decision to view her dropped calls as a conduct matter rather than a matter relating to performance (this was confirmed to the claimant on 4 July 2019 by Iain McIntyre);*

c. *the decision to limit assessment of her calls to June 2019 only (again this was confirmed to the claimant on 4 July 2019 by Iain McIntyre);*

d. *the predetermined decision to dismiss the claimant as evidenced at the investigation meeting. This was, as alleged by the claimant but denied by the respondent, confirmed to the claimant at the investigation meeting by Iain McIntyre on 4 July 2019; and*

e. *the claimant's dismissal (11 July 2019 – decision made by Jade Bradley).*

The respondent considers the following allegations are also time barred:

1. *Victimisation complaint, so far as in the detriment complained of is the act of dismissal;*

2. *Discrimination arising from disability, so far as in the unfavourable treatment complained of is the act of dismissal; and*

3. *A failure to make reasonable adjustments as all the alleged failures refer to matters during the course of the claimant's employment and prior to her dismissal, and are therefore out of time. A decision regarding adjustment requests was also communicated to the claimant on 28 June 2019.*

The complaints relate to one off acts rather than continuing conduct and therefore the time limit should run from the date of each act only.

The respondent would be placed at significant hardship should these claims be treated as in time in the basis of the financial and reputational risks that could be associated with any findings in favour of the claimant on the same. The claimant was aware of the 3 month time limit, instructed legal representation but failed to act

For the avoidance of doubt, the respondent also contends that the claimant's breach of contract claim is out of time. The claimant has failed to evidence why it was not reasonably practicable for this claim to be submitted in time.

The respondent submits that time limits should not be extended in this instance.

157. In his oral closing submissions to the Tribunal, Mr Byrom had stated that if the Tribunal exercised its discretion, it would potentially be a hardship to the respondents, as there would be potential exposure to financial and reputational risk to the respondents, if the Tribunal were to make findings in favour of the claimant, for parts of the claim that are out of time. Mr Byrom had submitted that the claimant's complaints were without merit, but if the Tribunal decided in the claimant's favour, that would be in a public judgment, to which the respondents' customers and client might have access, and that might have financial and reputational implications for the respondents long-term.

158. In the List of Issues, the matters for determination were set out as below, although Mr Byrom's written closing submissions did not repeat the set questions, nor seek to answer them. Those set questions were as follows:

A) Time limits

1) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2) If not, was there conduct extending over a period?

3) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

4) If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

a) Why were the complaints not made to the Tribunal in time?

b) In any event, is it just and equitable in all the circumstances to extend time?

159. In considering section A of the List of Issues, we have done so, using those set questions as a template, but looking at the two applicable tests, as the breach of contract claim is subject to the "***reasonable practicability***" test, not the "***just and equitable test***" which applies to the unlawful discrimination heads of complaint.

160. Looking first at the breach of contract claim, there is no dispute that the claimant's employment terminated on 11 July 2019, when she was summarily dismissed by Ms Bradley. That was a single act, and not a continuing act, although it had continuing consequences, as the claimant's employment had been terminated by the respondents. The 3-month time limit therefore runs from that date. Similarly, there is no dispute that the claimant did not notify ACAS until 18 October 2019, being after the expiry of the 3-month time limit.

161. An extension of time to facilitate ACAS conciliation before instituting ET proceedings therefore does not arise: we refer in this respect to paragraph 23 in the EAT judgment of Her Honour Judge Eady QC in Mr **Ian Pearce v 1) Bank of America Merrill Lynch 2) Bank of America Merrill Lynch International Ltd 3) Merrill Lynch: [2019] UKEAT/0067/19/ LA.**

162. Further, there are two limbs to the applicable statutory formula to extend time in a breach of contract claim: first, the employee must show that it was not reasonably practicable to present the claim in time; second, if the employee succeeds in doing that, the ET must be satisfied that the further time within which the claim was in fact presented was reasonable.

163. The claimant, in the course of these Tribunal proceedings, and as referred to by Mr Byrom, stated that she had an agreement with Ms Lucy Neil from Livingstone Brown to contact ACAS within 3 months after she was dismissed.

She states that Ms Neil failed to comply, for reasons unknown to the claimant. No additional information has been provided by the claimant. The Tribunal does not know if it was an oral or written agreement, no documents were provided by the claimant for consideration by the Tribunal, as part of the claimant's evidence, and the Tribunal did not hear from Ms Neil as a witness called by the claimant.

164. That statement by the claimant was included as part of her 10 April 2020 email to the Glasgow ET, enclosing her disability impact statement, and other attachments, as part of her response to case management orders made on 12 March 2020. Her one-page typewritten statement, entitled "***Time Barred under Section 123 of the Equality Act 20109"*** (sic) was not included as part of the Bundle used at the Final Hearing, but it was available to the Tribunal when perusing the casefile.

165. In these circumstances, as time limits are a jurisdictional provision that parties cannot waive, this Tribunal must, if a claim is out of time, and it cannot be brought within any statutory formula allowing for an extension of time, refuse to hear the case, as being outwith the Tribunal's jurisdiction.

166. That is the situation we find here. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. As per **Porter v Bandridge Ltd 1978 ICR 943, CA,** there is a duty on the claimant to show precisely why it was that they did not present the claim in time. Here, albeit we are not certain as to when the claimant instructed her solicitor at Livingstone Brown, there is no dispute that she instructed a solicitor, and that she was aware of the 3-month time limit, yet the claim was not raised within 3 months, nor was ACAS conciliation initiated until after 3 months from the claimant's date of dismissal.

167. As such, any failure to submit the breach of contract claim in time must lie with the claimant's former legal representative, and, as per **Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53**, the claimant is affixed with the conduct of her then legal adviser, Ms Neil. The "***Dedman***

principle", per Lord Denning, Master of the Rolls, re-affirmed as still good law by the Court of Appeal in **Marks and Spencer plc v Williams -Ryan 2005 ICR 1293**, is that: "***If a man engages skilled advisers to act for him – and they mistake the time limit and present [the claim] too late – he is out. His remedy is against them."***

168. There is no evidence before the Tribunal to establish that it was not reasonably practicable for the claimant to have presented her ET1 in time, either herself, or though her then solicitor. As regards the claimant herself, there was no evidence before the Tribunal to show that she was prevented by some physical impediment, debilitating illness or incapacity from submitting her own claim on time.

169. Further, even if there had been such evidence, it was not presented within a further, reasonable time. 3 months from date of dismissal expired on 10 October 2019, yet the claimant did not notify ACAS until 18 October 2019, getting her ACAS EC certificate on 2 November 2019, and Ms Neil presenting the claimant's ET1 on 4 November 2019. Her claim is thus **25 days late**, being the time between 10 October and 4 November 2019.

170. However, on 17 July 2019, the claimant had drafted her own letter of appeal and submitted it to the respondents, she had been in contact with them about re-arranging 8 August in lieu of 1 August 2019 for her appeal hearing with Mr Farwell, and she had attended and participated in that meeting.

171. For these reasons, we dismiss the breach of contract head of complaint as being time-barred. In any event, the claimant having been dismissed by the respondents, on 11 July 2019, for gross misconduct, no notice pay would have been payable to the claimant.

172. Turning now to the discrimination heads of complaint, we address ourselves to the relevant questions. The respondents accept that some, but not all matters, are within time. The claimant argues, as per her 10 April 2020 reply

to the Glasgow ET, that: "***The discrimination continued after the claimant was dismissed on 11 July 2019."***

173. She refers to the failure to give fair notice of the first scheduled appeal hearing on 1 August 2019, it being rescheduled for 8 August 2019, and Mr Farwell requiring her to disclose confidential information about the medication she was taking relating to her health status in front of former colleagues, which she says she found to be humiliating and demoralising, leading to her allegation of harassment at that appeal hearing.

174. These are all clearly events after the effective date of termination of employment, on 11 July 2019, and the Tribunal accepts that the date of the last act of discrimination complained of by the claimant is therefore 8 August 2019, when Mr Farwell dismissed her internal appeal against dismissal after hearing the claimant at the appeal hearing held on that date, and advising her orally that her dismissal was upheld, with his confirmatory appeal outcome letter issued on 12 August 2019.

175. As she was advised on 8 August 2019 by Mr Farwell that her dismissal was upheld, and so her appeal had been unsuccessful, the 3-month time limit runs at latest from that date, and not 12 August 2019. Whether or not she received the confirmatory appeal outcome letter of 12 August 2019 on or around that date therefore falls by the wayside, and having contacted ACAS on 18 October 2019, and her ET1 presented on 4 November 2019, the ET1 claim form, insofar as it complains of the appeal on 8 August 2019, is presented within time, the 3-month time limit having expired on 7 November 2019. She has not relied upon the outcome of her appeal as being less favourable treatment, but she alleges events at the appeal hearing itself constitute harassment.

176. The Tribunal does not regard events between 11 July and 12 August 2019 as being continuing acts. They were separate acts, and often with different participants. As such, the time limit should run from the date of each separate act complained of.

177. The claimant's dismissal, on 11 July 2019, is properly to be considered as a completed act which had continuing consequences, as she remained dismissed, rather than conduct which extended over a period. It was a specific, one-off decision by Ms Bradley on the particular facts of the claimant's case as emerged at the conduct hearing on that date.

178. On the evidence available to the Tribunal, the decision to dismiss was a single act, and not the result of the application of some discriminatory policy or rule, or a discriminatory, continuing state of affairs, in an ongoing situation.

179. In his email of 24 April 2020, Mr Byrom stated: "***The respondents will point to the hardship that would be caused by the exercise of discretion in this instance due to the fact that delay in these claims being raised timeously has and will present difficulties in obtaining supporting evidence to dispute the claims…"***

180. The respondents led 8 witnesses before us at this Final Hearing, and we had witness statements from 7 of those 8. Notwithstanding the passage of time, and some of those witnesses no longer being in the respondents' employment, the respondents' witnesses gave evidence disputing the claimant's various complaints. They did so without any evident difficulty in recalling matters from some 2 years ago.

181. As time-bar was, by decision of Employment Judge Robison, reserved for consideration at the Final Hearing, Mr Byrom's concern about any discretion to extend time limits being to the respondents' hardship is a factor for us to take into account, but as the evidence emerged before us, there were no real difficulties for the respondents' witnesses giving their evidence to this Tribunal.

182. Further, in August 2021, the respondents did not seek to invite Judge Robison to reconsider her decision, or set it aside, nor did they appeal against it. It was not for this Tribunal to depart from that earlier judicial ruling, and neither party asked us to, nor did we consider it appropriate to do so on our own initiative.

Nor, for that matter, did Mr Byrom, solicitor for the respondents, invite us to hold a discreet Preliminary Hearing on time-bar, before proceeding with evidence at large on the merits at this Final Hearing.

183. In our view, given that discrimination complaints are fact-sensitive, we did not consider it appropriate to dismiss the time-barred parts of the claim. There is also a public policy argument in hearing such claims. It would have been of greater hardship and injustice to the claimant if her discrimination complaints were dismissed as time-barred without any evidentiary Hearing. There is no evident prejudice or hardship to the respondents in dealing with such complaints, as they were able to lead evidence from relevant witnesses, lodge contemporary documents, and so there was no forensic prejudice to them.

184. In these circumstances, and notwithstanding the claimant has not really provided us with any adequate, let alone, full explanation of the reasons for the delay in presenting her ET1 claim form, we have decided that the discrimination heads of complaint, insofar as time-barred, are allowed to proceed, on the basis that it is just and equitable to allow them to proceed, although not presented in time, and the Tribunal grants the claimant an extension of time in terms of **Section 123 of the Equality Act 2010**.

B) Disability status under section 6 of Equality Act 2010

185. In their ET3 response, at paragraphs 3 and 4, the respondents did not accept that the claimant was disabled for the purposes of the Equality Act 2010, and, even if she was, which they did not admit, they denied that the claimant was unlawfully discriminated against by them under the Equality Act 2010 in any way as alleged, or otherwise.

186. Mr Byrom's email of 24 April 2020 to the Glasgow ET, as produced at page 83 of the Bundle, stated as follows:

Disability Status

The claimant provided a GP report dated 27 March 2020 together with a Disability Impact Statement. On review of this, the respondent's position on the matter of disability status for each of the claimant's conditions relied upon is as follows:

1 *Carpal tunnel syndrome – Disability status conceded;*

2 *Back pain – Disability status disputed. The claimant has not provided any information on the substantial or long-term effect this has on her ability to carry out day-to-day activities. In addition, the GP report does not reference back pain;*

3 *Anaemia – Disability status conceded;*

4 *Fibroids – Disability status conceded; and*

5 *Dry eyes – Disability status disputed. The claimant's GP report does not refer to dry eyes. In addition, the claimant's Disability Impact Statement states that all the conditions referred to above except for dry eyes had a substantial and long-term effect on her ability to carry out day-to-day activities.*

As such, the respondent currently disputes disability status as outlined above. The claimant is called upon within three weeks of the date of this email to provide further information and/or supporting documentation in respect of the substantial and long-term effect on her day-to-day activities as a consequence of (1) back pain and (2) dry eyes.

If the claimant provides sufficient information in support of disability status for those conditions, then the respondent may concede disability status. Alternatively, if the claimant is to withdraw reliance upon back pain and dry eyes as conditions on which she alleges she is a disabled person, then the respondent will concede disability status.

187. In his written closing submissions for the respondents, Mr Bryson made a fairly short and succinct submission, reading as follows:

The respondent does not accept the following qualify as a disability:

- *Back pain – as per the claimant's GP's letter of 20 August 2020, the claimant's back pain is due to:*

    1) *The claimant sitting at a desk all day, with recommendation to try and improve her desk and chair; and*

    2) *The claimant's fibroids – this is also supported by the claimant's disability impact statement.*

As such the back pain is evidently a reaction arising from the a (sic) *physical situation (desk and chair) and the claimant's fibroids and cannot be treated as a disability in its own right. The claimant has provided no evidence to counter the respondent's assertion on this matter; and*

- *Dry eyes – the claimant has provided insufficient evidence as to the substantial and long-term adverse effect of this condition. For example, in the claimant's addition to her disability impact statement she evidences flickering of the screen that was fixed, suggesting an environmental issue rather than an impairment. In any event, it is of note that this condition is not relied upon in its own right as per paragraph 7 of the claimant's ET1.*

188. In the List of Issues, the matters for determination were set out as below, although Mr Byrom's written closing submissions did not repeat the set questions, nor seek to answer them. Those set questions were as follows:

B) Disability status under section 6 of Equality Act 2010

For each of the asserted conditions of back pain and dry eyes:

1) Is there a physical or mental impairment?

2) If so, does the impairment affect the Claimant's ability to carry out day to day activities?

3) Does the impairment have an adverse effect?

4) Is this adverse effect substantial (i.e. more than trivial)?

5) Is the condition long term?

189. In considering section B of the List of Issues, we have done so, using those set questions as a template, but looking separately at each of the two asserted conditions of back pain and dry eyes.

190. Looking first at back pain, the respondents accept, as do we, that that is a physical impairment, and that it affects the claimant's ability to carry out day to day activities. What they do not accept is that the claimant has provided information on the substantial and long-term effect of this condition.

191. While not included in the GP's original report of 23 March 2020, back pain is now referenced in the further GP report by Dr K Brown of 20 August 2020. The GP refers (at page 325 of the Bundle) to "***significant back pain due to her uterine fibroids, which was discussed during a consultation on 27/5/19."***

192. We have carefully considered the claimant's disability impact statement of 10 April 2020, and her further information of 11 June 2020, as set out in our findings in fact, and the claimant adopted those documents as part of her evidence in chief to us at this Final Hearing. So too have we considered Mr Byrom's submissions, summarised at bullet 2 of his 9-point executive summary, so far as relevant to back pain: **The respondent disputes that back pain meets the test for disability; it is a reaction, possibly caused by an impairment (fibroids), rather than an impairment in its own right.**

193. Having done so, we agree with Mr Byrom's closing submission that, as per the claimant's GP's letter of 20 August 2020, the claimant's back pain is due to: (a) the claimant sitting at a desk all day, with recommendation to try and improve her desk and chair; and (b) the claimant's fibroids – this is also supported by the claimant's disability impact statement.

194. As such, we also agree with Mr Byrom's further closing submission that the back pain is evidently a reaction arising from a physical situation (desk and chair) and the claimant's fibroids and cannot be treated as a disability in its own right. Moreover, as Mr Byrom highlighted, the claimant has provided no evidence to counter the respondents' assertion on this matter, and prove that she is a disabled person an account of her back pain.

195. When we reviewed the content of her disability impact statement, she refers to advising her managers, in **November 2018**, about symptoms she was experiencing at that time, including back pain, but also fibroids, headache and fatigue, and she refers to "***sudden sharp pains in lower back***", in **December 2018.**

196. Her further information to the Tribunal, on 11 June 2020, as recited in our findings in fact, refers to her back pain started in **June 2018**, and her advising her GP in **March 2019** that she was experiencing lower back pain, and towards the end of **May 2019**, it became worse. No date is given, though we suspect that this is what was discussed at her GP consultation on **24 May 2019**. There is a conflict, which we cannot resolve, between whether her back pain started in June 2018, or November 2018 – her written statements to the Tribunal are not consistent in that regard.

197. Against these dates milestones in her chronology of her situation, any substantial adverse effect is not, as at 11 July 2019, long-term, as she has not shown it to have lasted more than 12 months, nor do we the Tribunal have any evidence before us, from her, to say it is likely to have lasted more than 12 months. Accordingly, she has not established that, at all relevant times,

she was a disabled person, within the meaning of **Section 6,** on the basis of back pain as a disability.

198. Looking now at dry eyes, the respondents accept, as do we, that that is a physical impairment, and that it affects the claimant's ability to carry out day to day activities. What they do not accept is that the claimant has provided information on the substantial and long-term effect of this condition. While not included in the GP's original report of 23 March 2020, dry eyes is referenced in the further GP report by Dr K Brown of 20 August 2020.

199. We have carefully considered the claimant's disability impact statement of 10 April 2020, and her further information of 11 June 2020, as set out in our findings in fact, and the claimant adopted those documents as part of her evidence in chief to us at this Final Hearting.

200. Her impact statement refers to going to her optician, in **December 2018**, when she was advised that her eyes were ***"healthy***", and in her further information to the Tribunal, on 11 June 2020, as recorded in our findings of fact, she refers to going back to her optician, on **5 July 2019,** and being diagnosed with Dry eyes / Flick Blinker and advised to use eye gel.

201. Having considered the evidence before us, we specifically note that the claimant's disability impact statement states that all the conditions referred to, except for dry eyes, had a substantial and long-term effect on her ability to carry out day-to-day activities.

202. We considered Mr Byrom's submissions, summarised at bullet 2 of his 9-point executive summary, so far as relevant to dry eyes: **The respondent also disputes that the claimant has led sufficient evidence as to the substantial and long-term effect of dry eyes.**

203. We agree with Mr Byrom's closing submission that, as regards dry eyes, the claimant has provided insufficient evidence as to the substantial and long-term adverse effect of this condition. As he rightly points out, in the claimant's addition to her disability impact statement she evidences flickering of the

screen that was fixed, suggesting an environmental issue rather than an impairment. In any event, it is of note that this condition is not relied upon in its own right as per paragraph 7 of the claimant's ET1.

204. Further, against the dates milestones in her chronology of her situation, any substantial adverse effect is not, as at 11 July 2019, long-term, as she has not shown it to have lasted more than 12 months, nor do we the Tribunal have any evidence before us, from her, to say it is likely to have lasted more than 12 months. Accordingly, she has not established that, at all relevant times, she was a disabled person, within the meaning of **Section 6,** on the basis of dry eyes as a disability.

205. For the foregoing reasons, we have accordingly decided that:

- By concession of the respondents, the Tribunal finds that, at all relevant times, the claimant was a disabled person, within the meaning of **Section 6 of the Equality Act 2010**, on the basis of her physical impairments of Carpal Tunnel Syndrome, Anaemia, and Fibroids.

- In respect of her other asserted physical impairments of Back pain, and Dry eyes, the Tribunal finds that the claimant has not established that, at all relevant times, she was a disabled person, within the meaning of **Section 6 of the Equality Act 2010**, on the basis of those physical impairments, as she has not shown them to be substantial, and / or of long-term effect, on her normal day to day activities.

C) Direct discrimination under section 13 of the Equality Act 2010 on grounds of race

206. In paragraph 24 of her ET1 claim form, the claimant pled that she considers the act of dismissal (on 11 July 2019) to be an act of discrimination due to her race, as well as direct disability discrimination for the acts (a) to (h) she cites as the acts engaged in by the respondents.

207. In their ET3 response, the respondents denied any race discrimination against the claimant. They pled as follows:

No discrimination on the grounds of race

56. *It is denied that the Claimant was unlawfully discriminated against on the grounds of race under the Equality Act 2010 in any way as alleged or otherwise.*

57. *The allegations facing the Claimant's alleged comparator of placing customers on hold are entirely different to those put to the Claimant for terminating customer calls. Therefore any difference in treatment is as a result of the different allegations, not the Claimant's race. Therefore the comparator identified in the ET1 isn't an appropriate comparator for the purposes of the Equality Act 2010.*

58. *Esto, no action was taken against the Claimant on the grounds of her race.*

208. In his written closing submissions for the respondents, Mr Byrom made the following submissions:

1) Did the Respondent investigate and discipline the claimant for her conduct in the way she handled calls?

Mr Byrom answered this question in the affirmative. From the evidence we heard at the Final Hearing, we are satisfied that that is the correct answer to this question.

2) Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than "Nathan", who was white and Scottish.

Mr Byrom submitted that Nathan was not an appropriate comparator because:

- *He was subject to a disciplinary process for a different conduct offence (calls on hold), albeit that fell within the same head of misconduct as the claimant wilfully dropping calls (call avoidance).*

- *His disciplinary for calls on hold was not concluded as he was subsequently dismissed for being absent without leave; the claimant did not challenge the respondent's evidence on this matter*

Therefore, submitted Mr Byrom, it cannot be that the claimant was treated less favourably than Nathan. Both the claimant and Nathan were subject to a disciplinary process (albeit for different reasons). This process was not concluded for Nathan as he was dismissed due to being absent without leave.

As Nathan was not an appropriate comparator, the Tribunal agrees with Mr Byrom that it cannot be said the claimant was treated less favourably than him by the respondents.

3) If so, was it because of race?

Mr Byrom for the respondents submits the claimant was not dismissed because of her race, but because of misconduct. Ms Bradley and Mr Farwell both gave evidence that their decisions were based on the claimant's conduct alone; this was not tested by the claimant in cross-examination.

209. The claimant has not provided any evidence as to the "***something more***", required in terms of the **Madarassay** case, than the fact she was Afro-Caribbean in ethnicity and allegedly received a different outcome to a disciplinary proceeding on separate conduct matters. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude, on the balance of probabilities, that the respondents had committed an unlawful act of discrimination.

210. In the present case, the Tribunal is satisfied that the facts are clear. The claimant was investigated and ultimately dismissed for a breach of the respondents' disciplinary procedure, call avoidance. This is a potential gross misconduct offence. There is no evidence that any action of the respondents was taken on the basis of the claimant's race.

211. The claimant cannot evidence different treatment, she cannot evidence treatment because of race; she has failed to shift the burden of proof and this part of her claim must therefore be dismissed. We agree with Mr Byrom's submissions on this part of the case, and accordingly we have dismissed this part of the case as not well-founded.

D) Direct discrimination on grounds of disability

212. In her ET1 claim form, the claimant pled the basis of her case for direct disability discrimination, contrary to **Section 13 of the Equality Act 2010**, at paragraph 23, with specific acts cited at (a) to (h).

213. In the ET3 response, the respondents pled their position as follows:

No direct discrimination

41. *It is denied that the Claimant was unlawfully discriminated against on the grounds of disability under Section 13 of the Equality Act 2010 in any way as alleged or otherwise.*

42. *The Respondent was entitled to investigate the allegations against the Claimant as these allegations related to the Claimant's termination of customer calls which constituted gross misconduct. These allegations were investigated as they are listed as gross misconduct under the Respondent's policies not because of the Claimant's disability.*

43. *It was appropriate for the Respondent to treat the termination of Customer calls as a conduct issue as opposed to a performance issue. The Respondent had a reasonable belief that calls were being dropped*

deliberately and thus was treated as a conduct issue not because of the Claimant's disability.

44. *It was appropriate that the Respondent limit its assessment to the month of June as the Claimant terminated 62 being almost 50% of the early termination calls that month. Under the Respondent's policy deliberately terminating a single customer call could constitute gross misconduct. This was the reason for limiting the assessment to the month of June not because of the Claimant's disability.*

45. *The decision to dismiss the Claimant was not pre-determined. The Respondent's reference to "gross misconduct" was in relation to the noting of the Claimant's actions being investigated as gross misconduct in line with the Respondent's policies and procedures.*

46. *The Claimant was not dismissed as a result of her disability. The Claimant was dismissed because she deliberately terminated a large number of customer calls which constitutes gross misconduct under the Respondent's policies and procedures.*

47. *The Respondent wrote to the Claimant informing her of her appeal hearing in good time and any issues with her receiving notification of that appeal hearing were due to issues with the delivery of that notification not because of the Claimant's disability. It is notable that the Respondent allowed a rescheduled appeal hearing in light of these issues.*

48. *It is denied that the Respondent denied knowledge of the Claimant's disability at the appeal hearing. The Jamie Farwell asked relevant questions at the appeal hearing to effectively understand the Claimant's points of appeal. Any questions asked were to assist the appeal process not because of the Claimant's disability.*

49. *The Claimant was not required to disclose details of her medication to her former colleagues. Jamie Farwell asked for further details in*

relation to the claimant's medication in order that he could properly consider the Claimant's points of appeal not because of her disability.

214. In his written closing submissions for the respondents, Mr Byrom stated that he understood that the claimant relies upon Carpal Tunnel Syndrome, Back pain and Fibroids. It also understood that the claimant relies upon a hypothetical comparator, being a telephone agent who does not have the disabilities the claimant relies upon. We have carefully considered his specific submissions that:

1) Did the Respondent do the following:

a. conduct an investigation into the Claimant's conduct rather than to make a decision regarding her reasonable adjustments request;

No. The claimant's flexible working request for change of hours had been rejected as of 28 June 2019. In any event, the respondent had reasonable grounds for investigating alleged misconduct.

b. view the Claimant's dropped calls as a conduct matter rather than a matter relating to performance;

Yes. The respondent's Conduct and Capability Policy and the respondent's witnesses all confirmed the act of deliberately dropping calls was considered gross misconduct; the claimant accepted the same. As Jade Bradley stated, this was a behaviour that can't be done by accident, which was supported by other witness evidence. On the balance of probabilities the respondent's position on this is the most likely.

c. limit assessment of the Claimant's calls to June 2019 only;

Yes. Paul Tausney explained he needed an adequate sample size to assess the instances of dropped calls highlighted by the Quality

Team. On the balance of probabilities that is the most likely have reason for the conduct.

d. predetermine the decision to dismiss the Claimant;

No. This was confirmed by Iain McIntyre when he sated (sic) *"absolutely not". The respondent evidenced, through its witness and documentary evidence, a thorough and reasonable disciplinary process.*

e. dismiss the Claimant;

Yes. The respondent evidenced a thorough and reasonable disciplinary process. The conduct was so serious (the respondent's witnesses evidence the risk of dropped calls to its and its client's businesses) that it warranted the claimant to be dismissed summarily. On the balance of probabilities the respondent's position on this is the most likely.

f. failure to provide fair notice to the Claimant's first scheduled appeal hearing;

No. The respondent's policy is to provide no less than 48 hours notice. A letter was issued dated 26 July 2019 for a hearing on 1 August 2019. This was not received due to a postal error. The hearing was rescheduled on 1 August 2019 for 8 August 2019, which the claimant attended.

g. deny knowledge of the Claimant's disability at her appeal meeting; and

No. Both Steven Murdoch and Jamie Farwell denied this allegation. It is evident from the appeal minute that claimant's disabilities were discussed.

h. require the Claimant to disclose her medication at the appeal hearing.

Yes. Both Steven Murdoch and Jamie Farwell evidenced that this was asked to support the claimant's appeal following her raising the fact she was on medication. On the balance of probabilities the respondent's position on this is the most likely.

It is submitted that there is no evidence of less favourable treatment because of disability compared to another person without a disability. The claimant has failed to discharge the burden of proof by evidencing the something more. The evidence is that allegations a, d, f and g were not factually done.

If the Tribunal is not with the respondent on this point, then the respondent denies that any of the actions listed above were because of the claimant's disability. In any event, for allegations b, c, e and h the respondent has evidenced (as noted above) that the conduct was not because of the claimant's disability.

215. Further, we have considered the evidence, and the claimant's closing submissions. Having done so, and for the reasons advanced by Mr Byrom, which we accept as being well-founded, we have decided that the claimant's complaint of direct discrimination on grounds of disability, contrary to **Section 13 of the Equality Act 2010**, is not well-founded, and it is dismissed.

E) Discrimination arising from disability under section 15 of the Equality Act 2010

216. In her ET1 claim form, the claimant pled, at paragraph 22, that : "*the respondent's actions in dismissing her and refusing her appeal was unfavourable treatment because of something arising in consequence of her disability and therefore discrimination contrary to s.15 Equality Act 2010.*"

217. In the ET3 response, the respondents pled their position as follows:

No discrimination arising from disability

50. *The Claimant alleges that the decision to dismiss her and to refuse her appeal was unfavourable treatment because of something arising in consequence of her disability. It is denied that the Claimant terminated calls as a result of her disability. It is the Respondent's view that calls were terminated when customers were upset or unhappy.*

51. *The Respondent denies there is any discrimination arising from her disability as alleged or at all.*

218. In his written closing submissions for the respondents, Mr Byrom made the following points:

1) At the applicable time did the Respondent know, or should reasonably have known, that the Claimant had the disability?

The respondent accepts knowledge of disability.

2) Did the Respondent treat the Claimant unfavourably by (a) dismissal; and/or (b) failure to uphold appeal to dismissal?

The respondent accepts the claimant was dismissed and her appeal was not upheld.

3) Was this treatment because of poorer performance arising in consequence of the Claimant's disability?

The respondent's Conduct and Capability Policy and the respondent's witnesses all confirmed the act of deliberately dropping calls was considered gross misconduct; the claimant accepted the same. As Jade Bradley stated, this was a behaviour that can't be done by accident, which was supported by other witness evidence, including that of the appeal manager, Jamie Farwell (who stated that in his 12 years' experience he had never had someone drop a call because they were drowsy). It was therefore not a performance issue

but a conduct issue and the respondent was entitled and correct to treat it that way.

This can be contrasted with the AHT (average handling time) performance issue the claimant had that is evidenced in the Cascade notes as being subject to coaching from her line manager.

The claimant failed to sufficiently evidence that the dropped calls was something that arose from her disability. For example, she admitted that she used both hands to operate the telephone, but only her right hand was subject to Carpal Tunnel Syndrome. The claimant referred to drowsiness but the respondent's witnesses consistently explained that the dropping of calls required synchronised conscious action of pressing 2 buttons which could not be explained through error due to drowsiness. Even if there was poor performance involved in dropping the calls, which is denied, the claimant has failed to properly articulate or evidence the link between this and the disabilities relied upon. On the balance of probabilities, the decision to dismiss and decision not to uphold the appeal were due to the claimant's conduct and it is submitted the Tribunal should make a finding of fact on that basis.

4) If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The legitimate aim was that the Respondent treated the termination of customer calls as a conduct issue as the Respondent has service level requirements to meet in its contract with clients, failure of which can result in financial penalties. The Respondent sets disciplinary rules and enforces disciplinary sanctions concerning employees breaches of rules imposed regarding service level standards, to ensure compliance with its policies and procedures, and to take appropriate action if standards of conduct are not met.

If the Tribunal is not with the respondent on the dismissal and appeal decisions being based on conduct, not performance, the respondent relies upon the treatment being a proportionate means to achieve a legitimate aim (as outlined above). The respondent's Conduct and Capability Policy and the respondent's witnesses evidenced the seriousness of this conduct and evidenced that it was so serious as to risk the reputation of it and its client's businesses, as well as to the potential commercial and financial damage also (for example Jade Bradley spoke in detail on this and also the social media risk associated, whilst Jamie Farrell referred to the conduct as serious and presenting a business risk, as well as other witness such as Steven Murdoch in his statement [para 19]),.

It is submitted that the claimant has failed to shift the burden of proof in this case as to the something more than the fact that she had a disability and issues that arose form that. The "something" relied (sic) *was not the cause of the claimant's alleged unfavourable treatment; she was dismissed for conduct alone. In any event, the treatment was a proportionate means to achieve a legitimate aim.*

219. Further, we have considered the evidence, and the claimant's closing submissions. Having done so, and for the reasons advanced by Mr Byrom, which we accept as being well-founded, we have decided that the claimant's complaint of discrimination arising from disability, contrary to **Section 15 of the Equality Act 2010**, is not well-founded, and it is dismissed.

F) Failure to make reasonable adjustments under section 20 of the Equality Act 2010

220. In her ET1 claim form, the claimant pled her case, at paragraph 20, by saying that "the *respondent failed to provide the reasonable adjustments as set out at paragraph 11. This failure to provide reasonable adjustments impacted upon the claimant's performance as it impacted upon her concentration during her shifts."*

221. Where she referred to paragraph 11, the claimant was cross-referring to her earlier pleading that, in May 2019, she asked her line manager, Jordin Adams, for a change in the type of calls she received to alleviate some of the pain caused by her carpal tunnel syndrome.

222. In the ET3 response, the respondents pled their position as follows:

No failure to make reasonable adjustments

52. *The Claimant alleges that the Respondent failed in its obligation to make reasonable adjustments under section 20 of the Equality Act 2010.*

53. *The Respondent denies there was a failure to make reasonable adjustments as alleged or at all.*

223. In his closing submission for the respondents, Mr Byrom set forth their position as follows:

1) Did the Respondent apply a provision, criterion or practice to the Claimant of the expectation for employees to work shift patterns between 7:30am and 11:30pm each day placed the claimant at a substantial disadvantage due to her fatigue?

The claimant admitted in her evidence, as was supported by the timesheets, that she did not work this shift pattern whilst in the employment of the respondent.

Therefore, as the PCP was not applied to the claimant, the claim must fail and must be dismissed.

2) Did any such provision, criterion or practice put the Claimant at a substantial disadvantage of:

2.1 the length of her shifts meant that she was more likely to make errors; and/or

2.2 exacerbating her carpal tunnel syndrome due to more typing.

2.3 The type of calls claimant handles was more likely to make errors.

As the claimant was not subject to the PCP pled, it follows that the claimant was subject to any substantial disadvantage because of her disability. If the Tribunal is not with the respondent on the matter of the PCP, then it is submitted that the claimant failed to lead sufficient evidence as to the substantial disadvantage suffered, nor did the respondent know or reasonably ought to know that there was a substantial disadvantage.

3) What adjustments does the Claimant say that the Respondent was under an obligation to make?

3.1 The Claimant relies upon flexible working, specifically reduced hours.

3.2 The Claimant relies upon changes in the types of calls handled as technical calls.

4) Were such steps reasonable?

No as there was no chance that they would have been effective to remove the substantial disadvantage because:

1) The claimant was on the shift pattern she alleges she requested for all but one day in June 2019; and

2) The respondent's evidence, including that of Jamie Farwell and Steven Murdoch, was consistent in that technical calls were more difficult calls to handle than the calls the claimant was actually receiving.

5) Did the Respondent fail to take such steps?

Notwithstanding no such was PCP applied, no such steps were taken as they were not deemed reasonable; this applies only to the request evidenced as made, that being the change in hours which did not fit the shape of the business as the respondent's witnesses' evidence. In addition it would not have been reasonable as there was no chance of it being effective. In any event, the claimant was already on a reduced 8am-8pm shift pattern.

In all the circumstances it is submitted this claim should be dismissed.

224. Further, we have considered the evidence, and the claimant's closing submissions. Having done so, and for the reasons advanced by Mr Byrom, which we accept as being well-founded, we have decided that the claimant's complaint of the respondents' failure to make reasonable adjustments, contrary to **Section 20 of the Equality Act 2010**, is not well-founded, and it is dismissed.

G) Harassment on grounds of disability under section 26 of the Equality Act 2010

225. In her ET1 claim form, at paragraph 19, the claimant pled that Mr Farwell's requirement, at the appeal hearing, on 8 August 2019, that the claimant disclose the medication she was on, during this meeting in front of her former colleagues, was humiliating, and she averred this was an act of harassment contrary to **Section 26**.

226. Further, at paragraph 23 (h), she pled that it was an act of direct disability discrimination, contrary to **Section 13**, because the respondent imposed "*the requirement for the claimant to disclose her medication to her former colleagues."*

227. In the ET3 response, the respondents pled their position as follows:

No Harassment

54. *The Claimant has alleged that the requirement to disclose her medication during her appeal hearing would constitute an act of harassment. The Claimant offered the explanation of her medication as an explanation for her actions, Jamie Farwell asked for further details on this so he could properly consider this point of appeal.*

55. *It is the Respondent's position that this does not amount to harassment as the question did not have the purpose or effect of violating the Claimant's dignity, or creating a degrading, humiliating, hostile, intimidating or offensive environment for the Claimant. The question was asked so that the Respondent could have a better understanding of the Claimant's point of appeal.*

228. In his written closing submissions for the respondents, Mr Byrom made the following points:

1) Did the Respondent require the Claimant to disclose the medication she was on during her appeal hearing on 8 August 2019?

Yes.

2) Did the act have the purpose or effect of (a) violating the Claimant's dignity; or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

The claimant's evidence is that it did. The respondent's position is that it did not have purpose to cause any such reaction, the sole purpose being to assist the claimant with her appeal (confirmed by Jamie Farwell and Steven Murdoch in their evidence). The respondent disputes that it has the effect on the basis that:

1) The claimant brought up that she was on medication as part of her appeal grounds; it was therefore reasonable for the respondent to ask that question, which the claimant accepted;

2) The claimant had issues with the matter being raised in front of her colleague. She chose the colleague to accompany her; she did not ask that colleague to leave or say that was the issue during the appeal; and

3) The medication was co-codamol – a painkiller. The claimant had discussed her health conditions openly in front of her colleague at the appeal. In all the circumstances it cannot be seen as reasonable for the claimant to have considered it unwanted conduct by being asked to disclose the name of a painkiller.

The claimant may have perceived the conduct had the purpose or effect, but other circumstances of case, that being she was at an appeal to her dismissal, mentioned being on medication as a ground of appeal and brought that up in front of her companion, as well as the legitimate aim of the respondent in asking the medication's name to support the claimant's appeal, all support the position that it was not reasonable for the conduct to have that effect.

3) Was the Claimant subjected to that unwanted conduct on the grounds of the Claimant's disability?

For the reasons stated at 2 above, it is clear that the claimant was not subject to unwanted conduct. The conduct was reasonable and was by reason to support the claimant's appeal, not by reason of her disability.

229. Further, we have considered the evidence, and the claimant's closing submissions. From the evidence before us, it is significant, in our view, that at the meeting with Mr Farwell, the claimant herself did not ask her companion, Ms Walker, to leave. She answered Mr Farwell's query, about her medication,

which we regard as a legitimate, follow-on question. From that, we infer that it was not an issue for the claimant, at the time, and it only became so when her ET1 claim form was presented, on 4 November 2019.

230. Accordingly, and for the reasons advanced by Mr Byrom, which we accept as being well founded, we have decided that the claimant's complaint of harassment on grounds of disability, contrary to **Section 27 of the Equality Act 2010**, is not well-founded, and it is dismissed.

231. We also remind ourselves, that insofar as this act was founded upon as being direct disability discrimination, contrary to **Section 13**, this has been addressed earlier in these Reasons at section **D(h)** above.

H) Victimisation under section 27 of the Equality Act 2010

232. In her ET1 claim form, at paragraph 21, it was stated that: "*The claimant believes that the respondent's actions in dismissing her and refusing her appeal against dismissing for "dropping calls" was an act of victimisation contrary to s.27 Equality Act 2010, and in particular in reprisal for her making a request for reasonable adjustments."*

233. Further, at paragraph 12, she pled that her verbal request to Mr Adams, during the first week of June 2019, for an altered shift pattern (between 08:30am and 5pm) to assist with her fatigue and the difficulty in her concentration, caused by her health conditions, was a protected act per **Section 27(2).**

234. In its ET3 response, the respondents submitted that there had been no victimisation against the claimant. Specifically, they pled: -

> *59. The Claimant alleges that she has been victimised by the Respondent. The protected act was the Claimant's request that the Respondent make reasonable adjustments and the detriment she suffered was her dismissal and the refusal of her appeal against dismissal.*

60. It is denied that the Claimant was victimised as alleged or at all. The Claimant was dismissed for allegations of terminating customer calls which the Respondent considers to be gross misconduct. The Claimant did not suffer the alleged detriment as the Respondent investigated the Claimant's discrimination claims thoroughly.

235. In his written submissions for the respondents, Mr Byrom stated that there is a three-stage test to be applied by the Tribunal:

1 *Did the alleged victimisation arise in any of the prohibited circumstances covered by the Equality Act?;*

2 *If so, did the employer subject the claimant to a detriment?, and*

3 *If so, was the claimant subjected to that detriment because he or she had done a protected act, or because the employer believed that he or she had done, or might do, a protected act?*

236. We note here his specific replies to the questions set in the List of Issues, as follows:

1) Did the Claimant make requests for reasonable adjustments in association with her fibroids and carpel tunnel syndrome?

It is accepted the claimant made a request for change the hours of her shift which was rejected on 28 June 2019. It is not accepted that the claimant made an (sic) *adjustments request for a change to her job/types of calls – there was no documentary or witness evidence to support this assertion save for the claimant's evidence.*

2) Was that a "protected act" or did the Respondent believe that the Claimant had done or might do a protected act?

Yes.

3) Did the Respondent subject the Claimant to a detriment of (a) dismissal; and/or (b) failure to uphold appeal to dismissal?

The respondent accepts the claimant was dismissed and her appeal was not upheld.

4) If so, was this because the Claimant did a protected act and/or because the Respondent believed the Claimant had done, or might do, a protected act?

Ms Bradley's evidence was that she was aware of a flexible working request for the claimant, but not the details of the same. She said she took into consideration the claimant's disabilities, but only to the extent of mitigation. Her evidence was that she dismissed the claimant because of the claimant's conduct (dropping calls) and no other reason.

Jamie Farwell's evidence was that the adjustment request had no impact on his decision to not uphold the claimant's appeal. His decision was based on the seriousness of the claimant's conduct and the fact she had presented no new grounds to justify further investigation or overturning the decision to dismiss.

The conscious and unconscious reason of the decision makers was not because of the protected act. The claimant has failed to shift the burden of proof. The claim should be dismissed.

237. Further, we have considered the evidence, and the claimant's closing submissions. Having done so, and for the reasons advanced by Mr Byrom, which we accept as being well-founded, we have decided that the claimant's complaint of victimisation by the respondents, contrary to **Section 27 of the Equality Act 2010**, is not well-founded, and it is dismissed.

l) Wrongful dismissal/breach of contract

238. In her ET1 claim form, at section 8.2, the claimant ticked that she was owed notice pay. Matters were not further particularised in the detailed 5 page, 27 paragraph paper apart.

239. In its ET3 response, at paragraph 61, the respondents denied that the claimant was owed any notice pay or other payments. Specifically, it was stated that the claimant had been paid all sums due to her, and accordingly she had no entitlement to any further payments.

240. In his written closing submissions for the respondents, Mr Byrom made the following points:

1. Did the respondent wrongfully dismiss the claimant?

The respondent's Conduct and Capability Policy and the respondent's witnesses all confirmed the act of deliberately dropping calls was considered gross misconduct; the claimant accepted the same. The respondent evidenced a thorough and reasonable disciplinary process. The conduct was so serious that it warranted the claimant to be dismissed summarily. There was a repudiatory breach of contract; there is no entitlement to notice pay as a consequence. The respondent was entitled to act as it did; there was no wrongful dismissal. The claimant's claim on this matter should be dismissed.

2. If so, what is the Claimant's contractual entitlement to notice if properly served.

If the Tribunal is not with the respondent on one, then the claimant's notice entitlement is one month.

241. We have considered the evidence, and the claimant's closing submissions. Having done so, and for the reasons advanced by Mr Byrom, which we accept as being well-founded, we have decided that the claimant's complaint of breach of contract, failure to pay notice pay, is not well-founded, and we would have dismissed it, had we not already dismissed that head of complaint as time-barred.

242. The Tribunal does not know, as parties did not provide us with a copy of the claimant's contract of employment, or written particulars of employment, what her contractual notice period was, but with less than 2 year's continuous employment, her minimum statutory period of notice would only have been one week, as per **Section 86 of the Employment Rights Act 1996.**

Disposal

243. Having carefully reviewed the whole evidence before us, and having reflected on it, and both parties' closing submissions, during our private deliberations, we have come to the clear view that the claimant has not proven any facts from which the Tribunal could conclude that the respondents had committed any act of unlawful discrimination against her, on the grounds of either of the protected characteristics relied upon by her, being disability, and race.

244. Further, even if the burden had shifted to the respondents, we are satisfied that they had good cause, with overwhelming evidence, to summarily dismiss the claimant for gross misconduct, and as such dismissal was on grounds of her conduct, and not her disability, or race, it was not discriminatory.

245. In these circumstances, we have decided that all of her complaints of unlawful discrimination by the respondents fail, and accordingly we have dismissed them for that reason. Similarly, we are satisfied that the respondents had good cause to summarily dismiss the claimant for gross misconduct, and as such her breach of contract claim, had it not been dismissed as time barred, would have failed in any event.

246. For all these reasons, and in all the circumstances, the claimant's claim against the respondents is dismissed in its entirety.

Closing Remarks

247. Finally, we close by stating that we recognise that our Judgment will not be well received by the claimant, because, even during the course of the Final

Hearing, it was clear to us that she still bears a deep sense of grievance and injustice at the way she perceives that she was treated by the respondents.

248. We appreciate that that is her perception, and so her reality, but, as the independent and objective fact finding Tribunal, applying the relevant law to the facts of this case as we have found them to be, based on the evidence led before us from both parties, we hope that in reading our Judgment, and these Reasons, the claimant will come to understand our reasons for dismissing her claim against the respondents.

249. Further, we also hope that the claimant will now turn her efforts towards seeking new employment, with another employer, and try to rebuild her employment experience for the benefit of a prospective new employer, and her own self-confidence and personal esteem, as well as her own financial security.

250. As regards the respondents, we have a few closing remarks for them too. Their administration of paperwork, and correspondence with the claimant, was shown to be lacking on several occasions, and it is to be hoped that, arising from this case, lessons have been learned already by the respondents, and their HR function, or People Advisory Service ("PAS"), about the importance of contemporary correspondence, and record / note taking by managers involved in investigatory, disciplinary and appeal meetings.

251. One matter that exercised the claimant in her evidence to us, and in her witness statement, was her perception that her dismissal was "***predetermined"*** from the investigation stage. While we do not find that to be so, we can see why the claimant came to that view. It is to be found in the very words used by Mr McIntyre at the start of the investigatory meeting – we refer to our findings in fact.

252. In her evidence before us, the claimant accepted that if instead of the actual words used, she had been told ***"potential gross misconduct"***, then she would not have had a problem with that. We trust the respondents will review

what appears to be standard wording in their template investigatory / fact finding notes. Read in context, the Tribunal saw that meeting as fact finding, as explained in the rest of Mr McIntyre's introductory remarks to the claimant at that meeting.

253. It was also of note that, despite the correspondence being in the Bundle produced to the Tribunal, the amended grounds of resistance in the ET3 response still referred (at paragraphs 28 and 29) to the claimant being invited to a disciplinary hearing on 9 July 2019, and attending on that date, when in fact it was held and she attended on the reconvened date of 11 July 2019.

254. We also note and record Ms Bradley's question to the claimant, after advising her on 11 July 2019, at the conduct hearing, that she was being summarily dismissed, she only then enquired whether the claimant felt the meeting had been carried out in a fair manner.

255. The claimant replied stating she could not comment upon that matter. We can well understand why, given the bizarre timing of the question, and we simply do not understand why such a question, if required, was not asked of the claimant, at the close of the claimant's contribution to the conduct hearing, and before Ms Bradley, as the decision maker, adjourned to take advice from PAS / HR.

256. In Ms Bradley's notice of summary dismissal, issued to the claimant by letter dated 11 July 2019, following close of the conduct hearing held with the claimant that day, it was highlighted that the claimant was being dismissed for breaches of two specific types of gross misconduct, identified in the respondents' Conduct and Capability procedure.

257. The wording used in Ms Bradley's letter was a straight lift from the wording in the procedure, and in evidence to this Tribunal, it was confirmed by witnesses for the respondents that it was call avoidance (deliberately and wilfully cutting the customer off calls), and not "***including misuse of Company intranet or inappropriate use of Webhelp UK's time."***

258. Further, we note and record Mr Farwell's answer, in reply to a point of clarification raised by Mr Alexander, Tribunal member, about why, after a short 10-minute adjournment, and without going to PAS / HR for advice, he simply advised the claimant that her appeal was unsuccessful, and her summary dismissal stood in place.

259. Mr Farwell explained that going to PAS / HR is "***very situational dependent"***, and while he accepted that the claimant had asked him to contact her doctor, he took the view that the dismissal was ongoing, and it was not his position to contact the claimant's doctor.

260. Further, in answer to the Judge, Mr Farwell stated that he did not go to Occupational Health, as that would have prolonged the situation and it was not merited, as the claimant had hung up on customers on many occasions, not just a few. In his view, the severity of the situation justified summary dismissal.

261. We also note and record Mr Farwell's acceptance, in answer to a point of clarification raised by the Judge, that, at the appeal hearing, on 8 August 2019, despite having seen the claimant's letter of appeal dated 17 July 2019, referring to "***my experience of harassment by colleagues"***, he did not make further enquiry of the claimant, and seek clarification.

262. With hindsight, Mr Farwell acknowledged to the Judge that he sees now that that phrase "***rings alarm bells***", but he stated that it didn't at the time, explaining that he found the meeting with the claimant very difficult, and that's why he did not ask her questions.

263. In their ET3 response, at paragraph 17, the respondents had averred that: ***"The Respondent provides a comprehensive equal opportunities policy to all employees, together with training for its employees on equal opportunities."***

264. Further, at paragraph 40, the respondents had pled that: **"*Should any discrimination be shown, which is denied, as per Section 109(4) of the***

Equality Act 2010, the Respondent took all reasonable steps to prevent its employees from committing discriminatory acts, including, but not limited to, providing a comprehensive equal opportunities policy, together with training for its employees on equal opportunities."

265. In his written closing submissions for the respondents, Mr Byrom did not refer back to this matter. While the Tribunal has found in favour of the respondents, that there was no unlawful discrimination on their part against the claimant, the Tribunal is compelled to observe that there was a paucity of evidence led before this Final Hearing on the matter of the respondents' comprehensive equal opportunities policy, and training for its employees on equal opportunities.

266. We had provided to us, within the Bundle, at pages 179 to 183, a copy of the respondents' Equality and Diversity Policy, but it was a version 4.5, reviewed and refreshed, and rebranded, in September and November 2019, and thus not the version 4.3 in force, since October 2017, and thus the version in force at the material time of the claimant's case, and her employment with the respondents. It is stated to work "i***n conjunction with our Dignity at Work policy"***, but no copy of that document was produced to the Tribunal in the respondents' Bundle.

267. The respondents' witness statements on the matter were shallow and lacking in any meaningful detail, and when clarification was sought by one of the lay members of the Tribunal, Mr Ashraf, the respondents' witnesses were unable to give any detailed response, other than to refer to the Equality and Diversity Policy included in the Bundle, and say that they had been trained, but without any specifics as to when the training was, what was its content, was it internally or externally provided, etc. He was also advised that it was on the company's WISE intranet system, but not with posters around the office.

268. Had this Tribunal required to consider a **Section 109** defence, it is not likely, on the evidence available to this Tribunal, that the respondents would have succeeded in such a defence.

Employment Judge: I McPherson
Date of Judgment: 25 January 2022
Entered in register: 27 January 2022
and copied to parties