



EMPLOYMENT TRIBUNALS

Claimant
Miss S Khan

- V -

Respondent
TJX UK

Heard at: London Central (video)

On: 6-10 February 2023

Before: Employment Judge Baty
Ms Z Darmas
Ms N Sandler

Representation:

For the Claimant: In person
For the Respondent: Ms Y Genn (counsel)

RESERVED JUDGMENT

1. The claimant's complaints of direct race discrimination; direct religion or belief discrimination; and harassment related to religion or belief were presented out of time and it is not just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear those complaints and they are therefore dismissed. If it had had jurisdiction to hear them, those complaints would all have failed.

2. The claimant's complaints of automatically unfair dismissal pursuant to section 100(1)(d)/(e) Employment Rights Act 1996 ("ERA"); discrimination arising from disability; and victimisation all fail.

REASONS

The Complaints

1. By claim forms presented to the employment tribunal respectively on 27 November 2020 (2207376/2020) ("the first claim") and 18 January 2021 (2200241/2021) ("the second claim"), the claimant brought complaints of automatically unfair dismissal pursuant to section 100(1)(d)/(e) Employment

Rights Act 1996 (“ERA”); direct race discrimination; direct religion or belief discrimination; discrimination arising from disability; harassment related to religion or belief; and victimisation.

2. The respondent defended the complaints.

3. The case had originally been listed for a five-day hearing in May 2022 on both liability and remedy, but that hearing had had to be postponed because there was no tribunal panel available to hear it at that time. That hearing had been listed by video as an adjustment for the claimant. The current hearing similarly took place by video.

The Issues

4. There were several case management hearings in relation to the claims, the last of which took place on 21 October 2021 before Employment Judge Stout. At that hearing, EJ Stout spent two hours discussing the claimant’s case with the parties, during which she sought to ascertain from the claimant which parts of her chronology of events she maintained were legal claims and on what grounds. This resulted in the production of a list of issues for the final hearing, which was annexed to the case management orders sent out by EJ Stout following the hearing.

5. At the start of this hearing, the judge asked the parties whether there were any changes to that list of issues or whether they remained the issues to be determined at the hearing. Both parties confirmed that those were the issues to be determined at the hearing and that there were no changes.

6. At the start of the second day of the hearing, after the tribunal had done its pre-reading, the judge suggested that one correction ought to be made to the issues regarding the complaint of discrimination arising from disability because, as drafted, it did not reflect the respondent’s position as set out in both the response and the respondent’s witness statements. That was to change issue 5.5 to confirm that the respondent accepted that the unfavourable treatment of dismissing the claimant was because of the claimant’s “unauthorised absence” from work as opposed merely to her “absence” from work. Both parties agreed.

7. The agreed list of issues is annexed to these reasons, inclusive of the correction set out in the paragraph above.

8. The claimant relies on eight alleged disabilities: Dyspraxia; Dyslexia; Dyscalculia; Hypermobility syndrome; Fibromyalgia; Osteoarthritis; PTSD; and Depression/anxiety. The parties noted, however, and agreed, that the respondent had since conceded that the claimant was a disabled person at the relevant times by reason of all of the disabilities upon which she relied with the exception of depression/anxiety and PTSD (although the respondent still disputed whether it had knowledge of any of her eight alleged disabilities at the relevant times).

9. EJ Stout’s case management orders indicated that the five-day hearing would consider issues of both liability and remedy. However, when the judge

discussed the timetabling of the hearing with the parties at the start of the hearing, it was evident that, given the number of witnesses and the amount of evidence, there would not be enough time to deal with matters of remedy in addition to liability. The parties agreed with the tribunal that the hearing would, therefore, cover the liability issues in the list of issues but not those relating to remedy.

Adjustments

10. The tribunal had noted that EJ Stout had, in the context of adjustments and special requirements, identified at her preliminary hearing that the claimant would need the tribunal and the respondent to use simple, clear language when speaking and that the claimant may need additional time to read any documents and may need longer breaks than would be usual. The judge asked the claimant at the start of the hearing whether she would need any further adjustments beyond those identified by EJ Stout. The claimant said that she would not but emphasised the need for breaks and the need to explain matters because of her dyspraxia.

11. The judge explained how a typical tribunal day would run, roughly from 10 AM to 4:30 PM with an hour's break around 1 PM for lunch and a mid-morning and mid-afternoon break, but said that, if the claimant required further breaks, she should just say. He also emphasised that he would avoid legal language to the greatest extent possible, would explain any legal language that he needed to use but that, if the claimant did not understand or follow anything, she should say so and he would explain.

12. Furthermore, at the start of the hearing, the judge spent some time for the claimant's benefit talking through the process of the tribunal hearing and, at her specific request, talking through what she would need to do when she came to give evidence herself and in terms of preparing to cross-examine the witnesses of the respondent (in particular that it would be of great help for her to have prepared in advance the questions she wanted to ask each of the witnesses, which she duly did).

13. The tribunal also accommodated the claimant's religious requirements, for example when towards the end of the second day she asked if the hearing could adjourn for the day at that point because she needed to pray, which the tribunal duly agreed to.

14. The claimant told the tribunal on more than one occasion that she was tired. However, when the judge discussed with her whether she was able to continue, the claimant always insisted that she was able to carry on. Indeed, she did carry on over the course of the five-day hearing, without any obvious indication that she was having difficulty in doing so. This included giving evidence herself on the second day of the hearing and cross-examining the respondent's witnesses on the third and fourth days of the hearing.

The Evidence

15. Witness evidence was heard from the following:

For the claimant:

The claimant herself.

For the respondent:

Mr Naveed Shabbir, who was at the times relevant to the claims an assistant manager at TJX UK, Charing Cross store;

Mr Muhammed Bilal Amjad, an assistant manager at TJX UK, Charing Cross store;

Ms Marianna Puntil, a team leader at TJX UK, Charing Cross store;

Ms Kirsty Read, who was at the times relevant to the claims a store manager at TJX UK, Camden, and who heard the claimant's grievance;

Mr Stephen Cook, a district manager at TJX UK, who heard the claimant's grievance appeal;

Ms Taslima Rahman, who was at the times relevant to the claims an assistant manager at TJX UK, Charing Cross store, and who took the decision to dismiss the claimant; and

Mr Ryan McArdle, a district manager at TJX UK, who heard the claimant's appeal against her dismissal.

16. A witness statement had also been produced from Ms Melania Mazzocato, who was the claimant's "team leader" while she worked for the respondent at its Charing Cross store. However, at the start of the hearing, Ms Genn informed the tribunal that Ms Mazzocato was on maternity leave and close to her due date and, for that reason, the respondent would not be calling her but would be relying on her witness statement alone. The judge explained, principally for the claimant's benefit, that the tribunal would read her statement but that it may be the case that it could give less weight to that statement as Ms Mazzocato was not attending the hearing to be cross-examined on her evidence. In fact, having heard all the evidence and the submissions, we felt that we were able to give weight to Ms Mazzocato's statement, for the following reasons: it was consistent with the statements of the respondent's other witnesses; we had no good reason not to accept that the only reason why Ms Mazzocato was not present at the tribunal was indeed the proximity of her due date (which is a good reason for not attending) and that her statement had, like the other witness statements of the respondent's witnesses, been prepared in good faith and was her genuine evidence; and, as we shall come to, we had significant concerns about the reliability of the claimant's evidence such that we did not feel able to

accept the claimant's evidence where it contradicted the evidence of the respondent's witnesses, including that of Ms Mazzocato.

17. A main agreed bundle numbered pages 1-624 was produced to the tribunal. In addition, there was an agreed "supplementary bundle" numbered pages 1-81 and a third bundle of "claimant's additional documents" numbered pages 1-54. We were referred to all three bundles during the course of the hearing.

18. In addition, the respondent provided a chronology and a cast list, although these documents were not agreed.

19. The tribunal read in advance the witness statements and any documents in the bundles to which they referred, together with the documents on a recommended reading list provided by the respondent to the extent that they were not already referred to in the witness statements.

20. A timetable for cross-examination and submissions was agreed between the tribunal and the parties at the start of the hearing so as to enable the evidence and submissions on liability to be completed within the five-day listing. This timetable was largely adhered to.

21. The order in which the witnesses would be called was agreed at the start of the hearing. That order of witnesses was duly kept to.

22. The hearing was conducted respectfully by both parties and the claimant and Ms Genn were courteous throughout. The claimant was courteous to all of the witnesses whom she cross-examined, often exchanging pleasantries with them at the start of the cross-examination and asking how they were, even those witnesses against whom she was making allegations of discrimination and harassment.

23. During her evidence, the claimant frequently did not answer the question put to her but went off on a tangent, even in the case of relatively simple questions. The judge intervened on several occasions to ask her to answer the question that was being put.

24. In her cross-examination of the respondent's witnesses, the claimant frequently was unable to formulate questions which were clear and in a form which the witnesses could easily answer. She also had a tendency to make lengthy statements without getting to a question. The judge did not intervene unless it was necessary but, when the narrative of the claimant's question was so extensive that it became difficult to follow or where the question was just not clear such that the witness (and the tribunal) could not understand it, the judge intervened to remind the claimant to focus on asking questions and not making statements and to ask her to rephrase questions. The judge explained that, unless the question was clear, the answer was unlikely to be clear and that it was important that the witness knew what was being asked of him or her.

25. On several occasions where she appeared to be struggling to formulate what she wanted to ask, the judge assisted by formulating the question which he thought the claimant was trying to ask, but in a clear way which was easily understandable by the witness. This appeared to be of assistance and the claimant thanked the judge for doing so on a number of occasions.

26. On occasions, the claimant went off track in her line of questioning and focused on areas which were not germane to the issues which the tribunal needed to determine. Whilst the judge allowed a certain amount of this before stepping in, he did intervene at times in those circumstances, asking the claimant to stop pursuing that line of questioning and to return to matters relevant to the issues of the claim. In doing so, on a number of occasions, he reminded the claimant what the issues of the claim were and which ones were of particular relevance to the witness whom she was cross-examining at that point.

27. At various points during the hearing, where the claimant either asked for an explanation of the law or where, for example, her line of questioning indicated that she might not be fully aware of the relevant legal provisions, the judge took time to explain for her benefit various aspects of the law. This included explaining what was necessary to do to prove discrimination; in other words, that simply because the claimant "felt" that she had been discriminated against, this was not enough and that she had to prove facts from which the tribunal could infer that she had been treated less favourably because of her race or religion. It also included an explanation of what victimisation was; in other words, that it did not simply mean bad treatment of the claimant but, in layman's terms, required the claimant to have alleged that discrimination law had been breached and for her to have been treated unfavourably because of making that allegation. It also included an explanation of how tribunal time limits worked, including proving that there was conduct extending over a period such that earlier conduct which would otherwise be out of time was brought in time, and the tribunal's discretion to extend the time limit on the basis that it was just and equitable to do so.

28. The judge explained for the claimant's benefit, both at the start of the hearing and again after the evidence was completed on the fourth day of the hearing, what submissions entailed. At the end of the fourth day, both parties indicated that they would produce written submissions. Ms Genn indicated that her submissions would be likely to be 15-20 pages (although in the end they were in fact only 10 pages). The judge asked the claimant, conscious of her dyslexia and dyspraxia, how much time she thought she might need to read the respondent's submissions. It was, therefore, agreed that the parties would send their submissions to the tribunal no later than 9:30 AM on the morning of the final day of the hearing and that the hearing would recommence at 11 AM that morning, so as to give an hour and a half to enable both the tribunal and the parties to read the submissions.

29. Ms Genn had some computer glitches and her submissions arrived at 9:45 AM. Five minutes later, the claimant sent an email to the tribunal, apologising for the delay and stating that *"I completely collapsed last night of physical and psychological exhaustion, and [am] still writing mine. I will be sending my submission in the next half an hour, which to everyone's relief, will only be a*

page or two long". The claimant in fact sent her submissions, which were five pages long and well structured, to the tribunal at 10:59 AM. The hearing reconvened shortly after 11 AM as planned, without the tribunal or Ms Genn having had the opportunity to read the claimant's submissions.

30. The judge asked the claimant, given that it appeared that she had been writing her own submissions over the course of the last hour or so, whether she had had the opportunity to read Ms Genn's submissions. The claimant said that she had only just begun to skim through them. She confirmed that she had spent the previous hour writing her own submissions. The judge asked if she would, therefore, need additional time to read Ms Genn's submissions and the claimant said she would like another hour. The tribunal agreed to this. The hearing adjourned and reconvened at 12:15 PM. During the adjournment, the tribunal read the claimant's written submissions.

31. When the hearing reconvened, Ms Genn made some brief oral submissions. The judge asked the claimant whether she wished to make any oral submissions beyond her written submissions. The claimant said that she did not wish to do so. However, she said that she just wanted to thank the tribunal very much for making her "*feel welcome and safe here*". She also thanked Ms Genn for being so patient with her.

32. The hearing concluded at that point. Given the time constraints, the decision was reserved.

Findings of Fact

33. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

Overview

34. We first set out an overview of the facts, before going into our more detailed fact-finding after that.

35. The respondent owns the chain of stores which trade as TK Maxx.

36. The claimant was employed by the respondent as an "associate" from 20 October 2019 until she was dismissed summarily with effect from 8 October 2020. At all times, the claimant was employed at the respondent's Charing Cross store.

37. The claimant worked on a part-time basis, working 16 hours per week, on Saturdays and Sundays. These were her core hours, although she was available to work at some other times if the respondent needed it.

38. The claimant describes herself as "Bangladeshi" and having brown skin. She is a Muslim.

39. Employees at the respondent are employed in the following roles, in ascending order of seniority: associate; team leader; assistant manager; deputy manager; store manager; district manager.

40. When the claimant worked at the Charing Cross store, her team leader was Ms Mazzocato. Ms Mazzocato was the team leader responsible for the basement floor, which was the “home” and “kids” departments, and which was where the claimant worked. When Ms Mazzocato was on annual leave or absent for any other reason, her colleague, Ms Puntil, who was another team leader, would take responsibility for the basement floor. Team leaders are the first step in the management team, but they also work on the shopfloor with the associates.

41. An incident occurred on Saturday 15 February 2020 involving the claimant and another associate, Ms SW. Ms SW is a white female.

42. The claimant was then absent from work, having provided a sick note to the respondent, from 22 February 2020 until 8 March 2020.

43. On 4 March 2020, the claimant raised a grievance relating to the incident with Ms SW and the handling of that incident. That grievance was not dealt with straightaway because the government lockdown as a result of the coronavirus pandemic occurred soon after it was submitted. At that point the respondent’s stores were shut and the majority of its employees placed on the government’s furlough scheme.

44. The claimant was absent without leave (absent from work without having provided a sick note) from 9 March 2020 to 20 March 2020.

45. The claimant was then, in common with many other of the respondent’s employees, placed on the government’s furlough scheme with effect from 20 March 2020. She remained on the furlough scheme until 9 June 2020. However, she never returned to work then or at any point after that from 9 June 2020 until the termination of her employment on 8 October 2020. Nor did she provide sick notes in relation to this period. This was, therefore, “unauthorised absence” for the purposes of the respondent’s policies.

46. A grievance meeting was held on 15 August 2020 in relation to the grievance raised by the claimant on 4 March 2020. The grievance was heard by Ms Read. Ms Read delivered her grievance outcome to the claimant on 16 September 2020. She partially upheld the grievance.

47. On 23 September 2020, the claimant submitted an appeal against the grievance outcome.

48. On 3 October 2020, Ms Rahman held a disciplinary hearing with the claimant. By letter of 8 October 2020, Ms Rahman notified the claimant of her summary dismissal from the respondent, by reason of unauthorised absence.

49. On 10 October 2020, the claimant's grievance appeal hearing took place. It was heard by Mr Cook.

50. On 16 October 2020, the claimant submitted a written appeal against her dismissal.

51. The claimant's appeal against dismissal was heard by Mr McArdle, who held three meetings with the claimant, on 31 October 2020, 6 November 2020 and 13 November 2020.

52. By letter of 18 November 2020, Mr McArdle delivered his outcome letter regarding the claimant's appeal against dismissal. Mr McArdle upheld the decision to dismiss the claimant.

53. On 10 December 2020, the outcome letter from the grievance appeal was delivered to the claimant. Mr Cook upheld Ms Read's original decision on the grievance.

Findings on respective reliability of evidence

54. Before going into our more detailed findings of fact, it is necessary to make some findings about the respective reliability of the evidence of the claimant and that of the respondent's witnesses.

The claimant

55. We have concerns about the reliability of the claimant's evidence for a number of reasons.

56. The claimant is clearly an intelligent individual. She was able to formulate intelligent answers when she wanted to; she was able to cross-examine a large number of the respondent's witnesses on matters relevant her claim; and she was able to put together structured and reasoned legal submissions on her case. That is important in the context of the points we make below, in which we conclude that a lot of what claimant said was inconsistent, lacking in credibility and/or evasive and therefore lacking in credibility.

57. First, we found that the claimant was evasive in her response to questions put to her at this hearing. We have already noted her tendency to go off on a tangent in relation to the questions asked. However, it was more than this and there were many occasions where she appeared to be avoiding answering the questions put. That is a pattern which is consistent with her approach in various of the meetings she had with employees of the respondent during her employment. For example, Ms Read noted that the claimant was being evasive in her grievance meeting (when Ms Read was trying to get an answer from her about what she meant by "recognition" from the respondent and what the respondent needed to do to get her back to work) and there are other examples in the notes of that grievance meeting where the claimant did not answer the question put (for example, when she was asked the simple question by Ms Read of whether she went back to the floor where she was working after

the alleged incident of 15 February 2020 (page 305 of the bundle); Mr McArdle noted that in his disciplinary appeal meeting, the claimant seemed to be avoiding his question as to why she did not provide a sick note for lengthy periods of absence.

58. The claimant's case developed as it went along. The claimant often said things in her evidence which clearly arose from her own recognition of a weakness in her case. For example, given the weakness of her discrimination arising from disability complaint on the issue of the respondent's knowledge of her disability, the claimant in her oral evidence for the first time said that at her introductory interview when she joined the respondent, she had told Mr Shabbir about her disabilities. He denied this and there is no corroborative evidence of this. However, the surprising point is that the claimant only brought it up at this stage. Furthermore, she clearly recognised the weakness of her section 100 claim by stating for the first time on day four of the hearing that her fear of the workplace was of an injury that would impact her caring duties.

59. The claimant had made repeated claims that Ms Punttil and Ms Mazzocato had turned a blind eye to any issues which she had raised about Ms SW; however, she eventually conceded in cross-examination that Ms Punttil had in fact dealt with a complaint made by her about Ms SW.

60. The claimant's account of the alleged 15 February 2020 incident developed in alleged seriousness throughout her interactions with the respondent over the remainder of her employment. At the time she brought the original grievance, she did not even suggest that there was an act of discrimination. However, as time went on, not only did she allege discrimination but the factual allegations regarding what had happened and their alleged seriousness developed and expanded.

61. Finally, during the claimant's evidence, Ms Sandler asked her about a lengthy email which she had written to the respondent's HR team on 13 July 2020. At one point in that email, the claimant explicitly states that she had recorded accounts of two separate conversations (one being a phone conversation and the other a meeting) which she had had respectively with Mr RM (a deputy manager at the Charing Cross store) and with Ms Rahman. Ms Sandler asked her if these were audio recordings. The claimant, clearly concerned that evidence of her covertly recording her work colleagues may not look good, replied that they were not audio recordings and that, rather, she had made written records of the conversations. Ms Sandler then took the claimant to the section further down her email which states: *"Neither [Mr RM] nor Romi are aware of my recording their accounts or sharing this information with the Metropolitan police. I have done this without their permission and take full responsibility for my action"*; Ms Sandler asked the claimant what she meant by that. The claimant paused and said *"good question. To give the benefit of the doubt may be"* but, when asked if that really referred to an audio recording, she again said that there was definitely no audio recording and that she only made a written record. Ms Sandler asked if she had that written record, to which the claimant said that she had. Ms Sandler asked her if she had disclosed it. The claimant said that she *"appreciated the question"* but that she had never been

told that she had to disclose such notes. What the claimant said was entirely lacking in credibility; quite clearly, she had recorded these conversations covertly, as was evident from the phrasing of her own email of 13 July 2020.

62. There are many other similar examples. However, for all these reasons, we have serious concerns about the reliability of the evidence given by the claimant and, except where her evidence is backed up by contemporaneous or documentary evidence, we place little reliance on it.

The respondent's witnesses

63. By contrast, we had no concerns about the reliability of the evidence of the respondent's witnesses. They provided straightforward evidence. They did not deviate from the questions asked, in contrast to the claimant and in spite of the many difficulties in identifying what it was that they were being asked by the claimant in cross-examination. Importantly, they provided consistent evidence supported by their witness statements, the other witness statements of the respondent's witnesses and the contemporaneous documents. To highlight one example, both Mr Shabbir and Mr Amjad were questioned at length by the claimant about the events of 15 February 2020. This included three separate meetings, in different locations, with the claimant, then with Ms SW, and then with the claimant and Ms SW together. Despite the complexity of this and the gap of time, both of them were absolutely consistent, both with their own evidence and with each other's evidence, about what happened.

Conclusion regarding respective reliability of evidence

64. For these reasons, where there is a conflict between the evidence of the claimant and that of the respondent's witnesses and where there is no contemporaneous documentary evidence to assist, we prefer the evidence of the respondent's witnesses over that of the claimant.

65. We now go on to make our more detailed findings of fact.

Start of the claimant's employment

66. Mr Shabbir interviewed the claimant for the role of associate which she had applied for and which she duly commenced in October 2019. There were approximately five candidates applying. Due to the claimant's studies, her availability for shifts was not as flexible as some of the other candidates, but Mr Shabbir thought that she would be good for the team and backed her in discussions with the management team. The claimant was duly offered the job.

67. At this tribunal for the first time, the claimant gave evidence that she informed Mr Shabbir at that time about the eight disabilities on which she relies for the purposes of her discrimination arising from disability complaint. There is no contemporary evidence of this happening. Mr Shabbir denies it. For the reasons of respective credibility set out above, we accept Mr Shabbir's evidence and find that the claimant did not tell him about any of her alleged disabilities.

68. One of the reasons why the claimant's basic working hours were on Saturdays and Sundays rather than during the week was that she was a student. The claimant made this known to Mr Shabbir and two other work colleagues at the respondent. At the start of her employment with the respondent, the claimant had recently submitted her MA dissertation and was on the lookout for further opportunities for a PhD placement.

Ms Mazzocato and Ms Puntill

69. As noted, the claimant worked on the basement floor of the Charing Cross store, where Ms Mazzocato was the team leader.

70. Ms Mazzocato met the claimant on her first day and was personally responsible for training her to work on the basement floor. She and the claimant generally worked well together. It was Ms Mazzocato who took the decision to confirm the claimant in a permanent role following her probationary period, as she was happy with her standard of work during her probationary period. Once the claimant secured a permanent position, her attitude changed slightly and she became quite assertive and bossy with some of her fellow associates, some of whom were more senior than her.

71. The claimant required a lot of flexibility in terms of when she took her breaks, mainly to do with her student activities, as the claimant had regular one-to-one hour-long sessions with a mentor of hers. Ms Mazzocato never refused these requests and worked around them.

72. Ms Mazzocato was aware that the claimant was a Muslim and the claimant used the respondent's prayer room during the course of shifts.

73. Ms Mazzocato's witness statement states that the claimant often chose to talk about religion with her and with other colleagues. She would also often ask very personal questions about other people and their own religion. On one occasion she asked Ms Mazzocato why she was not married, why she did not have children and why she was living with a man, unmarried. Ms Mazzocato politely but firmly told her that none of this was her business and that it was not appropriate for her to be asking such questions to a colleague. She explained to the claimant that they were all different, they will all have different principles, values and beliefs and it was important that they all respected each other. The claimant apologised to her about asking the questions and it did not happen again.

74. The claimant maintained that she did not seek to talk to others about religion. However, other witnesses of the respondent gave evidence that she did exactly that. Notwithstanding that Ms Mazzocato was not at the tribunal to give evidence, there is nothing inconsistent in her witness statement with that of the other witnesses of the respondent. For these reasons, and because of our concerns about the reliability of the claimant's evidence, we accept the account in the paragraph above given by Ms Mazzocato in her witness statement.

75. As noted, Ms Puntil took responsibility for the basement floor when Ms Mazzocato was away. She did not therefore work with the claimant regularly during her time at the respondent. However, when she did work with her, she got on well with her.

Ms SW

76. Ms Mazzocato and Ms Puntil also got on well with Ms SW, a colleague of the claimant who also worked on the basement floor at the Charing Cross store.

77. The claimant's position at paragraph 3 of her witness statement is that between 15 January and 14 February 2020, Ms SW's conduct was offensive and hostile to some extent (often in front of customers), and that various incidents were accordingly reported to Ms Mazzocato and Ms Puntil on numerous occasions, "*to which both turned blind eyes*". She goes on to say that Ms Mazzocato and Ms Puntil "*continually ignored*" anything Ms SW did or said to the claimant, without specifying what it was that Ms SW is alleged to have done or said to her.

78. We do not accept this account. First, we have already noted the surprising lack of specificity about the allegations of what Ms SW is said to have done or said to the claimant, which is particularly surprising if there were, as the claimant maintains, a number of these incidents. Secondly, as already noted, the claimant changed her position in cross-examination and admitted that Ms Puntil did deal with a complaint the claimant raised with her about Ms SW. Thirdly, the evidence of the respondent's witnesses, which we have no reason to doubt and therefore accept, is that Ms SW, in contrast to the claimant, was very quiet; came to work, did her job and then went home; and was very polite but was not overly friendly with colleagues and did not stop and chat with colleagues when she wanted to get on with her work; this is not a description of an individual who would be likely to be being repeatedly rude in front of customers. Fourthly, we reiterate the concerns we have about the reliability of the claimant's evidence. We therefore prefer the evidence given by Ms Mazzocato and Ms Puntil, which we set out below.

79. At some point in January 2020, the claimant told Ms Mazzocato that she thought that Ms SW was being rude to her. The claimant told Ms Mazzocato that Ms SW wouldn't talk to her and that Ms SW was not being friendly. When Ms Mazzocato then asked Ms SW about this, Ms SW told her that she was not happy that the claimant asked her a lot of personal questions.

80. Ms Mazzocato essentially explained to both Ms SW and the claimant (separately, in separate conversations) that they did not need to be best friends but that it was important for them all to be polite to each other and respect each other.

81. This was the only type of complaint that Ms Mazzocato received from the claimant in the time that they worked together.

82. We do not therefore find that Ms Mazzocato favoured Ms SW or disregarded or ignored the claimant's concerns about Ms SW. She acted upon her complaint as soon as the claimant raised it. Furthermore, Ms Mazzocato treated the claimant and Ms SW exactly the same and expected the same from them.

83. In January 2020, the claimant told Ms Punttil that Ms SW was not being friendly towards her. Ms Punttil spoke to Ms SW about this first, on a one-to-one basis. Ms SW told her that the claimant often asked her lots of personal questions, and would often talk and ask about religion, which she did not feel comfortable with. We accept that that was the case, not least because it is consistent with the evidence of other witnesses of the respondent that the claimant did often ask lots of personal questions and talk and ask about religion.

84. Ms Punttil then spoke to both the claimant and Ms SW together in January 2020. She explained to them that it was important that they were all polite to each other. She told Ms SW that she needed to make a little more effort in terms of being friendly to her colleagues. She told the claimant that she needed to avoid being so personal with people, in other words that there were certain boundaries in the workplace that she should respect. Both Ms SW and the claimant appeared to take on board what Ms Punttil had told them and she did not encounter any further difficulties between them. At the time, Ms Punttil was not aware that Ms Mazzocato had had a conversation with Ms SW and the claimant at a similar time about a similar issue.

85. We do not therefore find that Ms Punttil favoured Ms SW or disregarded or ignored the claimant's concerns about Ms SW. She acted upon her complaint as soon as the claimant raised it. Furthermore, Ms Punttil gave each of them instruction as to how they should adjust their behaviour going forwards, although that instruction, entirely reasonably and properly, was slightly different for each in that it was tailored to the conduct which Ms Punttil wanted each of them respectively to address.

Mr Shabbir and Mr Amjad

86. As noted, Mr Shabbir had recommended the claimant for the role of associate at the respondent. Whilst she worked at the respondent, he would generally see her at least once during each of her shifts and they always had a friendly relationship.

87. Mr Amjad also had a good working relationship with the claimant, although as he was largely based on a different floor of the store, their exchanges were fairly limited. However, she was always very pleasant with him and he with her. They were not friends outside of work, although they had a good working relationship. The claimant did ask Mr Amjad lots of personal questions, for example about where his family was born and whether he knew the history of his name. Although he engaged in these conversations, telling her that his family was from Pakistan and discussing the history of his name with her, he did not ever start or encourage these conversations, as they were only work colleagues and clearly these issues weren't relevant to work. However, although

Mr Amjad did not take offence at the questions which the claimant asked him, this is another example of the claimant raising and seeking to discuss personal issues with work colleagues. The claimant accepts that these conversations with Mr Amjad took place.

88. Mr Shabbir was aware that the claimant is a Muslim, as she made use of the respondent's prayer rooms at the store, but that was the extent of his knowledge. Mr Shabbir is not aware of Ms SW's religion. Mr Shabbir considers that a person's religion is a personal matter for them. He personally does not consider it appropriate to discuss religion in the workplace.

15 February 2020 incident

89. On Saturday 15 February 2020, Mr Shabbir and Mr Amjad were the two assistant managers on duty at the Charing Cross store. The incident itself occurred towards the end of the day.

90. The evidence in relation to the 15 February 2020 incident given by the claimant is considerably at odds with that of the respondent's witnesses.

91. In summary, in her witness statement, the claimant maintains the following:

1. Following an earlier (entirely ordinary) workplace conversation with Ms SW about replenishing stocks (specifically plastic hooks), the claimant then later informed Ms SW that these hooks had been moved but that she had since found them. As soon as she had delivered this message to Ms SW, Ms SW raised her cleaning product towards the claimant's face and sprayed it on her face "repeatedly". Startled, the claimant froze on the spot. She looked at Ms SW and asked: "How can you spray cleaning product on my face?"; and Ms SW replied "I am cleaning, you have to be careful". Ms SW then moved the cleaning spray away from the claimant's face and lowered it towards the table and started cleaning, ignoring what had happened.

2. The claimant tried one more time to speak with Ms SW without any form of physical or verbal aggression, but Ms SW continued to look away and act as though nothing had happened. At this point, the claimant ran upstairs where she found two colleagues (M and C) and broke down into tears while explaining to them what had just happened. They sent her upstairs to meet Mr Shabbir, who was the manager in charge.

3. The claimant explained to Mr Shabbir every detail of the assault as she struggled to control her tears. Mr Shabbir asked the claimant to wait in that room while he and Mr Amjad had a conversation with Ms SW. After they had finished speaking with Ms SW, the claimant was called to the system office. She struggled to pull herself together, wiped her face and tears and made her way to the system office.

4. Mr Shabbir and Mr Amjad informed the claimant that Ms SW had told them that she was upset about what the claimant had said to her about Jesus and that that was why she had sprayed on her. They said that Ms SW had told them that the claimant had told her that the claimant "went to Church" and that the claimant "did not like the way Jesus was kept in the Church". Mr Shabbir and Mr Amjad asked the claimant if she had ever said such things to Ms SW. The claimant replied in the negative and confirmed that she had never said such things.

5. At this point Mr Amjad raised his voice and in a rude tone told her in an intimidating manner "you should not have spoken about religious feelings on the

shopfloor". The claimant defended herself saying that she had never said such things. Mr Amjad repeated himself in a more forceful voice than before, saying that the claimant was not allowed to speak about religious feelings/religion on the shopfloor and made her feel that she was to blame for the assault by Ms SW.

6. Mr Shabbir then told the claimant that, since the claimant believed in God, she should know that everything is from God; and that she should therefore take this as something that had come from God. He then suggested that she should stop crying, try to be courageous and go back to the shopfloor.

92. The claimant also maintained in her witness statement that on 15 February 2020 she twice asked Mr Shabbir and Mr Amjad to complete an accident form but that they refused to do so.

93. She also stated that when she returned home on the evening of 15 February 2020, she was:

"unable to sleep and experienced persistent trauma and pain throughout the night. Next day I began to feel discomfort in my eyes and facial skin. Unable to sleep or relax the following night, I went to see my doctor on the Monday morning. Seeing me out of breath and traumatised by the event, my doctor referred me to Newham psychological team. On Tuesday, my eyes began to ache, and my facial skin irritation grew progressively worse. By Wednesday, it was too worse that I called my GP again. The surgery book me an emergency appointment on Thursday. Noticing the inflammation of my face, the clinician prescribed one steroid cream and another aqueous cream to help me reduce the skin irritations. I was sent immediately for an eye examination to an NHS eye clinic. I was also prescribed two eye drops to help me cope with my eye irritations. Between 16 and 22 February 2020, I sought medical assistance a few times through my GP. Followed by a lengthy eye check up with an optician, my eyes were found to be extremely dry, and prescribed me a further eye drop."

94. The claimant did not attend work on Sunday, 16 February 2020, and alleges that she telephoned Mr Shabbir on 16 February 2020 and was asked by him to return to work but was not able to comply "*due to an eye burn and a face burn that I sustained following the event*".

95. The accounts given by Mr Shabbir and Mr Amjad of the 15 February 2020 incident, which are in all material respects consistent with each other, are vastly different to that given by the claimant. For reasons set out below, we prefer their account, which is as follows.

1. In the early evening of 15 February 2020, the claimant came to Mr Shabbir and told him that an incident had occurred between her and Ms SW. Mr Shabbir asked Mr Amjad to join him.

2. Mr Shabbir and Mr Amjad sat down with the claimant and asked what had happened (the first meeting). The claimant told him that she had been working on the shopfloor and that Ms SW had been rude to her (she told them that she had told Ms SW that she was going on a break and that Ms SW had told her that the claimant didn't need to update her on her movements, rather she needed to tell a manager). She told them that Ms SW had got emotional and that she had sprayed her.

3. Mr Shabbir asked whether the claimant was feeling okay and she told him that she was fine. The claimant did not complain about being injured or affected in any way by being sprayed in the face. She did not complain of any pain physically. She did not say anything about her eyes or her skin. Although she was a little upset, she kept reassuring them that she was fine and that she was happy to go back to work.

4. The exchange which Mr Shabbir and Mr Amjad had with the claimant was very calm. They did not at any point during this exchange raise their voices.

5. In this discussion, the claimant made no mention of any discussion about religion between her and Ms SW.

6. Mr Shabbir and Mr Amjad then went to speak (separately) to Ms SW (the second meeting). Ms SW told them that the claimant had (again) been asking her very personal questions about religion which had made her angry and upset. She denied spraying the claimant. Mr Shabbir did not ask Ms SW the detail of what the claimant had been asking as Ms SW was clearly upset by the exchange. As it was approaching closing time, Mr Shabbir's priority was to allow Ms SW and the claimant time to calm down and then work out what needed to be done if anything.

7. Mr Shabbir and Mr Amjad then asked both the claimant and Ms SW to come into the same room to see what could be done (the third meeting). They told them both that it was crucial that they were polite and professional to one another. They explained that when it came to religion, it would not usually be appropriate to speak about it in the workplace particularly by expressing opinions or asking personal questions. They explained that the respondent was a multinational company with people from all backgrounds and religions and that the key thing was for them all to respect each other's differences. The claimant stated that she had not been speaking about religion. Ms SW stated that the claimant had been speaking about religion and that she hadn't wanted to engage in that discussion.

8. Having spoken to them both, Mr Shabbir then went and checked the CCTV footage of the shopfloor. He could see from the CCTV that the claimant and Ms SW were speaking. He could also see that Ms SW was moving her hands in quite an animated way when she was speaking to the claimant. The CCTV footage did not show Ms SW spraying the claimant, and the claimant did not react in a way that would suggest that she had been sprayed. Mr Shabbir also asked Mr RM, the deputy manager at the store, to watch the CCTV as well and he confirmed the same, that it did not show anything to support the claimant's allegation that she had been sprayed.

9. Mr Amjad also watched the CCTV footage, although he cannot recall exactly where and when he watched it or with whom. However, he recalls that from the CCTV it was not possible to conclude that Ms SW had sprayed the claimant in the face with her water bottle. He noted that, if he had been sprayed in the face, he imagined that he would have reacted in a physical way, for example moving his face to the side or wiping his face and there was no such thing shown on the CCTV. Although the CCTV showed Ms SW holding a bottle, there didn't appear to be a reaction or a pause in conversation.

10. Mr Shabbir and Mr Amjad asked the claimant and Ms SW whether they need to formally record what had occurred between them as a formal complaint against each other. Both the claimant and Ms SW asked them not to write a report and said that they were both happy to go back to work on separate floors and forget the exchange had ever happened. Mr Shabbir and Mr Amjad asked Ms SW to relocate to the first floor and the claimant remained on the basement floor.

11. At no point during any of these discussions did either Mr Shabbir or Mr Amjad raise their voices nor were they rude or forceful in any way.

12. As the claimant had said that she was okay, no first-aid was offered to her. As far as Mr Shabbir and Mr Amjad were concerned, once both the claimant and Ms SW had left the room to return to the shopfloor, that was the end of the issue.

13. Mr Shabbir cannot recall whether the claimant called him at the store the following day, 16 February 2020. However, he is confident that the claimant did not tell him anything about having any eye pain or visiting her GP, as he would have

remembered that. As the claimant told him she was fine on the evening of the incident, he had no reason to believe that there would be any follow-up in this sense.

96. As she set out in her account, the claimant did visit her GP on 17 February 2020, two days after the incident, for the first time since the incident. We have seen the GP notes. The notes record what the claimant told the GP, including that she told the GP that one of her colleagues sprayed a cleaning product on her face at work, that she washed her face twice afterwards, that she was psychologically traumatised and that she was experiencing tightness in her eyes, foreign body sensation in her eyes and blurred vision and experiencing headaches. However, on examination, the GP states in the records “GC fair” (“GC” being “general condition”); and “Face/Eyes NAD” (“NAD” being “nothing abnormal discovered”). The result of the GP’s examination is therefore very different from what the claimant told her GP.

97. As she noted in her witness statement, the claimant visited her GP again on 19 February 2020. Again, we have seen the GP notes. They record that she reiterated her account of the 15 February 2020 incident and complained of a burning sensation on her face and in both her eyes. This time, the examination notes record *“Face looks red and inflamed... More red and inflamed both cheeks... Generally well... Active and alert.”* The doctor then prescribes the aqueous cream and eyedrops and adds *“if any problem to come back”*. We accept Ms Genn’s submission that over the course of these two GP visits in short succession, it might be thought that the claimant has talked the GP into prescribing something. However, be that as may, there is no medical report that establishes a causal link between a chemical and the physical reactions which the claimant reports.

98. Despite her reference to having sought medical assistance *“a few times”* through her GP, these are the only two visits which she made to her GP until 16 March 2020 (roughly a month later).

99. Associates at the respondent (such as Ms SW and the claimant) do not have access to cleaning products. From a health and safety perspective (on the basis that the respondent has customers and children on the shop floor), the respondent does not allow associates to have cleaning products which may have certain chemicals in them when on the shop floor; it only allows water and a cloth for some light dusting/wiping. It is only the cleaners (who clean outside of opening hours) who have access to such materials, all of which are kept in a locked cupboard. Several of the respondent’s witnesses, including Ms Mazzocato, Mr Shabbir, Mr Amjad (who all worked in the Charing Cross store itself) and Ms Read confirmed this and we accept that that was the case. Accordingly, Ms SW could not have sprayed the claimant in the face with a cleaning product.

100. The claimant subsequently reported the incident to the Metropolitan Police (at some point between the incident but prior to her 4 March 2020 grievance, as she references having done so in that grievance). At some point, a police officer came to the store and viewed the CCTV footage. The view of the

police was the same as that of Mr Shabbir and Mr Amjad, in other words that the CCTV did not show any evidence of an assault.

Factual conclusions regarding 15 February 2020 incident

101. Our reasons for preferring the evidence of the respondent's witnesses with regard to the 15 February 2020 incident are as follows.

102. Other than the claimant's assertion, there is no evidence to support the claimant's case that the claimant was either sprayed in the face by Ms SW or that she was sprayed by Ms SW with a cleaning product.

103. First, as noted, we have great concerns about the reliability of the claimant's evidence.

104. Secondly, the GP evidence, as set out above, does not indicate that the claimant sustained injuries and trauma as she maintains. There is no medical evidence which indicates a connection between any chemical/cleaning product and any injury sustained by the claimant. In any event, Ms SW did not have access to cleaning products so could not have sprayed the claimant with a cleaning product. We find, therefore, that the substance in the bottle which Ms SW had on the evening of 15 February 2020 was (in accordance with the respondent's practice) water for light cleaning and was not a cleaning product. We find that the claimant was not, therefore, sprayed by a cleaning product.

105. Thirdly, the CCTV evidence, which was viewed by at least four individuals, including a police officer, did not show any evidence that Ms SW sprayed the claimant at all.

106. Fourthly, it is inherently unlikely that one individual would assault another individual simply following and because of an innocuous conversation about plastic hooks (which is the claimant's evidence).

107. Fifthly, if the claimant was in the state of upset which she maintained she was in, both in front of Mr Shabbir and Mr Ahmed and in front of her two colleagues (M and C) whom she alleges she spoke to before she went to see Mr Shabbir, we are surprised that she has not sought to call as witnesses M and C or at least to obtain a brief email from them evidencing that they saw how upset she was on the evening of 15 February 2020. Even though, on the claimant's account, they did not witness the incident themselves, they witnessed (on the claimant's account) the state of the claimant in the immediate aftermath of it and heard the claimant's account of it. They could have given persuasive evidence and it is noteworthy that the claimant has not sought either to call them or at least to obtain some sort of brief statement or email from them.

108. Sixthly, if the claimant was as traumatised and upset as she says she was, it seems implausible to us that, when (on her account) Ms SW simply carried on cleaning, the claimant stayed and tried to carry on having a conversation with her. That does not seem consistent with someone who has just been assaulted (with a chemical product on her account) and is so upset that

she then immediately goes to two work colleagues and breaks down in tears whilst telling them about it.

109. Seventhly, as we have found, the claimant has a history of asking personal questions of her colleagues and initiating conversations about religion (as she did in relation to Mr Amjad and Ms Mazzocato). Furthermore, her own account of what she says Mr Shabbir and Mr Amjad told her of why Ms SW was upset (that Ms SW told them that the claimant had told her that she went to Church and did not like the way Jesus was kept in the Church) sounds inherently bizarre in itself and is, in any event, contrary to the evidence of Mr Shabbir and Mr Amjad, which we prefer over the claimant's for reasons of respective reliability of evidence.

110. For these reasons, we find that it is far more likely that the claimant (not for the first time) initiated a conversation about religion with Ms SW on 15 February 2020 which was unwanted; that that was what caused Ms SW (as was clear from the CCTV) to be animated with the claimant; but that she did not spray the claimant with water from her water bottle; and that, whilst there was a disagreement between the two of them, there was no assault.

111. As to the aftermath of the incident and Mr Shabbir and Mr Amjad's handling of it, we prefer their evidence to that of the claimant's; not only do they corroborate each other in all material respects (and did so consistently despite a great deal of questioning from the claimant about the issue in cross-examination), but by contrast we have serious concerns about the reliability of the claimant's evidence.

112. The claimant had a good relationship with both Mr Shabbir and Mr Amjad. It is unlikely that these two managers would not complete an accident form if the claimant, with whom they got on well, had asked them to do so, let alone if she had asked them to do so twice. The far more likely explanation is the one given by Mr Shabbir and Mr Amjad, that they did not complete an accident form because both Ms SW and the claimant asked them not to do so. We accept that that is what happened.

113. Similarly, in the light of their good relationship, it is inherently unlikely that Mr Amjad would be so rude to the claimant and repeatedly raise his voice in the forceful manner which she describes. Having heard evidence from both Mr Amjad and Mr Shabbir over a lengthy period of time, we have seen nothing to suggest that either of them is the sort of person who would easily get angry or raise their voice and we accept their evidence that it is not in their nature to do so, particularly at work. We therefore find that neither Mr Amjad nor Mr Shabbir raised their voices or were rude to the claimant on 15 February 2020.

114. Similarly, we find it highly unlikely that Mr Shabbir would express the sentiments which the claimant alleges he expressed about the claimant needing to accept that what happened "came from God". It is inherently unlikely that a manager investigating a complaint in a workplace setting would express himself in that way to an employee; furthermore, we found Mr Shabbir to be a reliable witness, in contrast to the claimant. We therefore accept that, whilst Mr Shabbir

quite reasonably told both the claimant and Ms SW that he did not consider it to be appropriate to discuss religious matters at work, he did not make the comments which the claimant attributes to him about her accepting that what happened “came from God”.

115. Even on the claimant’s own case, Mr Shabbir and Mr Amjad did not ignore the concerns which she raised about Ms SW on 15 February 2020. They investigated what happened and spoke to both individuals. However, as to the nature of that investigation, we accept their evidence over that of the claimant; they carried out their investigation over the course of three meetings, first individually with the protagonists and then together; they viewed the relevant CCTV footage; they discussed with the claimant and Ms SW as to what outcome the claimant and Ms SW wanted; and in accordance with their wishes they took action, relocating Ms SW to a different floor from the claimant; and they genuinely thought that that was the end of the matter. Not only did they not ignore the claimant’s concerns, but they managed affairs to put in place a solution which they thought was acceptable to both the claimant and Ms SW. Their conclusion that Ms SW did not spray the claimant was entirely reasonable in view of the evidence.

116. Furthermore, it follows from our findings above that we find that Mr Shabbir and Mr Amjad did not tell the claimant that (as set out in the list of issues) Ms SW *“had sprayed the claimant in her face because the claimant had spoken disrespectfully about Jesus Christ”*.

22 February 2020

117. The claimant was next due to be at work on Saturday, 22 February 2020. However, she did not attend work then and at some point provided a sick note to the respondent, covering the period from 22 February 2020 until 8 March 2020.

118. The claimant asserts that, on 22 February 2020, she called the Charing Cross store to inform the respondent of her sick leave; that Mr Amjad picked up the phone and threatened her by saying *“nothing has happened”*; that he accused her of lying; and threatened her by saying that *“you will be in trouble”*.

119. Mr Amjad’s evidence is that, as far as he can remember, he never saw or spoke to the claimant again after the incident on 15 February 2020 (and indeed the claimant never did return to work again after 15 February 2020, so that would not be surprising). He is clear that he did not speak to the claimant at all over the phone, let alone say anything of the sort that she alleged.

120. By way of context, Mr Amjad confirmed that when a person calls the store, it is an associate that would pick up the phone; an assistant manager such as himself would not answer a call but, if the associate needed to transfer the call to a relevant manager, that would then happen. We have no reason to doubt that this is the case and therefore accept this.

121. Mr Amjad is clear that no one ever transferred a call to him from the claimant after the 15 February 2020 incident. Furthermore, the claimant's assertion was that Mr Amjad picked up the phone directly, and we accept that, as he was an assistant manager, that in itself would be unlikely to have happened. Therefore, given that context, it is unlikely that the claimant would have spoken to Mr Amjad at all on 22 February 2020.

122. As to the comments which the claimant alleges that he made, we would add that, given that Mr Shabbir and Mr Amjad thought that the 15 February 2020 incident had been resolved on the evening of 15 February 2020, there would be no reason for him to make such comments; that is a further reason why it is unlikely that they would have been made.

123. Furthermore, for the reasons of respective reliability of evidence of the claimant and Mr Amjad referred to above, we prefer Mr Amjad's evidence and find that, on the balance of probabilities, the claimant did not speak to Mr Amjad on 22 February 2020 at all; and that he did not make the comments alleged.

The claimant's grievance

124. As noted, on 4 March 2020, the claimant submitted her grievance, by email to HR.

125. Her grievance sets out the details of the incident in similar terms to her witness statement. However, in her grievance, she does not make any assertion that the incident or the handling of it (or anything else) were acts of discrimination, either on the grounds of race or religion or otherwise.

126. The grievance ends *"I would like this to be investigated further before making a final decision whether to instruct solicitors to pursue matters legally."* This barely disguised threat to sue the respondent is a further stage in ramping up the pressure on the respondent; first the reporting of the incident in the terms she did; then reporting the matter to the police; and then threatening legal proceedings in her grievance.

127. As noted, the claimant's grievance was not dealt with initially because of the pandemic, which soon afterwards resulted in the majority of the respondent's employees (including the claimant) being placed on furlough between 20 March 2020 and 9 June 2020. This followed the claimant's unauthorised absence from work between 9 March 2020 and 20 March 2020.

Post furlough

128. As noted, the claimant was due to return to work from furlough on 9 June 2020, but never did and remained on unauthorised absence until the termination of her employment.

129. On 2 June 2020, the respondent emailed the claimant (as it did with its other employees) regarding a return to work on 9 June 2020 following furlough. The email was sympathetic and understanding and invited the claimant to

discuss any issues about personal commitments, health and safety or anything else that may be on their mind in connection with returning from furlough. Unfortunately, unknown to the respondent (until it became clear to all at this hearing when we looked at the email during the evidence), the claimant did not receive this email because there was one letter wrong in the email address used to send it to her.

130. In addition, the respondent called all of its employees personally. Ms Rahman sought to contact the claimant by telephone on several occasions around this time.

131. In early June 2020, shortly after the Charing Cross store reopened, Ms Rahman managed to speak to the claimant. She invited her to return to work. However, the claimant said that she would not be returning to work. Ms Rahman asked the claimant why she would not be returning to work, but the claimant did not provide her with any reason. She told her that she would be raising some issues with HR (but did not explain to Ms Rahman what those issues were, despite Ms Rahman asking her). During the call, Ms Rahman explained that if the claimant did not return to work without providing a legitimate reason, this would be classed as an unauthorised absence, as the respondent did not have any sick note from her or any explanation as to why she would not be returning.

Claimant's email of 12 June 2020 to HR

132. On 12 June 2020, the claimant emailed HR again. In it, she referenced the incident of 15 February 2020 and the effect which she says it had on her. She said that she was *"diagnosed with post-traumatic stress disorder"* in *"March"*. She then stated that, in the light of those circumstances, she considered it was psychologically and physically difficult to resume her work in the store *"any time soon"* and asked: *"Because of these difficulties, I want to be under your job retention scheme as long as possible and until I am able to resume my work"*.

133. The dominant purpose of the email was, therefore, to request the respondent to keep her on furlough. The claimant did not then (or any stage after that) supply a sick note. That is despite the fact that she knew how to obtain and provide sick notes (as she had previously supplied a sick note in February 2020). The claimant is an intelligent individual and was aware that, if she remained in the furlough scheme (under the terms of the furlough scheme that applied at the time), she would be paid all or the majority of her pay, whereas if she was simply on sick leave, what she would be paid would be considerably less.

134. The claimant attached to that email a letter dated 11 June 2020 from a CBT therapist, which explained that the claimant was currently engaging in a course of cognitive behavioural therapy and had had two sessions so far out of 8-12 sessions *"to help manage her symptoms of anxiety which are characteristic of PTSD"*.

135. We have also seen a further letter from the same CBT therapist dated 30 June 2020, which references the claimant having *"PTSD type symptoms"*. The

respondent accepts that at some point around that time, a copy of this letter was sent to the respondent.

Claimant's meeting with Ms Rahman and Mr RM on 4 July 2020

136. On 4 July 2020, Ms Rahman and Mr RM met the claimant outside the store to discuss her absence and her returning to work. To try to keep things informal, they agreed with her that they would meet across the street from the store, where they sat on some benches as the claimant did not want to come into the store. It was a fairly short conversation. The claimant said that she didn't want to return to work because she was undergoing therapy. Ms Rahman asked her to provide them with a doctor's note to certify her absence (although, as noted, this was never forthcoming). The claimant asked about her contractual sick pay entitlement and asked whether her sick pay would continue. Ms Rahman notified that her contractual sick pay had run out and that she was not entitled to any further contractual sick pay. They reminded her that she would need to provide a sick note in order to receive statutory sick pay. The claimant told Ms Rahman that she would not provide a sick note as she felt that this would impact on her being on furlough. Ms Rahman and Mr RM told the claimant that there was no reason for her to be furloughed now that the stores had reopened. The claimant provided no other reason or explanation as to why she was staying away from work.

137. During this conversation, Mr RM told the claimant that Ms SW had been suspended following the incident of 15 February 2020. This was true. In fact, a decision was taken to dismiss Ms SW. It is not clear exactly when and, given that Ms SW's appeal against dismissal had taken place by 6 August 2020 at the latest, it is quite possible that she had been dismissed by the time of the 4 July 2020 meeting at which Mr RM had referenced Ms SW having been "suspended".

138. Ms Rahman and Mr RM kept trying to call the claimant throughout the rest of July and August 2020. Whenever they did, an engaged tone would almost immediately follow. Given that this consistently happened, Ms Rahman thinks that that meant that the claimant had blocked her number and that of Mr RM. For that reason, we consider that that is the most likely explanation and find that the claimant did block their numbers.

Claimant's email of 13 July 2020

139. On 13 July 2020, the claimant sent a further email to HR. The email is lengthy but one of the core concerns is again the claimant's wish (acknowledging the impact of being on sick leave on her pay) to remain on furlough. In one passage in the email, she also states: *"In none of my correspondence to you, I have ever declared that I am not fit to work. On the contrary, firstly, I do not feel safe to return to a workplace among the colleagues, one of whom had assaulted me and two others who aided and abetted a criminal through subsequently suppressing a criminal act. Secondly, I have lost all my confidence in returning to the shop floor from the significant trauma that I have experienced following the assault."* The claimant is therefore declaring that (notwithstanding the course of CBT which she was undergoing at the time) she is in fact fit to work. Her

purported reason for not returning is the presence of Ms SW, Mr Shabbir and Mr Amjad in the workplace. However, Ms SW's presence cannot have been a genuine reason for not returning, as the claimant knew by that stage that Ms SW had been suspended (as Mr RM had told her that on 4 July 2020).

140. The email ended with a further threat: *"If I do not hear from you by 20th of July 2020, I will then have no option but seeking legal help without your reply."*

141. (This is also the same email in which the claimant references having recorded conversations which she had with Ms Rahman and Mr RM, which we referred to in our findings regarding the reliability of the claimant's evidence.)

Ms SW's appeal against dismissal

142. As noted, Ms SW appealed against her dismissal. The appeal was heard by Mr KO, a general manager. Mr KO allowed the appeal and overturned the decision to dismiss Ms SW.

143. In an email he wrote on 6 August 2020 summarising his appeal findings, Mr KO wrote *"I have reasonable believe that [the claimant's] legal threats in her letter to HR, and dramatising her behaviours in addition to accusation of management for lack of support and empathy, made us panic to make a decision without giving time to follow the process in detail by interviewing all individuals mentioned for more facts"*. He concluded that there was *"no substantial evidence supporting the decision"* to dismiss Ms SW and he reinstated Ms SW. Ms SW had requested to return to a different store to Charing Cross and Mr KO arranged this. Ms SW, therefore, never returned to the Charing Cross store.

144. The claimant was not aware of this during her employment. However, she remained under the impression that Ms SW had been suspended and therefore knew that she was not working at the Charing Cross store.

Ms Read's hearing of the claimant's grievance

145. As noted, Ms Read was appointed to hear the claimant's grievance. The claimant attended a grievance hearing with her on 15 August 2020 (via Microsoft Teams). At the meeting, they discussed the claimant's allegations about the incident of 15 February 2020 and its aftermath. Ms Read sought to discover what the claimant's desired outcome was. The claimant told her that her desired outcome would be to receive *"recognition"* from the respondent and support. Ms Read asked her what she meant by *"recognition"* and what the respondent needed to do to get her back to work. Although the claimant referenced *"safety"*, she did not give Ms Read a clear answer and was quite evasive about this. When Ms Read asked for clarity, the claimant referenced the furlough scheme and wanting the respondent to support her by keeping her on the furlough scheme (such that she would not lose out on pay as a result of being only on statutory sick pay).

146. During the meeting, the claimant informed Ms Read that she was diagnosed with fibromyalgia, dyspraxia and depression. She did not mention any of the other conditions which she now relies on as disabilities.

147. During the meeting, the claimant stated that trust was broken and that she could not go back to the same store where the alleged incident happened and be around the same people. Later in the meeting, therefore, Ms Read asked the claimant if she had considered transferring to another store to help with this situation. The claimant said that she had (on more than one occasion) thought about it.

148. Whilst it is not necessary to go into the detail of all the investigations which Ms Read carried out, she did speak to appropriate witnesses including Mr Shabbir, Mr Amjad and Mr KO, and carried out a thorough investigation.

149. Notes of the grievance meeting had been taken at the hearing and these were sent to the claimant on 25 August 2020.

150. On 10 September 2020, the claimant emailed HR stating that she thought there was a discrepancy in the notes and that there were several places that needed to be broken down with explanation for further clarity. This email was not forwarded to Ms Read and she never saw it.

151. Ms Read issued her grievance outcome on 16 September 2020. In summary, Ms Read did partially uphold the grievance, for example finding that more could have been done on 15 February 2020 by Mr Shabbir and Mr Amjad in terms of documenting what happened in the form of an accident report, to ensure that the matter was dealt with thoroughly. However, she found that there was not enough evidence that the incident with Ms SW took place as the claimant alleged and did not therefore uphold the grievance in this respect.

152. Ms Read made no findings in relation to discrimination (because of race, religion or otherwise), because the claimant had not made specific allegations of discrimination in her grievance (albeit at one point in the 25 pages or so of notes of the 15 August 2020 grievance meeting, the claimant makes a generalised reference to *"I was victimised, discriminated and harassed"*, but without suggesting that this was because of her race or religion or attributing it to any specific act).

153. Ms Read also stated in her outcome letter that the respondent was unable to continue the furlough scheme for the claimant, although it would be happy to support her request to have 12 weeks off but on the proviso that she provided the respondent with accurate and up-to-date medical notes.

154. Ms Read also stated *"If on your return to work you would still like to transfer to another store, we can discuss what suitable options are available."* That reference follows on from the discussion she had with the claimant in the grievance meeting about the possibility of transferring to another store; it was a reasonable and considerate thing to offer and was an offer made with a view to the claimant's well-being. Ms Read did not, however, state, as the claimant has

alleged as part of this claim, that the claimant had asked to move to another store as the outcome of the grievance.

Disciplinary action against the claimant

155. In the meantime, as the claimant had not been answering Ms Rahman's calls, Ms Rahman had written to the claimant on 14 August 2020 and 4 September 2020 requesting that the claimant contact her to discuss her absence but again the claimant failed to do so.

156. Ms Rahman's letter of 14 August 2020 includes: "*Our records show that you have been absent from work since 16/02/2020 due to PTSD type symptoms*". Whilst there were no recent sick notes confirming the claimant's absence and the reason for it, that line is evidence that Ms Rahman was aware that the respondent had been informed that the claimant had PTSD type symptoms (perhaps due to the references in the 11 and 30 June 2020 letters from the CBT therapist and perhaps due to the assertion made by the claimant herself in her email to HR of 12 June 2020).

157. Having exhausted all informal routes of communication, Ms Rahman therefore wrote to the claimant on 15 September 2020 to formally invite her to a disciplinary meeting. The proposed date for the disciplinary meeting was changed at the claimant's request and Ms Rahman issued a further letter, dated 25 September 2020, inviting the claimant to a disciplinary meeting on 3 October 2020 (to take place virtually via Zoom).

158. The charge as set out in the 25 September 2020 invitation letter, was "*Repeated unauthorised absence since 17/08/2020*" (Ms Rahman, somewhat generously and following HR advice, had decided to reduce the period of unauthorised absence to be considered to the period from 17 August 2020 onwards, notwithstanding that the claimant's unauthorised absence actually went back to the end of the furlough period on 9 June 2020 and indeed to the period from 9 March to 20 March 2020 prior to the furlough period. She did so on the basis that the claimant had had some contact with the business through the grievance process conducted by Ms Read.)

159. There is no dispute that the claimant's absence was indeed unauthorised.

160. The invitation letter (as was the case with the earlier invitation letter) informed the claimant of her right to a representative and reminded her that the outcome could include dismissal without notice.

161. The disciplinary hearing took place on 3 October 2020.

162. During the hearing, the claimant told Ms Rahman that she had not provided a sick note (despite having been asked several times) because she had asked to be kept on furlough in order to support herself financially. She did not give any other reason. She did not make any reference to her mother or needing to care for her mother. She did not say that she was staying away from work

because of any danger which she believed to be imminent or serious or to protect herself or her mother.

163. The claimant's absence was unauthorised. This amounted to gross misconduct. The claimant accepted that she was aware of the respondent's absence policy. The claimant had been asked for sick notes on multiple occasions. Importantly, it was clear that the claimant chose to try and stay absent without providing sick notes so as to try and go back on the furlough scheme (to benefit herself financially) and not because of any conditions or sickness.

164. Ms Rahman therefore took the decision to dismiss the claimant. She did so because of the claimant's unauthorised absence and for no other reason. She wrote to the claimant on 8 October 2020 to confirm the decision.

Grievance appeal

165. In the meantime, on 23 September 2020, the claimant had submitted an appeal against the grievance outcome.

166. It is not necessary to set out all of the details of it. However, it contains another implicit threat that the claimant will follow the matter up in an employment tribunal. It makes criticisms about the claimant's request for changes to the notes of the grievance meeting not being taken into account and alleges that Ms Read's outcome letter stated that transferring to a different store was one of the claimant's desired outcomes of the grievance. It states that "*I explained clearly that I felt I was victimised, discriminated and continually harassed since the day of the assault...*" (although again, not specifying whether this was because of her race or religion or any other protected characteristic). It ended by seeking that the respondent should "*recognise*" the way the claimant alleges she was treated.

167. The grievance appeal was heard by Mr Cook on 10 October 2020. He allowed the claimant a fair hearing, in which she expanded on the points in her grievance appeal letter. Mr Cook then carried out reasonable and thorough investigations, including interviewing Ms Read, Ms Rahman (on 21 October 2020, after Ms Rahman had taken the decision to dismiss the claimant) and Mr RM, and including reviewing the documentation.

168. The claimant submitted some amendments to the notes of the 10 October 2020 grievance appeal meeting. These were not, however, corrections to the notes but, rather, the claimant's commentary on the notes (in other words the claimant was not suggesting that these were things which were said in the meeting but not recorded; rather, she was simply commenting on what was said). Mr Cook did not ignore them. However, he did not agree to change the notes because the purpose of the notes was to record what was said at the meeting and the additional commentary by the claimant was just that and did not reflect what was said at the meeting.

169. Mr Cook did not uphold the claimant's grievance appeal. It is not necessary to go through the details for the purposes of the issues of this claim; however, having reviewed the material, we consider that his decision not to uphold the grievance appeal was a reasonable one.

170. Mr Cook communicated the outcome to the claimant by letter of 10 December 2020.

Appeal against dismissal

171. In the meantime, the claimant had, on 16 October 2020, submitted an appeal against her dismissal.

172. There were several grounds of appeal. In her appeal letter, the claimant again insisted that, notwithstanding that she also indicated that she was getting therapy for PTSD, she was not unfit to work. She also suggested that *"those who launched their attack on [her], discriminated against her race and religion, victimised her and continued to harass her"*. This is the first time that she specifically alleged that any treatment of her was related to her race and religion. She also stated that she had not been made aware that the furlough scheme could have been continued for employees who were *"carers"* and stated, for the first time, that *"I have been a carer for my mother since 2015 who is identified as a vulnerable adult and is quarantined since March 2020"*.

173. As noted, Mr McArdle heard the claimant's appeal against dismissal. He clearly took his responsibilities very seriously, prepared thoroughly, had three separate meetings with the claimant over the course of the appeal, and conducted appropriate further investigations and enquiries, including interviewing Ms Rahman and Mr RM.

174. During the first appeal meeting, the claimant expressed a clear frustration with management and focussed largely on not being kept on the furlough scheme.

175. During the second appeal meeting, the claimant indicated that she felt traumatised by the store and said that they had failed to provide a safe working environment but she was never really clear on what she meant by this. Mr McArdle found it very difficult to pull out the key information from the claimant and she was never clear on why she felt the workplace was unsafe.

176. Mr McArdle had asked management if they were aware that the claimant was a carer but none of them were. Mr McArdle asked the claimant to explain why she couldn't or chose not to let the respondent know that she had caring responsibilities, but she couldn't provide any reasonable explanation for this.

177. Mr McArdle also asked the claimant who, prior to the lockdown, would look after her mother (and sister) when the claimant was at work. The claimant stated *"They were not bed bound, they can manage out of bed. We have occasional carers if I was unwell. They can manage for time I'm at work, we managed this."* She did not, therefore, contend that she needed to be at home

as a carer or that any caring responsibilities she had prevented her from attending work.

178. At the third appeal meeting, Mr McArdle wanted to clarify what the claimant's desired outcome was and she told him that she wanted the respondent to acknowledge that what they had done was wrong. She again referred to not being kept on the furlough scheme but, after Mr McArdle queried whether she was seeking reinstatement, the claimant said that she felt unsupported by the respondent and indicated that she had concerns that if she was reinstated, there was a risk that the same treatment would happen again.

179. It is not necessary to go through all of the detailed findings which Mr McArdle made and which were set out in his lengthy and detailed outcome letter of 18 November 2020. However, he upheld Ms Rahman's decision to dismiss the claimant for unauthorised absence. He also found that there was no evidence to suggest that she had been discriminated against throughout this process.

180. As to the point raised by the claimant about being a carer for her mother, Mr McArdle explained that, as per the government's advice, it was up to an employer to decide which employees were eligible for the furlough scheme; and that those decisions were based on associate inability to return to work due to caring responsibilities preventing them from returning. However, he noted that at no point did the claimant inform the respondent that she had caring responsibilities that would prevent her from returning to work and that, had she done so, the respondent would have considered this request based on the criteria set for associates with caring responsibilities. Very importantly, he also noted that the claimant had made it clear throughout the process that the reason that she wanted to be furloughed was because she would not have accrued enough sick pay and SSP would have financially impacted her. Furthermore, he found no evidence to suggest that any information about the criteria for remaining on the furlough scheme was withheld from the claimant deliberately and that, in the circumstances, the respondent had treated her correctly by not placing her on the extended furlough scheme.

181. The claimant's health in terms of the disabilities which she now seeks to rely on was not mentioned during the various disciplinary appeal hearings which Mr McArdle had with her and, other than the references to PTSD, Mr McArdle had no knowledge of any conditions and/or disabilities which the claimant had or alleged to have had.

The claimant's caring responsibilities

182. In her oral evidence at the tribunal, the claimant stated that she had no concerns about Covid as far as her mother was concerned; that she was not worried about taking Covid home; and that that was not the reason she did not want to be in the workplace.

The Law

Automatically unfair dismissal (section 100(1)(d) & (e) ERA)

183. Section 100 ERA states as follows:

100.— Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

...

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time...

184. Ms Genn also drew our attention to the analysis of this section undertaken by HHJ Taylor in Rodgers v Leeds Laser Cutting Ltd [2022] EAT 69 approved by the Court of Appeal [2022] EWCA Civ 1659, which was a case considering an employee's response to the coronavirus pandemic. However, given the facts we have found in the present case, it is not necessary to go into the detail of that analysis in order properly to determine the issues.

Disability

185. Under section 6(1) of the Equality Act 2010 (the "Act"), a person has a disability if that person has a physical or mental impairment which has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities.

186. The effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months or it is likely to last for the rest of the life of the person affected. "Substantial" for these purposes means "more than minor or trivial".

187. An impairment is to be treated as having a substantial effect on the ability of the person to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

188. It is for the claimant to prove on the balance of probabilities that she has a disability.

Discrimination arising out of disability

189. Section 15 of the Act provides that 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.

190. However, A does not discriminate if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

191. For discrimination under section 15 to be established, the employer must have the requisite knowledge of disability at the time it treats the employee unfavourably. In cases involving one-off acts this is very straightforward. However, if the treatment complained of is made up of a series of distinct acts occurring over a period, it is necessary to consider not only whether the employer had the requisite knowledge at the outset but also, if it did not, whether it gained that knowledge at any subsequent stage when the treatment was ongoing. For example, in Baldeh v Churches Housing Association of Dudley and District Ltd EAT 0290/18 the EAT held that a tribunal had erred by rejecting B's claim that her dismissal was discriminatory contrary to section 15 on the basis that the employer did not know about her disability when it reached the decision to dismiss her, without also making a finding as to whether the employer had gained actual or constructive knowledge of her disability by the time it rejected her appeal against dismissal. On the facts of the case, B's complaint of unfavourable treatment in her dismissal had to be taken as referring both to the employer's initial decision to dismiss and to its subsequent rejection of her appeal.

192. The Baldeh case was distinguished in Stott v Ralli Ltd 2022 IRLR 148, EAT, where the EAT upheld a tribunal's decision that the dismissal of a paralegal for poor performance was not an act of discrimination contrary to section 15 because the employer had no knowledge of her disability at the time of dismissal. S argued that the tribunal should have regarded the grievance she brought after her dismissal, and her appeal against the outcome of that grievance, as an integral part of the dismissal process. She submitted that R Ltd had knowledge of her disability by the end of that process. The EAT noted that, for the purposes of an unfair dismissal claim, dismissal is regarded as a process that includes the appeal stage. However, Baldeh did not establish any legal principle to the effect that the same approach invariably applies in a discrimination claim. In the age discrimination case of Reynolds v CLFIS (UK) Ltd 2015 ICR 1010, CA, the Court of Appeal held that allegations of discrimination relating to a decision to dismiss and a decision on appeal were distinct claims that must be raised and considered separately. In the EAT's view, that approach applies equally to claims under section 15. It is important to consider whether the employer had the requisite actual or constructive knowledge at the time of the impugned treatment; knowledge acquired only at a later point is not sufficient. In the instant case, S

had not brought a claim of disability discrimination in relation to her grievance. Her claim related solely to dismissal, and the tribunal had been entitled to find that R Ltd lacked actual or constructive knowledge of her disability at the time of dismissal.

Direct race and religious discrimination and harassment related to religion

193. Under section 13(1) of the Act, a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (direct discrimination).

194. Under section 26(1) of the Act, a person (A) harasses another person (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

195. In deciding whether conduct has the effect referred to above (but not the purpose referred to above), each of the following must be taken into account: the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

196. Race and religion/belief are protected characteristics in relation to both direct discrimination and harassment as referred to above.

197. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator. By contrast, there is no requirement for such a comparison in establishing harassment.

198. Under section 39(2) of the Act, an employer must not discriminate against an employee of his on various grounds, including dismissing him or subjecting him to any other detriment. Under section 40(1) of the Act, an employer must not harass an employee of his. Where conduct constitutes harassment, it cannot also constitute a detriment as defined in the Act and therefore cannot be direct discrimination as well as harassment.

199. In Richmond Pharmacology v Dhaliwal 2009 ICR 724 EAT Mr Justice Underhill, then President of the EAT, said: *'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'*. The EAT affirmed this view in Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13. The EAT observed that *'the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence'*. Indeed, the Court of Appeal in HM Land Registry v Grant (Equality and Human Rights Commission

intervening) 2011 ICR 1390 further stated in this context that *'tribunals must not cheapen the significance of these words since they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment'*.

Victimisation

200. Section 27 of the Act provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act.

201. Protected acts include the bringing of proceedings under the Act; giving evidence of information in connection with proceedings under the Act; doing any other thing for the purposes of or in connection with the Act; or making an allegation (whether or not express) that A or another person has contravened the Act. However, 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.

202. Under section 39(2) and (4) (b) and (d), an employer (A) must not victimise an employee of A's (B) in the way A affords B access to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service or by subjecting B to any other detriment. Detriment can be anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. However, an unjustified sense of grievance alone would not be enough to establish detriment.

203. In respect of the above provisions, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene one of these provisions. To do so the employee must show more than merely that she was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied; there must be "something more" to indicate a connection between the two (Madarassy v Nomura International plc [2007] IRLR 246). If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, we must hold that the provision was contravened and discrimination did occur.

204. However, if the tribunal can make clear positive findings as to an employer's motivation, then it need not revert to the burden of proof (Martin v Devonshires Solicitors [2001] ICR 352 (EAT)).

Time extensions and continuing acts

205. The Act provides that a complaint under the Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (adjusted by time spent in ACAS early conciliation) or such other period as the employment tribunal thinks just and equitable.

206. It further provides that conduct extending over a period is to be treated as done at the end of the period and that failure to do something is to be treated as occurring when the person in question decided on it.

207. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was “an act extending over a period”, as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of “an act extending over a period”. The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of “an act extending over a period”.

208. As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA. This is the exercise of a wide, general discretion.

Conclusions on the issues

209. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Automatically unfair dismissal (Section 100(1)(d/e) ERA)

Circumstances of danger etc

210. The first issue in relation to both of these sections is whether or not there were circumstances of danger which the claimant reasonably believed to be serious and imminent and (in the case of subsection (1)(d)) which she could not reasonably have been expected to avert. Thereafter, we need to ask whether in those circumstances the claimant refused to return to her place of work or any dangerous part of it (subsection (1)(d)) or took appropriate steps to protect herself or others from the danger (section (1)(e)).

211. The claimant’s case in relation to the danger has shifted over time and there are a number of candidate reasons, which we deal with in turn.

212. First, we turn to the suggestion that the claimant did not come back to work because of caring issues in relation to her mother. As the claimant admitted, coming to work in itself did not impact upon her caring responsibilities. Furthermore, she admitted that she had no concern in coming to work because of Covid or bringing Covid back to her mother. She did not, therefore, have any belief at all (let alone a reasonable one) that there were serious and imminent

circumstances of danger in coming back to work for this reason. Any complaint based on this reason therefore fails.

213. Secondly, we turn to the issues of her own health. Although she was undertaking CBT treatment in the summer of 2020, the claimant was adamant throughout that she was not unfit to work. In fact, it has not been seriously contended at this tribunal that there was a danger in the claimant returning to work because of her therapy and any links to her health. She has never suggested that coming back to work represented serious or imminent danger in this respect. The claimant did not, therefore, have any belief at all (let alone a reasonable one) that there were serious and imminent circumstances of danger in coming back to work for this reason. Any complaint based on this reason therefore fails.

214. Thirdly, we turn to the suggestion that she could not come back because of the incident of 15 February 2020 and the presence of the individuals (specifically Ms SW, Mr Shabbir and Mr Amjad) connected with that incident. Although the claimant returned to this theme repeatedly throughout the grievance and disciplinary processes, we have found that the incident of 15 February 2020 did not take place as the claimant described; quite the contrary. As it did not take place, the claimant cannot have had any belief (let alone a reasonable one) that there were circumstances of danger at all, let alone that they were serious or imminent. Furthermore, the claimant knew that Ms SW, the main alleged perpetrator, was no longer at the Charing Cross store, as Mr RM had told her that Ms SW had been suspended; she cannot therefore have considered herself to be in any danger from Ms SW's presence if Ms SW was not even there. Any complaint based on this reason therefore also fails.

215. We would add that the actual reason why the claimant did not return to work (and did not seek to obtain or provide sick notes) was that she wanted to remain on the furlough scheme; and the reason she wanted to remain on the furlough scheme was because that was far more financially beneficial to her than supplying sick notes and receiving SSP only. The actual reason why the claimant did not return to work was not for any of the other purported reasons which form the basis of these complaints, which we have dealt with above.

216. These complaints therefore fail at this stage.

Reason for dismissal

217. However, even if the claimant had overcome the first hurdle of the test, the complaints would clearly fail at the second (causation) stage.

218. That is because, as we have found, the reason for dismissal was not because of the claimant refusing to return to her workplace or taking steps (reasonable or otherwise) to protect herself or anyone else, but wholly because of her unauthorised absence.

Direct race discrimination

Sprayed in the face with cleaning spray by Ms SW on 15 February 2020

219. As we have found, the claimant has not established the facts of this allegation. Ms SW did not spray the claimant in the face with cleaning spray or at all.

220. As the factual basis for this allegation has not been proven, this complaint fails.

Claimant's concerns about Ms SW disregarded by Ms Mazzocato and Ms Puntil

221. As we have found, the claimant has not established the facts of this allegation. Neither Ms Mazzocato nor Ms Puntil disregarded the claimant's concerns or ignored her. When they dealt with them, they dealt with them even handedly and did not favour Ms SW over the claimant or vice versa.

222. As the factual basis for this allegation has not been proven, this complaint fails.

Mr Shabbir and Mr Amjad ignoring the claimant's concerns on 15 February 2020 and telling her that Ms SW had sprayed the claimant in the face because the claimant had spoken disrespectfully about Jesus Christ

223. As we have found, the claimant has not established the facts of this allegation. Mr Shabbir and Mr Amjad did not ignore the claimant's concerns but rather carried out an investigation into what happened, reasonably concluded that there was no evidence that there had been an assault and sought to find a resolution (which they thought that they had achieved). They did not make the comment alleged about Ms SW spraying the claimant in the face because the claimant had spoken disrespectfully about Jesus Christ.

224. As the factual basis for this allegation has not been proven, this complaint fails.

225. As all of these complaints have failed, that is the end of the matter. However, we would add that we have seen no evidence (other than the claimant's assertion) that any of the actions of Ms SW, Ms Mazzocato, Ms Puntil, Mr Shabbir or Mr Amjad were in any way whatsoever taken because of the claimant's race; and we find that they were not.

226. All of these complaints of race discrimination therefore fail.

Direct religious discrimination

Claimant's concerns about Ms SW disregarded by Ms Mazzocato and Ms Puntil

227. As we have found, the claimant has not established the facts of this allegation. Neither Ms Mazzocato nor Ms Puntil disregarded the claimant's

concerns or ignored her. When they dealt with them, they dealt with them even handedly and did not favour Ms SW over the claimant or vice versa.

228. As the factual basis for this allegation has not been proven, this complaint fails.

Mr Shabbir and Mr Amjad ignoring the claimant's concerns on 15 February 2020 and telling her that Ms SW had sprayed the claimant in the face because the claimant had spoken disrespectfully about Jesus Christ

229. As we have found, the claimant has not established the facts of this allegation. Mr Shabbir and Mr Amjad did not ignore the claimant's concerns but rather carried out an investigation into what happened, reasonably concluded that there was no evidence that there had been an assault and sought to find a resolution (which they thought that they had achieved). They did not make the comment alleged about Ms SW spraying the claimant in the face because the claimant had spoken disrespectfully about Jesus Christ.

230. As the factual basis for this allegation has not been proven, this complaint fails.

231. As all of these complaints have failed, that is the end of the matter. However, we would add that we have seen no evidence (other than the claimant's assertion) that any of the actions of Ms Mazzocato, Ms Puntill, Mr Shabbir or Mr Amjad were in any way whatsoever taken because of the claimant's religion; and we find that they were not.

232. All of these complaints of religious discrimination therefore fail.

Discrimination arising from disability

Disability

233. As noted, it is accepted that the claimant was a disabled person at the material time by reason of Dyspraxia; Dyslexia; Dyscalculia; Hypermobility syndrome; Fibromyalgia; and Osteoarthritis.

234. It is not accepted that the claimant was a disabled person at the material time by reason of PTSD or Depression/anxiety.

235. The claimant has brought no medical evidence to support her assertion that she had PTSD or depression/anxiety, beyond a generalised GP letter dated 13 April 2021 (some 6 months after the termination of her employment with the respondent), which contains the line: *"[The claimant] is a 36 year old patient registered with our practice since 30 December 2014. She has a history of mental health disorder, including PTSD, recurrent depressive disorder and anxiety."* As this is a general statement about recurring mental health issues over a lengthy 6-7 year period (in other words conditions which come and go over time), we do not consider that it amounts to a diagnosis that she had PTSD or depression/anxiety at the material time, in other words at the time at which the

decision to terminate her employment was taken. Apart from this, the only evidence at all beyond her own assertion is the references in the letters from the CBT therapist which refer to “PTSD type symptoms”. However, the therapist is not a clinician so there is no medical diagnosis. Furthermore, even in that letter, the highest that the therapist puts it is “PTSD type symptoms”; she is not purporting to give a diagnosis that the claimant actually had PTSD. Furthermore, whilst the claimant did produce an impact statement in the supplementary bundle, this is her own work and, in the light of our concerns about the reliability of her evidence, we do not give any weight to it.

236. The burden of proof is on the claimant to prove that she was a disabled person at the material time. In the light of our findings above, she has not proved that she had a mental impairment of or related to PTSD or depression/anxiety; that it had a substantial adverse effect on her ability to carry out normal day-to-day activities; or that it was long-term. She was not therefore a disabled person at the material time by reason of PTSD or depression/anxiety and any discrimination arising from disability complaint founded on these conditions therefore fails at the first stage.

Knowledge

237. As we have found, the claimant did not inform the respondent about any of the eight health conditions which she relies upon at any stage prior to the limited information provided in the therapy letters in June 2020 (PTSD) and the limited number of conditions she referenced in her grievance meeting with Ms Read on 15 August 2020 (fibromyalgia, dyspraxia and depression).

238. As can be seen from her letter of 14 August 2020, Ms Rahman was aware that the claimant alleged that she had PTSD. The claimant then referenced PTSD in her appeal against dismissal to Mr McArdle. Their knowledge is important as the discrimination arising from disability complaint relates (only) to the claimant’s dismissal and they were the two individuals who took the decisions in relation to her dismissal and her appeal against dismissal respectively. However, that they had knowledge that the claimant asserted that she had PTSD is somewhat academic as we have already found that the claimant was not a disabled person by reason of PTSD. Importantly, there is no evidence to suggest that Ms Rahman or Mr McArdle were aware of any of the other conditions relied upon by the claimant and we find that they were not. We therefore find that neither of the decision-makers in relation to the claimant’s dismissal (Ms Rahman and Mr McArdle) had knowledge of any of the claimant’s six proven disabilities.

239. The discrimination arising from disability complaint therefore fails for that reason.

Unfavourable treatment/something arising from

240. For completeness, we go on to consider the substance of the complaint itself. The respondent accepts that dismissal was “unfavourable treatment”. The respondent dismissed the claimant because of unauthorised absence. For the

complaint to succeed, the unauthorised absence would need to have arisen in consequence of the claimant's disability. The claimant has not even sought to make a case that the unauthorised absence arose as a consequence of any of the claimant's alleged disabilities. By contrast, it is clear why the unauthorised absence arose; the claimant's absence was unauthorised because she did not provide sick notes and she did not seek to obtain or provide sick notes because she wanted instead to be placed on the furlough scheme and thereby benefit financially (as opposed to receiving only SSP, which would have happened if she had provided sick notes). The claimant's unauthorised absence was not, therefore, something which arose as a consequence of any of her alleged disabilities.

241. The discrimination arising from disability complaint therefore also fails on its substantive merits.

Justification

242. Although the issue of justification is set out in the list of issues (at issues 5.7 and 5.8), we have heard very little evidence and no submissions on that issue. For that reason, and because the complaint of discrimination arising from disability has failed on several grounds anyway, we do not consider it is necessary to address the issue of justification and do not do so.

Harassment related to religion

Mr Shabbir and Mr Amjad ignoring the claimant's concerns on 15 February 2020 and telling her that Ms SW had sprayed the claimant in the face because the claimant had spoken disrespectfully about Jesus Christ

243. As we have found, the claimant has not established the facts of this allegation. Mr Shabbir and Mr Amjad did not ignore the claimant's concerns but rather carried out an investigation into what happened, reasonably concluded that there was no evidence that there had been an assault and sought to find a resolution (which they thought that they had achieved). They did not make the comment alleged about Ms SW spraying the claimant in the face because the claimant had spoken disrespectfully about Jesus Christ.

244. As the factual basis for this allegation has not been proven, this complaint fails.

Mr Amjad on 22 February 2020 telling the claimant "you will be in trouble"

245. As we have found, the claimant has not established the facts of this allegation. There was no conversation between the claimant and Mr Amjad on 22 February 2020 at all, let alone one in which Mr Amjad made the remark alleged.

246. As the factual basis for this allegation has not been proven, this complaint fails.

247. As all of these complaints have failed, that is the end of the matter. However, we would add that we have seen no evidence (other than the claimant's assertion) that any of the actions of Mr Shabbir or Mr Amjad were in any way whatsoever related to the claimant's religion, and we find that they were not; nor that they had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, and we find that they did not.

248. All the complaints of harassment related to religion therefore fail.

Victimisation

Protected acts

249. The claimant relies on two protected acts: her grievance appeal letter of 23 September 2020; and her appeal against dismissal letter of 16 October 2020. She does not specify exactly which sections of these letters are said to be protected acts.

250. We turn first to the grievance appeal letter of 23 September 2020. That letter does include the words "*I explained clearly that I felt I was victimised, discriminated and continually harassed since the day of the assault...*". However, it does not suggest that any of this unspecified alleged treatment was linked to race or religion or any other protected characteristic or because of her having previously raised breaches of the Equality Act 2010 (such as to amount to an allegation of victimisation). Expressions such as "discrimination" "harassed" and "victimisation" are frequently used in layman's terms by people in a nonlegal sense to denote what they regard as very unfair or unpleasant treatment, without it being linked to unlawful treatment under the Equality Act 2010. It was particularly evident that the claimant herself used such expressions in this way, for example from the fact that the judge needed to explain to her during the hearing that victimisation needed to be detrimental treatment because of a particular protected act, rather than just unfair or unreasonable treatment of an individual per se. We do not, therefore, consider that the references in that letter amount to an allegation that anyone has contravened a provision of the Equality Act 2010. As such, the claimant has not proven that this was a protected act. Any of the complaints of victimisation which rely on this alleged protected act therefore fail at this stage.

251. The claimant's appeal against dismissal letter of 16 October 2020 contains the following reference: "*those who launched their attack on [her], discriminated against her race and religion, victimised her and continued to harass her*". This is an allegation that the claimant has been discriminated against because of her race and religion and as such is an allegation of a contravention of the Equality Act 2010. The letter of 16 October 2020 was therefore a protected act.

The allegations of victimisation

252. We turn now to the two specific allegations of victimisation. The preface to these allegations in the list of issues is very wide, referencing Ms Read, Mr Cook and Mr McArdle and then referencing the grievance appeal meeting and the three disciplinary appeal meetings. That preface is logically incoherent (for example Ms Read was not present at any of these meetings). However, given the findings of fact we have made it is clear to which meetings and to which individuals the allegations which we deal with below can only apply and we are accordingly able to deal with them.

Saying that the claimant had asked to move to another store as the outcome of the grievance, when she had not asked for that

253. This allegation can only relate to Ms Read (neither Mr Cook nor Mr McArdle referenced the claimant moving stores as part of the decisions they had to make, save for the fact that Mr Cook had to deal with a grievance appeal point made by the claimant in relation to this specific issue which arose from Ms Read's grievance outcome letter).

254. However, neither at the grievance meeting nor in her grievance outcome letter did Ms Read state that the claimant had asked to move to another store as the outcome of the grievance. The possibility of the claimant moving to another store was discussed at the grievance meeting as a way of potentially enabling her to return to work, understandably given the claimant's reluctance to return to the Charing Cross store. The grievance outcome letter simply stated in one line that *"If on your return to work you would still like to transfer to another store, we can discuss what suitable options are available"*. It did not state that this was the claimant's desired outcome of the grievance. The inclusion of the word *"still"* perhaps inadvertently suggests a greater level of interest in potentially changing stores on the part of the claimant than that which is reflected in the grievance meeting notes; however, that is not the same as declaring that moving stores was the claimant's desired outcome of the grievance. The factual basis of this allegation of victimisation is not therefore made out. This complaint therefore fails at the first stage.

255. Furthermore, the grievance outcome letter of 16 September 2020 predated each of the two alleged protected acts (which were in letters of 23 September 2020 and 16 October 2020). The treatment could not therefore have been because of either of the alleged protected acts. This complaint fails for this reason too.

256. Finally, Ms Read's actions were not detrimental treatment. In light of the fact that the claimant had expressed unwillingness to come back to the Charing Cross store, Ms Read discussed with the claimant and held open for her the possibility of her transferring to another store. This was for the claimant's benefit. There was no obligation or compulsion for her to transfer stores, but it was an option which was open to her to consider and which Ms Read hoped might enable her to return to work. As the action did not amount to a detriment, the complaint fails for that reason too.

Not accepting the claimant's comments on the meeting notes

257. This allegation could potentially apply to 2 sets of comments: the comments which the claimant sent by email to HR on 10 September 2020 in relation to the notes of the grievance meeting with Ms Read; and the comments which she sent to Mr Cook following the grievance appeal meeting. We deal with both.

Ms Read

258. Just as with the previous allegation, the grievance outcome letter of 16 September 2020 (by which stage any decision on whether to accept or reject the claimant's comments would have to have been made) predated each of the two alleged protected acts (which were in letters of 23 September 2020 and 16 October 2020). The treatment could not therefore have been because of either of the alleged protected acts. This complaint fails for this reason.

259. In any case, Ms Read never received the comments sent by the claimant on 10 September 2020. Therefore, she did not take a decision as to whether to accept or reject them at all, because she did not have them. She cannot therefore have subjected the claimant to detrimental treatment at all. This complaint fails for this reason too.

Mr Cook

260. Mr Cook's grievance appeal outcome letter was dated 10 December 2020. This was after he received the claimant's comments on the grievance appeal meeting notes. Furthermore, it was after the one proven protected act (the claimant's appeal letter of 16 October 2020 against dismissal). However, we have no evidence before us to suggest that Mr Cook, whose involvement was in the grievance process, had seen the dismissal appeal letter and in the absence of any such evidence and the likelihood that the respondent would have sought to keep the grievance and disciplinary processes separate, we find that on the balance of probabilities he was not aware of and had not seen that letter. Any action which he took cannot therefore have been because of the content of that letter. This victimisation complaint therefore fails for that reason.

261. In addition, Mr Cook did not accept the comments for the very good reason that they did not purport to be things that were said at the meeting but were rather the claimant's commentary on what happened at the meeting (and the purpose of the meeting notes was to provide a record of what was actually said at the meeting). We do not, therefore, consider that not accepting the comments was detrimental treatment at all and the complaint fails for that reason too.

262. Furthermore, the reason for not accepting the comments was (regardless of whether or not Mr Cook had had sight of the 16 October 2020 dismissal appeal letter) nothing whatsoever to do with any suggestion by the

claimant of a breach of the Equality Act 2010. Rather, it was for the reasons set out above. The complaint fails for that reason too.

Summary

263. In summary, therefore, all of the claimant's complaints fail on their merits. We must, however, also consider the issues of jurisdiction/time limits, which we do below.

Time Limits/jurisdiction

264. As noted in the list of issues, any complaint about something that happened before 19 August 2020 may not have been brought in time.

265. That means that the automatically unfair dismissal, discrimination arising from disability and victimisation complaints were brought in time.

266. However, all the other complaints (direct race and religious discrimination and harassment related to religion) related to matters prior to 19 August 2020 and are therefore potentially out of time.

Conduct extending over a period

267. As there were no successful in time complaints, there can be no conduct extending over a period to link the earlier complaints with any successful in time complaint such that those earlier complaints are deemed to be in time. Those earlier complaints were therefore presented out of time.

268. We therefore need to go on to consider whether it is just and equitable to extend time in relation to those out of time complaints.

Just and equitable

269. It is for the claimant to show why it would be just and equitable for us to extend time in relation to those complaints. The claimant has given no reason in her evidence as to why she did not submit those complaints earlier. She merely stated in her written submissions that "*I believe the discrimination and victimisation continued to extend over a period which is evident from the hearing in the last four days*". That does not represent a reason to extend time, particularly as we have found that those later complaints failed anyway.

270. In the absence of any reason, we do not consider it would be just and equitable to extend time in relation to those complaints. The tribunal does not therefore have jurisdiction to hear those complaints and they are dismissed.

271. To be clear, had we had jurisdiction to hear them, they would for the reasons given above have all failed.

9 May 2023

Employment Judge Baty

Judgment and Reasons sent to the parties on:

09/05/2023

For the Tribunal Office

Annex

Agreed list of issues

1) Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 19 August 2020 may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

1.2.2 If not, was there conduct extending over a period?

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

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

1.2.4.1 Why were the complaints not made to the Tribunal in time?

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

2) Automatic unfair dismissal (ERA 1996, s 100(1)(d)/(e))

2.1 Was the Claimant absent from work between 9 March and 20 March 2020 and/or between 17 August and 8 October 2020 because of matters falling within s 100(1)(d)/(e), i.e.

2.1.1 Because there were circumstances of danger which the employee reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert; and/or

2.1.2 Because she was taking appropriate steps to protect herself or her mother from circumstances of danger which she reasonably believed to be serious and imminent?

2.2 If so, was that the sole or principal reason for her dismissal?

3) Direct race/nationality/colour discrimination (Equality Act 2010 section 13)

3.1 The Claimant is Bangladeshi and has "brown skin".

3.2 Did the Respondent do the following things:

3.2.1 Claimant was sprayed in the face with cleaning spray by Ms SW on 15 February 2020 between 6.15pm – 6.35pm - The Claimant says she was treated less favourably by Sabina than the named comparators.

3.2.2 Claimant escalated her concerns regarding Ms SW's behaviour to supervisors, Mariana and Melanie however both Mariana and Melanie favoured

Ms SW and disregarded the Claimant's concerns (between 15 January 2020 and 14 February 2020) - The Claimant says that Mariana and Melanie ignored her and treated her less favourably than Ms SW.

3.2.3 Claimant raised concerns to Naveed and Bilal on 15 February 2020 that her concerns regarding Ms SW had been ignored. However Naveed and Bilal explained that Ms SW had sprayed the Claimant in her face because the Claimant had spoken disrespectfully about Jesus Christ - Their treatment made the Claimant feel as if she was guilty rather than Sabina.

3.3 Did the Respondent's treatment amount to a detriment?

3.4 Was that less favourable treatment? The Claimant relies on the following comparators in relation to each incident (all of whom are Caucasian):

3.4.1 Melanie, Mariana

3.4.2 Ms SW

3.4.3 Ms SW

3.5 If so, was it because of the Claimant's race/nationality/colour?

4) Direct religious discrimination (Equality Act 2010 section 13)

4.1 The Claimant is Muslim.

4.2 Did the Respondent do the following things:

4.2.1 Claimant escalated her concerns regarding Ms SW's behaviour to supervisors, Mariana and Melanie however both Mariana and Melanie favoured Ms SW and disregarded the Claimant's concerns (between 15 January 2020 and 14 February 2020) - The Claimant says that Mariana and Melanie ignored her and treated her less favourably than Ms SW.

4.2.2 Claimant raised concerns to Naveed and Bilal on 15 February 2020 that her concerns regarding Ms SW had been ignored. However Naveed and Bilal explained that Ms SW had sprayed the Claimant in her face because the Claimant had spoken disrespectfully about Jesus Christ - The Claimant feels that she was treated differently because of her religion by Naveed and Bilal because they said she had spoken disrespectfully about Jesus Christ, which made her feel as if she was being regarded as a religious fanatic and told her that she should not have spoken about religion on the shop floor.

4.3 Did the Respondent's treatment amount to a detriment?

4.4 Was that less favourable treatment? The Claimant relies on Ms SW as a comparator (who is Christian).

4.5 If so, was it because of the Claimant's religion or belief?

5) Discrimination arising from disability (Equality Act 2010 section 15)

5.1 The Claimant says she has disability because she has the following conditions: Dyspraxia, Dyslexia, Dyscalculia, hypermobility syndrome, depression and PTSD, Fibromyalgia and Widespread inflammatory pain syndrome including osteoarthritis.

5.2 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

5.2.1 Did s/he have a physical or mental impairment?

5.2.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

5.2.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

5.2.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

5.2.5 Were the effects of the impairment long-term? The Tribunal will decide:

5.2.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

5.2.5.2 if not, were they likely to recur?

5.3 Did the Respondent treat the Claimant unfavourably by dismissing her?

5.4 Did the Claimant's absence from work arise in consequence of the Claimant's disability?

5.5 The Respondent accepts that the unfavourable treatment was because of the unauthorised absence from work.

5.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability at the relevant time?

5.7 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent will identify its aims in its Amended Response.

5.8 The Tribunal will decide in particular:

5.8.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.8.2 could something less discriminatory have been done instead;

5.8.3 how should the needs of the Claimant and the Respondent be balanced?

6) Harassment related to [] (Equality Act 2010 section 26)

6.1 Did the Respondent do the following things:

6.1.1 Claimant raised concerns to Naveed and Bilal on 15 February 2020 that her concerns regarding Ms SW had been ignored. However Naveed and Bilal explained that Ms SW had sprayed the Claimant in her face because the Claimant had spoken disrespectfully about Jesus Christ - Claimant was made to feel like a religious fanatic.

6.1.2 Claimant called in sick on 22 February 2020 and was told "you will be in trouble" by Bilal - Claimant lost the courage to call the store and limited all her future correspondence to HR alone.

6.2 If so, was that unwanted conduct?

6.3 Did it relate to the Claimant's religion or belief?

6.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

6.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7) Victimisation (Equality Act 2010 section 27)

7.1 Did the Claimant do a protected act as follows:

7.1.1 Letter of 23 September 2020;

7.1.2 Letter of 16 October 2020.

7.2 Did the Respondent (Christy Reed, Stephen Cook and Ryan McArdle) do the following things: "False representation and deliberate misinterpretation" at the grievance appeal meeting on 10 October 2020 and in the disciplinary appeal meetings on 31 October, 6 November and 13 November 2020, specifically:-

7.2.1 Saying that the Claimant had asked to move to another store as the outcome of the grievance, when she had asked for that.

7.2.2 Not accepting the Claimant's on the meeting notes.

7.3 By doing so, did it subject the Claimant to detriment?

7.4 If so, was it because the Claimant did a protected act?

7.5 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

8) Remedy

[UDL only] – reinstatement/re-engagement

8.1 Does the Claimant wish to be reinstated to their previous employment?

8.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

8.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

8.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

8.5 What should the terms of the re-engagement order be?

[EA 2010 only]

8.6 What declarations/recommendations should the Tribunal make?

Compensation

8.7 To what compensation, if any, is the Claimant entitled?

8.8 If the Claimant was unfairly dismissed and/or discriminated against in relation to dismissal and the remedy is compensation:

8.8.1 [UDL only] what is the amount of the Claimant's basic and compensatory awards?

8.8.2 What are Claimant's pecuniary and non-pecuniary losses?

8.8.3 what, if any, deduction or limitation should be made to the award to reflect the chance or probability that the Claimant would have been lawfully dismissed either at the time of dismissal or later had the Respondent followed a fair procedure/had there been no discrimination? (Polkey);

8.8.4 (unfair dismissal only) would it be just and equitable to reduce the amount of the Claimant's basic award or compensatory award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA 1996 sections 122(2) or 123(6); and if so to what extent?

8.8.5 (discrimination only) is there any contributory fault for which there should be a reduction (First Greater Western Limited v Waiyego UKEAT/0056/18/RN)?

8.8.6 has the Claimant taken reasonable steps to mitigate any financial loss suffered, whether by obtaining alternative employment or otherwise?

8.8.7 did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

8.8.8 did the Claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease

any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

8.8.9 if the unfair dismissal claim succeeds (but not otherwise) and the Claimant has received JSA, Income-related employment and Support Allowance, Universal Credit or Income Support between the date of dismissal and the date of the award of compensation, then for the purposes of reg 4 of the Employment Protection (Recoupment of Benefits) Regulations 1996, what are the:

8.8.9.1 'monetary award',

8.8.9.2 'prescribed element' (i.e. the amount of the award that relates to loss of income between dismissal and the date of the award which the employer must withhold pending recoupment by DWP),

8.8.9.3 the dates of the period to which the prescribed element is attributable and

8.8.9.4 the amount, if any, by which the monetary award exceeds the prescribed element?

8.8.10 alternatively, in a discrimination case [the above benefits may be taken into account as reducing any award payable]/what (if any) state benefits has the Claimant received following dismissal and should they be taken into account as reducing the compensatory award?