



## EMPLOYMENT TRIBUNALS

**Claimant:** Ms N Sheraliyeva

**Respondent:** John Lewis PLC

**HEARD AT:** London Central Employment Tribunal

**ON:** 1, 4,5,6,7,8 September 2023, 3 - 4 October (in Chambers)  
5 October 2023

**BEFORE:** Employment Judge Akhtar

**Members:** Ms J Marshall  
Mr M Baber

**Attendances:**

**For Claimant:** In person

**For Respondent:** Ms G Nicholls, of Counsel

## JUDGMENT

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

1. The Claimant was not unfairly dismissed and her complaint for unfair dismissal is not upheld.

2. The Claimant's claims for direct disability discrimination, discrimination arising from disability, disability related harassment and failure to make reasonable adjustments are not well-founded and are dismissed.

## **REASONS**

### **Background**

1. On 13 December, at a case management preliminary hearing before Judge Walker, the parties agreed the list of issues below. The parties agreed at the start of the hearing that the issues remain as those set out on 13 December 2020.
2. The Respondent confirmed that it remained in dispute whether the Claimant was disabled by way of back pain within the meaning of the Equality Act 2010 ("EqA 2010") at all material times.
3. The Claimant brings claims of unfair dismissal, disability discrimination, disability related harassment and failure to make reasonable adjustments. The Respondent denies all claims and contends that the Claimant was fairly dismissed for misconduct.

### **LIST OF ISSUES**

#### **Time limits**

4. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 12 May 2022 may not have been brought in time.
5. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

6. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
7. If not, was there conduct extending over a period?
8. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
9. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
  - 10.1 Why were the complaints not made to the Tribunal in time?
  - 10.2 In any event, is it just and equitable in all the circumstances to extend time?

### **Unfair dismissal**

10. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
11. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
  - 12.1 there were reasonable grounds for that belief;
  - 12.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
  - 12.3 the respondent otherwise acted in a procedurally fair manner;
  - 12.4 dismissal was within the range of reasonable responses.
12. The claimant says the dismissal was unfair because:
  - 13.1 She was dismissed because of her behaviour on 24 April 2022, but

her behaviour was because of her back pain, which was caused by the respondent's instruction to remove the chickens from the raised oven on the previous day; and

- 13.2 She was only given seven days to appeal the dismissal, even though the respondent knew that she was on holiday from 20 July to 6 August 2022.

### **Remedy for unfair dismissal**

13. The claimant wishes to be reinstated to her previous employment or re-engaged to comparable employment or other suitable employment.
14. 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.
15. 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.
16. What should the terms of the re-engagement order be?
17. If there is a compensatory award, how much should it be? The Tribunal will decide:
- a. What financial losses has the dismissal caused the claimant?
  - b. Has the claimant taken reasonable steps to replace her lost
  - c. earnings, for example by looking for another job?
  - d. If not, for what period of loss should the claimant be compensated?
  - e. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - f. If so, should the claimant's compensation be reduced? By how much?
  - g. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

- h. Did the respondent or the claimant unreasonably fail to comply with it? The respondent says that the claimant unreasonably failed to comply with it as she did not appeal the decision to dismiss. The claimant says that she was only given seven days to appeal the dismissal, even though the respondent knew that she was on holiday from 20 July to 6 August 2022.
- i. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- j. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? The respondent relies on the alleged misconduct of 24 April 2022.
- k. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- l. Does the statutory cap apply?
- m. What basic award is payable to the claimant, if any? Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent? The respondent relies on the alleged misconduct of 24 April 2022.

## **Disability**

18. 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:
- a. Did she have a physical impairment to her back?
  - b. Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
  - c. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
  - d. 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?
  - e. Were the effects of the impairment long-term? The Tribunal will decide: did they last at least 12 months, or were they likely to last at least 12 months? if not, were they likely to recur?

**Direct disability discrimination (Equality Act 2010 section 13)**

19. On 24 April 2022 did James McIntosh:

- a. Call the police and the respondent's security staff?
- b. Describe the claimant as a "crazy person"?
- c. State that the claimant needed a psychiatrist?
- d. State that the claimant was suicidal?
- e. State that the claimant would kill everyone around her?

20. Was that less favourable treatment?

21. The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

22. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

23. The claimant has not named anyone in particular who she says was treated better than she was.

24. If so, was it because of disability?

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

25. On 24 April 2022 did James McIntosh:

- a. Call the police and the respondent's security staff?
- b. Describe the claimant as a "crazy person"?
- c. State that the claimant needed a psychiatrist?
- d. State that the claimant was suicidal?
- e. State that the claimant would kill everyone around her?

26. On 18 July 2022 the respondent dismissed the claimant.
27. Did the following things arise in consequence of the claimant's disability:
  - a. In respect of the detriment of Mr McIntosh's actions on 24 April 2022: the claimant's need for an adjustment to her duties to remove the requirement for her to take chickens out of the raised oven;
  - b. In respect of the detriment of dismissal: the claimant's conduct on 24 April 2022 (including her screaming and crying).
28. Was the unfavourable treatment because of any of those things?
29. Did Mr McIntosh do the things at paragraph 69.1 above because he was trying to cover up the fact that he had failed to adjust her duties and had made the claimant take the chickens out of the raised oven the previous day?
30. Did the respondent dismiss the claimant because of her conduct on 24 April 2022 (including her screaming and crying)?
31. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
  - (a) Ensuring a safe and appropriate working environment for employees and others
  - (b) Protecting employees and others from violence or threats of violence
  - (c) Ensuring employees maintain standards of conduct
  - (d) Protecting reputation, brand and business interests
  - (e) Ensuring employees aren't subjected to unnecessary health risks
  - (f) Ensuring safety in the workplace
32. The Tribunal will decide in particular:

- a. was the treatment an appropriate and reasonably necessary way to achieve those aims;
- b. could something less discriminatory have been done instead;
- c. how should the needs of the claimant and the respondent be balanced?
- d. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

**Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

33. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?
34. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: the requirement to remove chickens from the raised oven.
35. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that performing this duty would place her at a risk of back pain?
36. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
37. What steps could have been taken to avoid the disadvantage? The claimant says that the respondent should have removed the requirement for her to perform this duty at all times, including on 23 April 2022.
38. Was it reasonable for the respondent to have to take those steps?
39. Did the respondent fail to take those steps?

**Harassment related to disability (Equality Act 2010 section 26)**

40. On 24 April 2022 did James McIntosh:



- a. Call the police and the respondent's security staff?
  - b. Describe the claimant as a "crazy person"?
  - c. State that the claimant needed a psychiatrist?
  - d. State that the claimant was suicidal?
  - e. State that the claimant would kill everyone around her?
41. If so, was that unwanted conduct?
42. Did it relate to disability? Specifically:
- a. Did it relate to the claimant's alleged disability because the reason why Mr McIntosh did these things was to cover the fact that he had not adjusted the claimant's duties the previous day, which was an adjustment to accommodate her disability?
  - b. Did it relate to a disability of a mental impairment? The claimant does not say that she was disabled by virtue of a mental impairment.
43. 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?
44. 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.

**Remedy for discrimination**

45. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
46. What financial losses has the discrimination caused the claimant?

47. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
48. If not, for what period of loss should the claimant be compensated?
49. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
50. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
51. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
52. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
53. Did the respondent or the claimant unreasonably fail to comply with it? The respondent says that the claimant unreasonably failed to comply with it as she did not appeal the decision to dismiss.
54. If so is it just and equitable to increase or decrease any award payable to the claimant?
55. By what proportion, up to 25%?
56. Should interest be awarded? How much?

**Procedure, documents and evidence heard**

57. The Tribunal heard evidence from the Claimant and Mr Rosa on her behalf. The Tribunal had the written evidence of Mr Farooq, he did not attend to give

evidence and the Respondent did not seek to challenge the content of his witness statement.

58. The Tribunal heard the evidence of the following witnesses on behalf of the Respondent:

Mr James McIntosh, Deputy Branch Manager

Mr Yosef Abai, Team Manager & dismissing officer

Mr David Mason, Team Manager & discipline investigator

Mr Aslam Miah, Team Manager & Claimant's line Manager

59. There was a tribunal bundle of approximately 445 pages and an agreed list of issues. On 6 September 2023 both parties disclosed some additional documents; the Claimant produced approximately 20 pages of documents, relating to medical notes, and the Respondent produced 4 pages of WhatsApp group messages. Those documents were adduced and allowed in by the Tribunal on the morning of 7 September 2023. We informed the parties that unless we were taken to a document in the bundle we would not read it. Both parties provided written closing submissions.

## **FINDINGS OF FACT**

60. Having considered all the evidence, both oral and documentary, we made the following findings of fact. These findings are not intended to cover every point of evidence given but are a summary of the principal findings that we made from which we drew our conclusions.

### Reliability of Evidence

61. At the outset of our fact finding, we felt it important to address the issue of reliability of witness evidence as this has had a bearing on our fact finding and the inferences we have drawn from those facts. We have referred to such matters in our fact finding but in terms of general comment, we found the Claimant's evidence unreliable on a number of key matters but most strikingly it

was her admission under cross-examination that Mr McIntosh did not say to her that she was crazy, or that she was suicidal, or that she would kill everyone around her. These are very serious allegations against Mr McIntosh and formed a key aspect of the Claimant's case cutting across all her individual claims and as Ms Nicholls put it in her submission to us the Claimant accepted with ease that Mr McIntosh had not said these things to her. We accept that some of this may be due to the Claimant's English language difficulties, but we do not accept that this entirely explains away the changes in position in terms of her evidence.

62. We agree with the Respondent's submissions that at times the Claimant has exaggerated her claims. A clear example of this is in respect of what was said to Mr Rosa by the police on 24 April 2022. Mr Rosa's second witness statement states "*they [the Police] said they have been told that Natalya is missing from work*" and "*they [the Police] have been told by the manager at Waitrose that Natalya has mental health issues and wanted to commit suicide*". Mr Rosa confirmed that the police did not say that "*they have been told of a missing mentally dangerous person who can cause harm to herself and others around her*", as set out at page 4 of the Claimant's witness statement.
63. We are also concerned about the reliability of Mr Rosa's evidence, in particular when asked in cross-examination whether he wrote his own statements, rather than clearly responding in the affirmative, he responded that he did 'to the best of his knowledge'. We note the similarities of style and use of language in his witness statement and that of the Claimant's, which in our opinion tends to support the proposition that the Claimant either wrote Mr Rosa's witness statement or heavily contributed to the content.
64. Notwithstanding the above, we have examined each individual allegation carefully in order to reach a view as to whether on the balance of probabilities it occurred and what it signified. We were alive to the possibility that, for example, the claimant may have misheard, misunderstood or misinterpreted comments and behaviour. We make further comment on this in our conclusions, in

particular around the Claimant's objections to being referred to as someone experiencing mental health difficulties.

65. Overall, we found the Respondent's witnesses to be consistent and reliable in their evidence. We agree with the Claimant's submissions that there were a number of occasions where the Respondent's witnesses, particularly Mr McIntosh and Mr Miah were unable to recollect events. However, we find that that this was particularly prevalent on occasions when the Claimant asked them to recollect matters such as the copying of her fit notes or absences from over a few years ago. It is understandable that witnesses would struggle to recall events dating back so long, which may have been of minor significance to them at the time, for example Mr Miah was asked to recall a period of absence the Claimant had in July 2021. On the main evidence, we found the Respondent's witnesses oral evidence was consistent with their written evidence.

#### Background/General

66. The Respondent's organisation is known as the John Lewis Partnership and its employees are referred to as "Partners". The Respondent has two trading divisions, namely its John Lewis & Partners department stores and its Waitrose & Partners supermarkets. The business is run on co-ownership principles and all Partners are eligible to participate in a share of the Respondent's annual profits.
67. The Claimant was employed by the Respondent from 31 October 2016 until 18 July 2022 when she was dismissed on the grounds of misconduct. The Claimant worked at the Waitrose & Partners store in Barbican, London (the "Branch"). The Claimant's role was Supermarket Assistant.
68. The Claimant's employment was subject to the Respondent's rules, policies and procedures. The relevant section of the Respondent's handbook confirms that *"in certain cases, your conduct may be considered so serious that you may be dismissed summarily.....whether or not you have been warned about*

*such conduct on a previous occasion and regardless of your performance or length of service". The handbook contains examples of serious misconduct which can result in summary dismissal. These examples include "serious breach of Partnership rules and procedures".*

69. The Respondent's handbook further states that *"Partners are people of outstanding honesty and integrity. Our commitment to integrity is at the core of our co-owned business: we are honest with each other and in all our business relationships. Behaviours that fall short of our high standards are not tolerated and may result in disciplinary action, which could include you losing your job."* It also states *"Make sure that your own conduct does not cause offence to other Partners, customers, suppliers or anyone else who you have contact with during the working day. We treat bullying, harassment or any offensive conduct of a written, spoken, physical or visual nature as a disciplinary matter".*
70. Further, the standards of behaviour that are required of Partners are set out in the Respondent's Commitments which include a commitment to *"Build relationships powered by our principles". This requires Partners to "respect our customers, other Partners and our suppliers, treating them fairly, with honesty and courtesy". It also requires Partners to "take responsibility for [their] decisions" and to "be honest".*

### **Events of 23 April 2022**

71. On Saturday 23 April 2022, the Claimant was working on the meat and fish counter of the branch. This was an area that she was trained on as well as the bakery section referred to as "bake off". James McIntosh, deputy branch manager, was on duty as the branch manager on that day.
72. One of the tasks required of staff working on the meat and fish counter is to deal with the rotisserie chickens, which are cooked on skewers in raised ovens behind the counter. When the chickens have completed their initial cooking time it is necessary for their temperature to be tested to ensure they are fully cooked. If they are fully cooked, it is then necessary for the chickens to be

transferred to the counter to be bagged and dated. This involves removing the whole chickens on skewers out of the oven and to the preparation area.

73. On this date, the claimant alleges that Mr McIntosh ordered her to remove the chickens from the ovens. She alleges that she approached Mr McIntosh and reminded him that she had been removed from all heavy lifting and asked for another Partner named Thomas to assist her. She alleges Mr McIntosh refused her request and advised her that Thomas was busy with another task. The Claimant says she was surprised by Mr McIntosh's 'order' as she had been removed from all heavy lifting for a period of around 6 months due to her bad back. She claims after her request was refused, she attempted to remove the chickens but felt a sharp pain in her shoulder and stopped. She states that she then went to the bake-off counter to ask Thomas to help and he came to take the chickens out but by that point it was too late as she had already damaged her shoulder. She states she managed to continue work but finished work in pain and tears, she was in pain all evening but felt she had no choice but to go into work the next day as she had been informed by her manager in February that if she had another sick day that she could be fired.
74. In his evidence to the Tribunal, Mr McIntosh advised that he could not recall asking the Claimant to remove the chickens on this date but he is aware that he confirmed that he had done so when asked by David Mason, Team Manager and Discipline Investigation Officer, as part of the discipline investigation. He stated that such a request would not be unusual as in any given shift he makes many requests of Partners, as is his responsibility as branch manager. Mr McIntosh denies refusing the Claimant help and stated that had she asked him for help he would have found another partner to help her, or he would have helped her himself. Mr McIntosh states he did not see the Claimant take the chickens out and that she did not tell him that she had hurt her back whilst attempting to take the chickens out. Mr McIntosh confirmed in oral evidence to the Tribunal that he was previously aware of the Claimant's back pain through the managers WhatsApp group conversations.

75. On this particular issue, we prefer the evidence of Mr McIntosh, and we find that whilst he did request the Claimant take the chickens out of the oven, she did not ask him for assistance. We find it implausible that the Claimant would have attempted to remove chickens knowing that this may cause her to suffer back pain. She states that she did this as Mr McIntosh refused her request for Thomas to assist her. Despite this, she does ultimately ask Thomas to assist her, and he ultimately removes the chickens. It is also implausible that she does not mention anything to Mr McIntosh or anyone else at the time about hurting her back, yet when he asks her how she is the following morning, she claims to immediately inform him that she has been suffering all night from the pain from yesterday. We comment further on this in the events of 24 April 2022 below.

### **Events of 24 April 2022**

76. The majority of issues in this case concern events that unfolded on 24 April 2022. On this day, Mr McIntosh was the only manager for the branch, which was normal for a Sunday. The Claimant was also at work on the meat and fish counter and Mr McIntosh asked her how she was. There is no dispute between the parties that the Claimant informed him that she had back pain and that she had taken her medication and expected to feel better when this started working. However, the Claimant contends that she told Mr McIntosh at this point that she had been suffering with back pain all night from yesterday, whereas Mr McIntosh's evidence is that she did not mention anything about hurting her back the day before.
77. We accept that Mr McIntosh's question to the Claimant asking how she was, was a general, polite question and one that he would ask all Partners. This is also supported by the fact that at this stage and by the Claimant's own admissions, he was not aware of the Claimant alleging that she had hurt her back the day before from attempting to lift chickens. We do not accept that the Claimant informed him at this point, having been so reluctant to mention anything from the day before, we find it implausible that the Claimant would suddenly decide to mention something now.



78. At some point after starting work, Mr Farhan Farooq, a Partner, found the Claimant sitting on the floor and crying. He asked her what had happened, and she told him that her back was hurting. Mr Farooq then informed Mr McIntosh that the Claimant was crying on the floor behind the meat and fish counter due to her back pain. In Mr Farooq's written evidence to the Tribunal, there is no mention of the Claimant advising him that she had injured her back the day before or that Mr McIntosh had ordered her to remove chickens causing the injury.
79. Mr McIntosh then went to check on the Claimant and suggested that the Claimant move to the branch manager's office, asking Hannan Mohammed, supermarket assistant, to accompany her. There is no dispute that the Claimant moved from the shop floor and ended up sitting on the floor of the ladies' changing rooms and that she was crying, shouting, and screaming. The Claimant refused Mr McIntosh's suggestion that she sit on chair in the manager's office and accused him of trying to hide her from other Partners.
80. During this time period, someone remained with the Claimant, this was predominantly Ms Mohamed, who had been asked by Mr McIntosh to stay with the Claimant. At some point, Laurice McIntosh, another partner and Ansu Patel, supermarket assistant, also attended work and came across the Claimant on the floor of the ladies' changing rooms. In statements provided to Mr Mason, Mr McIntosh, Ms Mohammed and Ms Patel all confirm that the Claimant was shouting at Mr McIntosh.
81. There is then a significant variation in the accounts of the Claimant and Mr McIntosh. There are also some variances in the account of other partners that became involved like Ms Mohammed and Ms McIntosh. We found it difficult to breakdown and reconcile exactly what had taken place and concluded that a large part of this was due to the chaotic nature of the events that unfolded. What was clear was the Claimant was shouting, screaming and crying throughout the next few hours whilst the incident was ongoing. Whilst the Claimant does not accept shouting at anyone, she accepts that she was screaming and crying in pain.

82. Whilst she was in the changing room the Claimant called 999 for an ambulance on a number of occasions. These calls were overheard by Ms Mohammed as the phone was on loudspeaker and she states that the Claimant was informed that an ambulance would not attend as it was not an emergency, and the Claimant was advised to call her GP. The Claimant's evidence is that the ambulance would be coming at some point but not immediately as it was not an emergency. We prefer the evidence of Ms Mohammed on this point as ultimately the ambulance did not attend.
83. Ms Mohammed also states that she overheard the Claimant advise the emergency operator that she was suffering with back pain that had started 3 days prior. Whereas Ms McIntosh states the Claimant said "it [the back pain] started on Saturday when James made her do chickens". This is consistent with the Claimant's account that she has continued to maintain. We did not hear any evidence from Ms Mohammed, and it could be in the midst of all the screaming and crying, that she misheard. As such, we do not place any weight on this aspect of Ms Mohammed's evidence.
84. The Claimant asked Mr McIntosh to call an ambulance. Having been informed by Ms Mohammed what the emergency service operator had previously said to the Claimant, Mr McIntosh explained that he was likely to receive the same response from the emergency operator as the Claimant had received. In evidence the Claimant suggested that as Mr McIntosh was the manager of a large branch, he may have been able to persuade an ambulance to attend and she would not accept his position that the ambulance response would be no different for him. We find the Claimant again started to shout at Mr McIntosh accusing him of not caring about her and wanting her to die.
85. Mr McIntosh returned to check on the Claimant a number of times throughout the course of the next few hours, and given the emergency services were not sending an ambulance, he offered to arrange for a taxi to take the Claimant to the hospital, and allow Ms Mohammed to accompany the Claimant to the hospital, but she declined. The Claimant accepted in cross-examination that the offer of a taxi and for Ms Mohammed to accompany her was made.

86. We find the Claimant shouted at Mr McIntosh and accused him of 'trying to throw her out onto the street like a dog'. In cross-examination, the Claimant accepted she made that comment but not that she was shouting at Mr McIntosh.
87. Whilst there appears to be discrepancies in specific timings, the parties are in agreement that the whole incident lasted over 2 hours. During the incident and whilst she remained at the branch, the Claimant remained on the floor in the ladies' changing rooms, continuing to shout, scream and cry. At some point during the course of the incident, the Claimant accused Mr McIntosh of making her move chickens the day before and causing her injury.
88. Describing the situation and what was going on, we noted in particular the following accounts of 3 different witnesses:
- In her follow up meeting with Mr Mason, Ms Mohammed describes noise levels as 9-10 on scale;
  - She describes "there was a lot of shouting, I felt overwhelmed, exhausted and worried.";
  - She describes the Claimant as in distress and crying;
  - She describes Mr McIntosh as not shouting but trying to deal with the situation;
  - She describes the Claimant shouting at Mr McIntosh, and refusing his help;
  - Ms Patel states that the Claimant was *"shouting to James you are not helping me and lying about everything she was crying and saying all this while I was in there. She was very angry whilst she was she talking to James"*;
  - Mr McIntosh states that the Claimant started screaming at him *"see see!! You want to hide me away so that the other Partners don't see me. You worry about what they will think but you don't care about me"*.
  - He goes on to state that the Claimant accuses him of not caring about her and wanting her to die.
89. We find that the accounts of Mr McIntosh, Ms Mohammed and Ms Patel all corroborate one another in that the Claimant was shouting, angry and aggressive towards Mr McIntosh. In contrast, Mr McIntosh did not shout at the Claimant and offered her assistance to attend the hospital in the absence of an ambulance attending. We find the Claimant refused to accept support from Mr

McIntosh and demonstrated aggressive and rude behaviour by way of shouting and screaming at him.

90. We accept that as time went on, Mr McIntosh became increasingly concerned for the Claimant's wellbeing. This resulted in him calling the Claimant's emergency contact, which was her ex-husband Mr Rosa. Mr Rosa refused to come to the store as Mr McIntosh had requested but told Mr McIntosh that he would call the Claimant.
91. At some point during the course of the incident, the Claimant managed to get off the floor and change out of her work uniform and into her own personal clothes and walk out of the branch. The Claimant states that she did this with great difficulty and in any event had her personal clothes under her uniform as well as 'slops' suggesting that this made it easier for her to change. We find it implausible that in light of the level of pain the Claimant states that she was in for such a prolonged period of time that she was suddenly able to get up and change, even if it was just removing a top layer of clothes, and walk out of the branch without assistance
92. As the situation continued, we accept that Mr McIntosh felt he had exhausted all options and as he stated on the Managers Google chat "he simply didn't know what else to do". He was aware from speaking to Ms Mohammed that an ambulance would not be coming, and Mr Rosa had made it clear that he would not be attending to collect the Claimant. In the circumstances, Mr McIntosh took the decision to contact 111, the non-emergency police phone number for assistance, in the hope they may be able to arrange an ambulance.
93. A short while after the Claimant left the branch, the police found her outside and she was conveyed to the hospital in what the police incident report describes was a mental health car, the Claimant states it was an ambulance.
94. We also find Mr McIntosh was not the only person who was concerned that that the Claimant was suffering with mental health issues, Ms Mohammed also shared those concerns as set out in the following comments in her statement:

- I honestly don't believe that Natalya was intentionally aware of how damaging and destructive her behaviour was to James, myself and everyone else involved.
- She describes the claimant as "may seem to be suffering from some sort of emotional or mental health crisis".
- "I wish Natalya the best and she is able to get the help and support she needs and deserves"
- "I was really concerned for her well-being and safety for suddenly walking out of the branch".

95. Throughout the incident there are a number of different accounts of conversations involving the use of the word dying and killing. Examples of some of these include:

- Ms Mohammed recalling the Claimant stating "If she leaves the branch without an ambulance, she will die, and we are not helping"
- Mr McIntosh states that the Claimant accused him of trying to kill her and that she would rather kill herself than leave the branch. He posts on the Managers google chat at 10.44 that "she says she is going to kill herself"
- The Claimant states that Mr McIntosh stated to her that said if she wanted the ambulance to come quicker to call them and tell them you have mental health issues and want to commit suicide

96. We find that amidst all the chaotic shouting, screaming and crying, as well as the language communication difficulties, it is perhaps understandable that things may have been mis-heard, mis-communicated and misunderstood. As a result of these difficulties in reconciling exactly what was said and to whom, we decided to focus our fact finding on the specific five allegations that the Claimant makes against Mr McIntosh.

Call the police and the respondent's security staff?/ State that the Claimant was suicidal?

97. In respect of these allegations, we will deal with them together as the facts are linked. There is no dispute that at some stage during the incident, Mr McIntosh called the police. What is in dispute is exactly what Mr McIntosh said to the police. Mr McIntosh is categorical in his assertion that he did not tell the police that the Claimant was suicidal, however, we find that it is more likely than not that he told the police as he did on the Managers group chat that the Claimant "*had stated that she is going to kill herself*". We heard from Mr Rosa that he was told by the police that they had been told by the manager at Waitrose that the Claimant had mental health issues and wanted to commit suicide. We accept Mr Rosa's evidence that the police may well have used these or similar words, however, we find that it would not be unusual for the police to record reports of a person stating that they are going to kill themselves as a person wanting to commit 'suicide'.
98. The documentary evidence that the Tribunal has seen in the form of the google chat is Mr McIntosh reporting what he states the Claimant has said to him. That is not the same as Mr McIntosh stating his own belief that the Claimant 'is suicidal'. In cross-examination Mr Rosa admitted that Mr McIntosh did not say this to him, instead he had stated that the Claimant "had had a mental breakdown", this is consistent with Mr McIntosh's evidence. The Claimant admitted that he had not said to her that she was suicidal and there is no other evidence from anyone stating that Mr McIntosh had stated that the Claimant was suicidal. In light of all these factors we conclude that Mr McIntosh did not state that the Claimant was suicidal either to the police or indeed anyone else.
99. We find there is no evidence that Mr McIntosh called the respondent's security staff, and it is accepted by the Claimant that security staff did not attend.

Describe the Claimant as a “crazy person”?

100. The Claimant admitted in cross-examination that Mr McIntosh did not say this to her as did Mr Rosa. There is no evidence that Mr McIntosh said this to anyone else, as such we find that he did not state this.

State that the claimant needed a psychiatrist?

101. Other than the Claimant’s evidence, there is no other corroborating evidence that Mr McIntosh said this to the Claimant or anyone else. In light of our findings in terms of the Claimant’s reliability, we find that Mr McIntosh did not state this.

State that the claimant would kill everyone around her?

102. The Claimant admitted in cross-examination that Mr McIntosh did not say this to her as did Mr Rosa. In light of our findings earlier in respect of Mr Rosa confirming that the police did not say this to him, we also find there is no evidence that Mr McIntosh said this to anyone else.

**Reasonable adjustments - removal from heavy lifting**

103. In or around 13 February 2022, in a contemporaneous message on the Managers Whatsapp group chat, Mr Miah advises that he has spoken to the Claimant about her absence levels following a return to work from an absence around 8<sup>th</sup> February. He states that he has suggested moving the Claimant away from meat and fish and bake off to checkouts and shop floor as it does not involve heavy lifting to an extent. He states that the Claimant has agreed but asked to wait until April when she will be seeing her chiropractor. Mr Miah asks the Claimant for her GP notes so he can add them to her wellness form. There is no suggestion that the Claimant asked to be removed from heavy lifting or that he had removed from her the same.

104. This is followed by a Wellness and Reasonable Adjustments form dated 13 March 2022 which is completed by Mr Miah in conjunction with The Claimant. In this form, Mr Miah records the following relevant information:

- a) The Claimant is to be careful with the tasks she carries out and is to be given an additional body in the mornings to assist with lifting;
- b) The Claimant has a physiotherapy appointment on 14 April 2022;
- c) The Claimant is taking co-codamol;
- d) The Claimant finds heavy lifting challenging;
- e) Under the section what will the Claimant do if she starts to feel unwell, it is recorded that "I will let a manager know".

105. Again, this form does not suggest that the Claimant is to be removed from all heavy lifting rather it confirms that she will manage her tasks carefully with support being provided in the mornings to assist with lifting. The Claimant's evidence was that her GP's note from a week prior stated no heavy lifting. We have seen a fit note dated 6 April covering the period 4 April 2022 to 17 April 2022 which states that the Claimant may be fit for work with amended duties and/or workplace adaptations, it does not specify anything about heavy lifting. It was also accepted by the Claimant that she was actually off sick during this period.

### **Conversation between Claimant and Mr Miah, sick leave**

106. In or around 13 February 2022, Mr Miah held a meeting with the Claimant as her sickness levels had exceeded the Respondent's threshold triggering an informal line manager conversation. Mr Miah states that during this conversation he informed the Claimant that if her absence didn't improve in accordance with policy, one potential outcome could be dismissal from the Partnership. It was also during the course of this conversation that Mr Miah had discussed reasonable adjustments with the Claimant.

107. In her written evidence and claim form, the Claimant alleges that Mr Miah had informed her that if she missed 'one' more day of work she could be dismissed.



In her oral evidence, the Claimant changed her evidence and stated that she meant one more period of absence. The Tribunal find that it was in fact the Claimant's understanding from her conversation with Mr Miah that she could be dismissed for one more day of sickness. She makes reference to her concerns about being dismissed if she took any more sick days, makes reference to this during the incident on 24 April and during the incident with Mr Gilbert on 3<sup>rd</sup> April.

**Adam Gilbert incident, April 2022**

108. On 3 April 2022, Adam Gilbert, branch Manager is made aware by another Partner, that the Claimant was crying and upset. She was in a room situated off the Meat and Fish Counter. Mr Gilbert made his way over to the Claimant and found the Claimant still in the room visibly upset. The Claimant agreed to speak to Mr Gilbert and accompanied him to his office.
109. When asked why she was upset, the Claimant informed him that this was due to the fact that she been left in bake off the day before without support despite the branch being aware that she was unable to lift due to ongoing back pain and for which she had been referred for. She asked Mr Yusef Abai, Team manager and dismissing officer, for help as she needed to lift a box from the bottom of a cage, but her request was declined. Mr Gilbert asked her why she hadn't made him aware of this yesterday as he was duty manager and had been working. Mr Gilbert asked her what support the branch could provide and the Claimant advised that her line manager, Mr Miah had already referred her to occupational health and that he had promised her that she would have "Thomas" to support her on every shift. In response Mr Gilbert informed the Claimant that they simply couldn't afford to have 2 people doing 1 person's job and then explored with her what else she could do.
110. In his statement, provided as part of the disciplinary investigation, Mr Gilbert states that during the course of the conversation, the Claimant became agitated and started to raise her voice, he asked her not to shout at him but she continued to do so whilst also at the same time stating that she was not

shouting. She said that Waitrose lawyers had told her that he was going to do this and that if he was going to fire her, he just needed to get on with it. Mr Gilbert then describes the Claimant as becoming more agitated and started to yell at him to fire her as she knew that was what he was going to do. He states, she continued to yell at him as she made her way out of his office and down the corridor. Mr Gilbert then left to inform Mr McIntosh of what had just occurred.

111. In her evidence the Claimant accepts that the conversation took place but denies shouting at Mr Gilbert. She felt that during the course of this conversation, Mr Gilbert was removing the adjustment that she had been provided of an additional person to support her.

112. Mr McIntosh in his evidence stated that his understanding was that Mr Gilbert was simply pointing out the additional support was not something that was available at all times of the Claimant's shift but only if the Claimant required assistance with heavy lifting, which was predominantly in the mornings for certain tasks. We find that this incident did occur, the Claimant did shout at Mr Gilbert and did believe that he was going to fire her. This was all in the context of her understanding of what Mr Miah had said to her about her leave and the fact that she felt that during the course of this conversation, Mr Gilbert was removing the adjustment that she had been provided of an additional person to support her with heavy lifting, as required.

### **Disciplinary Investigation**

113. An investigation was carried out by Mr Mason, who held a meeting with the Claimant on 19 May 2022. The Claimant was informed that she was invited to the meeting to discuss her potential serious misconduct.

114. As part of his investigation, Mr Mason also spoke to Mr McIntosh, Ms Mohamed, Ms Patel and Ms McIntosh. The Claimant confirmed in cross-examination that she did not feel there was anyone else that Mr Mason should have spoken to. She does challenge the fact that Mr Mason did not speak to Ms McIntosh to begin with, however, we accept Mr Mason's explanation that Mr

McIntosh and Ms Mohammed were the two main individuals involved with the Claimant on 24 April 2022.

115. Mr Mason considered, after carrying out a thorough investigation, that the Claimant had behaved in an inappropriate manner without sufficient mitigating circumstances, and believed there was therefore a case to answer. Mr Mason referred the matter to Mr Abai.

## **Dismissal**

116. The Claimant was invited by letter on 9 June 2022 to a meeting on 14 June 2022 to discuss her potential serious misconduct. The letter confirmed that the purpose of the hearing was to discuss the allegations of *"potential serious misconduct, namely inappropriate behaviour, capable of causing harm and offence"*. The Claimant was advised that she was entitled to be accompanied to the meeting by a work colleague or trade union representative.
117. The disciplinary hearing took place on 14 June 2022 chaired by Mr Abai.
118. During the meeting, Mr Abai set out the events leading to the disciplinary meeting and asked the Claimant to say in her own words what happened. The Claimant discussed the incident of 24 April including alleging that Mr McIntosh refused to call an ambulance and that he called the police to escort her from the building.
119. In an effort to understand the effects of the Claimant's back pain and if it could lead to the behaviour the Claimant exhibited on 24 April, Mr Abai adjourned the hearing and referred the Claimant to the Respondent's in-house occupational health provider. In or around 4 July 2022, OH replied simply stating that the behaviour may not have been acceptable, but it was understandable how it may have happened. We find there was no specific confirmation that severe back pain would have caused the Claimant to behave in that manner. We also note as did Mr Abai that in her discussion with Occupational Health, the Claimant appears to have accepted that she was "aggressive.....raising her

voice, shouting at times and crying". She states that this was out of frustration as managers had removed the person who was meant to be assisting her with heavy lifting.

120. Ultimately, the Claimant produced no evidence, medical or otherwise which supported her contention that her behaviour on 24 April was brought about as a result of her back pain.
121. Following receipt of the occupational health report, the Claimant was invited to attend a reconvened disciplinary meeting. A reconvened disciplinary hearing took place on 18 July 2022 chaired by Mr Abai.
122. Following a further discussion with the Claimant, including discussing the Claimant's latest occupational health report, Mr Abai adjourned the meeting to consider the outcome.
123. During the adjournment, Mr Abai reviewed all of the relevant evidence including documentation gathered during the investigation, the notes of the investigation meeting with the Claimant, the notes of the disciplinary meeting, the occupational health report and the Claimant's mitigation in respect of her back pain. Mr Abai then considered an appropriate sanction and concluded that due to the serious nature of the allegations it was appropriate to dismiss the Claimant with immediate effect. Mr Abai considered the Occupational Health referral and concluded that it did not state that the Claimant's back pain would cause erratic and aggressive behaviour. As such he formed the opinion that the back pain was not the root cause of the Claimant's behaviour. Mr Abai considered that the Claimant showed no remorse for her aggressive, and rude behaviour, and that her behaviour was capable of causing harm and offence.
124. Mr Abai reconvened the meeting and informed the Claimant of his decision. After the meeting, Mr Abai handed the Claimant a letter which confirmed that the outcome of the disciplinary hearing was that she was dismissed for serious misconduct, namely inappropriate behaviour capable of causing harm and offence.

125. The letter also informed the Claimant of her right to appeal. In the meeting, Mr Abai also informed the Claimant that she had 7 days to appeal the outcome of her disciplinary hearing. It is not disputed that the Claimant informed Mr Abai that she was going on holiday, however, Mr Abai states that she did not inform him of the dates, nor did she request that Mr Abai grant her an extension of time in which to submit her appeal. The Claimant stated in oral evidence that she was flying out of the country the day after the hearing but then admitted her flight was actually a few days later.

126. The Claimant did not appeal against the decision to dismiss her.

### **Disability**

127. It is clearly recorded at the Preliminary Hearing in December 2022 that the Claimant does not allege she is disabled by virtue of a mental impairment. The disability alleged by the Claimant is her “back”.

128. In the disability impact statement provided by the Claimant, she identifies two “adverse” effects on her day-to-day activities, these being the need to carry one day’s worth of shopping and difficulties getting her daughter ready for school. In oral evidence, when cross-examined on this issue, the Claimant added the following substantial adverse effects on her day-to-day activities, these being that she was *“unable to cook, clean, have a shower or bath myself, unable to look after my daughter”*.

129. In cross-examination, when asked, about how frequently she is restricted from assisting her daughter to get ready for school, the Claimant replied, *“every two months for two weeks, I end up in hospital, when I can’t do it anymore”*. There are two records of hospital attendance for back pain, these being 5 July 2021 and 24 April 2022. The Claimant also attended hospital for MRI scans in relation to her spine on 21 November 2021.

130. In her disability impact statement, the Claimant has alleged she has suffered from back pain for 20 years and received medical care in Turkmenistan. The Tribunal has seen no evidence from Turkmenistan. The earliest reference in

the Claimant's medical records to back pain is 16 May 2018, however, we note the entry does record ongoing history of back pain. In light of this, whilst there is no medical evidence of back pain prior to this, the Tribunal conclude that the Claimant has suffered with back pain since at least 16 May 2018. For the purpose of these claims, there is no requirement for the Tribunal to make any finding in terms of any earlier period and the Tribunal declines to do so.

131. The Claimant produced approximately 20 pages of evidence at the hearing consisting of medical records which had not previously been disclosed. It is unclear why these records had not been disclosed any earlier, the Tribunal found they were clearly relevant. The Tribunal noted that the medical records included in the bundle referenced the dates of the GP and hospital attendances, the records now disclosed appeared to be the detail behind the summary entries on the notes within the bundle. It appears the Claimant was confused as to whose responsibility disclosure was and misunderstood that the Respondent would be including the notes. Regardless of the position on this the Tribunal admitted the notes into evidence and considered them relevant to the issue of disability.
  
132. The Tribunal notes the following relevant references in the additional medical records and evidence disclosed by the Claimant:
  - a) 16 May 2018 – ongoing history of back pain, has had MRI scan with NAD detected, said was under a lot of stress from her workplace last week. Starts on co-codamol;
  - b) February 2020 – GP entry states *“was in tears most of the time from the consultation, not coping with day-to-day activities”*;
  - c) 9 March 2021 – unable to eat or do housework when this happens, co-codamol or naproxen;
  - d) 9 March 2021 - Naproxen medication box;
  - e) 5 July 2021 - presents with worsening backpain since being off her analgesia since three days ago.- medication allowing her to do some day to day activities;

- f) 23 November 2021 – deformity of spine, patient has recurrent back pain, refer her to MSK, musculoskeletal clinic;
- g) 14 March 2022 – Physiotherapy appointment. It is accepted that the date on this appointment note has been noted incorrectly and it should state 14 April 2022. This is corroborated in the contemporaneous account that the Claimant provides Mr Miah following her return to work meeting on 2022.

133. In terms of the Respondent's knowledge of disability, the Tribunal noted the following relevant references in the bundle:

- a) Entry dated 16.05.2018 - back pain unspecified not fit for work for one week;
- b) Entry dated 29.06.20 recording, bad back can't move, consider referral back pain.
- c) Email dated 29 February 2020 relating to the Claimant's sickness absence, from Ashleigh Legg to Mr Abai (Claimant's line manager at that time) copying in other managers. The email states there have been 5 periods of absence, 3 of which related to "bad back" and for which permission for referral was to be sought;
- d) In an investigation note dated 29 February 2020, 31<sup>st</sup> May, 26 October and 8 February 2020 recorded as bad back absences;
- e) Managers group Whatsapp chat message from Mr Miah dated 13 February 2022 records details of conversation with Claimant following return to work from back pain;
- f) Wellness reasonable adjustments checklist form dated 13 March 2022, setting out adjustments;
- g) Medical Fit note records history of back pain and Claimant unfit for work between 4 April and 17 April 2022.

## Relevant Law

### Unfair dismissal

134. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.
135. Where the Respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in section 98(4): "...the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case".
136. In misconduct dismissals, there is well-established guidance on fairness within section 98(4) in the decisions in ***Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827***. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (***Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563***).



Discrimination arising from disability

137. Section 15 of the Equality Act 2010 provides;
- (1) A person (A) discriminates against a disabled person (B) if—
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
138. In **Gallop v Newport City Council [2013] EWCA Civ 1583**, the Court of Appeal highlighted that it is vital for a reasonable employer to consider whether an employee is disabled, and form their own judgment on this issue.
139. The burden of proof in terms of knowledge is on the employer to prove that it was unreasonable for them to have the required knowledge. This is a question of fact for the Tribunal. The burden is on the employer to show it was unreasonable to have the required knowledge.
140. The EHRC Employment Code provides that employers must do all they can reasonably be expected to do to find out whether a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.
141. S15 (2) provides that the discrimination will not arise if A shows they did not know and could not reasonably be expected to know that B had a disability.
142. In order for a Claimant to succeed in a claim under section 15, the following must be made out: a. there must be unfavourable treatment; b. there must be something that arises in consequence of the Claimant's disability; c. the unfavourable treatment must be because of (i.e. caused by) the something that

arises in consequence of the disability; d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

143. Useful guidance on the proper approach was provided by Mrs Justice Simler in the case of ***Pnaiser v NHS England [2016] IRLR, EAT***: “A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.”
144. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and the Respondent’s motive in acting as he or she did is simply irrelevant.
145. The Supreme Court considered this claim in ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] IRLR 306*** and confirmed that this claim raises two simple questions of fact: what was the relevant treatment and was it unfavourable to the Claimant? ‘Unfavourable’ must be given its normal meaning; it does not require comparison, it is not the same as ‘detriment’. A Claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable. The court confirmed that demonstrating unfavourable treatment is a relatively low hurdle.
146. The Supreme Court said that in dealing with a section 15 claim, the first requirement was to identify the treatment relied upon. In that case it was the

award of a pension. There was nothing intrinsically unfavourable or disadvantageous about the pension on the facts of this case. On the facts the pension was only available to disabled employees (since the entitlement only arise upon permanent incapacity). While that could be less favourable than someone with a different disability, who may have worked more hours upon cessation of employment, no comparison was needed for the purposes of section 15. The claim failed. The Court emphasised that unfavourable treatment meant what it says and was not a high hurdle to surmount.

147. The Equality and Human Rights Commission Code of Practice contains some provisions of relevance to the question of justification. Paragraph 5.2.1 of the Code suggests that if a Respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of the Claimant is justified. As to justification, in paragraph 4.27 the code considers the phrase *“a proportionate means of achieving a legitimate aim”* (albeit it in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:- *\* is the aim legal and non discriminatory, and one that represents a real, objective consideration? \* if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances.*
148. As to that second question, the code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:- *“although not defined by the Act, the term “proportionate” is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an “appropriate and necessary” means of achieving a legitimate aim. But “necessary” does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.”*

149. In **Chief Constable v Homer 2012 ICR 704** Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

150. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the Respondent's business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

#### Duty to make adjustments

151. Sections 20 & 21 of the Equality Act 2010 provides;

##### Section 20 – Duty to make adjustments

- (1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
- (2) *The duty comprises the following three requirements.*
- (3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

- (4) *The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
- (5) *The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

## **Section 21 Failure to comply with duty**

- (1) *A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
- (2) *A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*
152. It is not necessary to prove that the potential adjustment will remove the disadvantage; if there is a “real prospect” that it will, the adjustment may be reasonable. In ***Romec v Rudham* [2007] All ER (D) 206 (Jul)**, EAT: HHJ Peter Clark said that it was unnecessary to be able to give a definitive answer to the question of the extent to which the adjustment would remove the disadvantage. If there was a 'real prospect' of removing the disadvantage it 'may be reasonable'.
153. In ***Cumbria Probation Board v Collingwood* [2008] All ER (D) 04 (Sep)**, EAT: HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage'.
154. In ***Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10, [2011] EqLR 1075**, the EAT said that, when

considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage.

155. In respect of reasonable adjustment claims, an additional element of knowledge is required. The first element is the same test as in S15 namely that A shows they do not know or could be reasonably be expected to know that the [interested] disabled person has a disability. Schedule 8 EQA 2010 pt. 3 para 20 states that A is not subject to the duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage. Accordingly, the additional element on knowledge for S20/21 claims is that A must also be reasonably expected to know the disabled person is likely to be placed at the disadvantage.

### **Direct discrimination**

156. Section 13 of the Equality Act 2010 provides as follows;

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

### **Burden of Proof**

157. Section 136 of the Equality Act 2010 provides;

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

158. In ***Islington Borough Council v Ladele [2009] ICR 387*** Mr Justice Elias explained the essence of direct discrimination as follows: *“The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detriment or treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic.”*
159. ***Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT*** is an example of the proposition that it is for the tribunal to decide as a matter of fact what is less favourable treatment and the test posed by the legislation is an objective one. The fact that a Claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment, although the Claimant’s perception of the effect of treatment is likely to be relevant as to whether, objectively, that treatment was less favourable.
160. In order for a disadvantage to qualify as a “detriment”, it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to “detriment”. However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, ***Shamoon v Chief Constable of RUC [2003] UKHL 11***.
161. ***Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246***. The employment tribunal should go through a two-stage process, the first stage of which requires the Claimant to prove facts which could establish that the Respondent has committed an act of discrimination, after which, and only if the Claimant has proved such facts, the

Respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the Claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the Respondent and the Claimant.

162. ***Madarrassy v Nomura International Ltd 2007 ICR 867*** - the bare facts of the difference in protected characteristic and less favourable treatment is not “without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the Respondent” committed an act of unlawful discrimination”. There must be “something more”.
163. ***Nagarajan v London Regional Transport [1999] IRLR 572, HL***, - “The crucial question in every case was, 'why the complainant received less favourable treatment ... Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?’”
164. ***Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL***, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for ...'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: 'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'

### Harassment

165. **Section 26 of the Equality Act 2010 provides;**

*(1) A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other*



*circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.”*

166. ***Richmond Pharmacology V Miss A Dhaliwal [2009] ICR 724.*** There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the Respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so.
167. ***Grant v HM Land Registry & EHRC [2011] IRLR 748 CA*** emphasised the importance of giving full weight to the words of the section when deciding whether the Claimant’s dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created: “Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”
168. ***Pemberton v Inwood [2018] EWCA Civ 564.*** Underhill J "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).

#### Time limits

169. Section 123 of the Equality Act 2010 provides as follows;

*(1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other*

*period as the employment tribunal thinks just and equitable. (3) For the purposes of this section— (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it.*

170. ***British Coal Corporation v Keeble [1997] IRLR 336***, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'
171. ***(Southwark London Borough v Afolabi [2003] IRLR 220). Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA*** - there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.
172. ***Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640*** - the "such other period as the employment tribunal thinks just and equitable" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the Respondent".
173. The Court of Appeal made it clear in ***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686***, that in cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what she has to prove, in order to establish 'an act extending over a period', is that (a) the incidents are linked to each other, and

(b) that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an “ongoing situation or continuing state of affairs” as oppose to “a succession of unconnected or isolated specific acts”. It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals.

## **DISCUSSION & CONCLUSIONS**

### **General**

174. Throughout the course of the hearing, the Claimant expressed her deep sense of injustice at being described as someone with mental health difficulties. She described the stigma that was associated with mental health in Turkmenistan, where she originated from and a real concern that her child could be removed from her if she was found to be suffering with mental health issues. We made it clear to the Claimant on a number of occasions that we were not being asked to determine whether or not she had a mental health disability and would not be doing so. This was not something either party relied upon in terms of their evidence or submissions. The Claimant did not seek to argue any mental health disability and was clear that she had never suffered with any mental health issues.
175. In terms of the Respondent, any mental health references were confined to the events of 24 April 2022 and it was the evidence of Mr McIntosh and Ms Mohammed that in their respective opinions the Claimant was experiencing some sort of mental breakdown. Mr McIntosh in his evidence accepted he was not a medical professional and this conclusion was only his opinion.
176. In order to determine the Claimant’s complaints we were required to make findings in respect of the actions of Mr McIntosh and any comments he may have made regarding the Claimant’s mental health. The findings and our

conclusions in respect of this should not be seen in any way as our views in respect of whether or not the Claimant was experiencing mental health issues.

**Disability & Knowledge of disability**

177. We conclude based on our findings that the Claimant was a disabled person at all material times as a result of her back pain. Whilst there were some gaps in the medical evidence, it is evident that back pain features in the records as far back as 16 May 2018, with reference to a history of back pain prior to this. The Claimant appears to have had an MRI scan at some point which at that stage did not detect any abnormality. She is prescribed co-codamol painkillers at this stage. There are then a further 4 GP record entries between February 2020 and November 2021, all recording back pain and there is further reference to co-codamol and naproxen pain killers being prescribed. The last entry in November 2021 states recurrent back pain and referral to the musculoskeletal clinic.
178. With regard to the back pain having a substantial, long term adverse effect on the Claimant's ability to carry out day-to-day activities, we agree that the disability impact statement is sparse in detail, however the Claimant does reference difficulties with shopping and getting her daughter ready for school. In oral evidence the Claimant added that she was unable to cook, clean and have a shower. She also added that she would suffer with symptoms every 2 months and would struggle with day to day activities for a few weeks. The medical records to some extent also corroborate the impact on day to day activities with a number of reference to the Claimant being unable to cope with these activities including being unable to do any housework when she experiences the symptoms. The medical records include consistent references to impact on day-to-day activities between February 2020 and July 2021. Considering this information in its totality, we conclude that the back pain had a substantial, long term adverse effect on the Claimant's ability to carry out day to day activities.
179. With regard to the Respondent's knowledge of the Claimant's disability, there are a significant number of references in the Claimant's employment records to

back pain and the Claimant not being fit for work, these date back to May 2018 and continue to April 2022. Referrals to Occupational Health are mentioned on a number of occasions with the last reference being around February 2022, when Mr Miah discusses the Claimant's return following a period of absence for back pain, he posts the details of this on the Manager's WhatsApp group ensuring all other Managers were made aware. In March 2022, Mr Miah completes a wellness form and agrees adjustments with the Claimant further highlighting his awareness of the impact of the back pain on the Claimant's ability to carry out her role. Shortly prior to the events of 23 and 24 April 2022, the Claimant provides a fit note which states that she is unfit for work as a result of back between 4 and 17 April 2022.

180. In consideration of all of the above, we are satisfied that the Respondent had knowledge of the Claimant's disability at all material times relevant to this claim.

#### **Direct disability discrimination**

181. As a result of our earlier findings the only allegation of direct disability discrimination that remains for us to consider is that relating to Mr McIntosh calling the police.

182. We find that the calling of the police was not because of the Claimant's disability rather it was due to Mr McIntosh's concerns relating to the Claimant's mental health due to her conduct at the time. This was not a case of Mr McIntosh reaching an unreasonable conclusion, his actions were based on the circumstances and the Claimant's behaviour at the time. It is of note that Ms Mohammed who was present for the majority of the incident also shared Mr McIntosh's concerns regarding the Claimant's mental health at that time.

183. We conclude the decision to call the police was a last resort action taken by Mr McIntosh who had clearly exhausted all other options available to him, including requesting the Claimant's emergency contact to attend the branch and collect the Claimant. The incident had been ongoing for a prolonged length of time, other staff were becoming visibly distressed and we accept Mr McIntosh as

branch manager had a responsibility towards all staff including the Claimant and to ensure the smooth running of the branch. Contrary to what the Claimant believed, the police were not called to arrest her, they were contacted by Mr McIntosh to see if they could assist the Claimant in getting an ambulance. This is supported by the fact that Mr McIntosh followed up his call to the police even after the Claimant had left the branch. We find this corroborates Mr McIntosh's version of events in that he was concerned about the Claimant's welfare.

184. There is no evidence to suggest that Mr McIntosh would not have done the same if he was in a situation involving a person who did not have a disability. There was simply no evidence put forward by the Claimant to support this allegation. We therefore conclude that the Claimant has not proven facts from which a tribunal can conclude that discrimination has occurred.

### **Harassment**

185. The same applies to harassment in that the only allegation that remains is that of Mr McIntosh calling the police.

186. We repeat paragraphs 181 and 182 above and in light of these considerations, we find the Claimant's response to this was unreasonable. The claim of harassment fails.

### **Failure to make reasonable adjustments**

187. We conclude that the Respondent did have a PCP in existence of requiring removal of chickens from a raised oven. We conclude that in respect of the complaints before us, this PCP was not applied to the Claimant.

188. In respect of the incident on the 23<sup>rd</sup> April, we repeat our conclusions at paragraph 75. We accept Mr McIntosh requested the Claimant to remove the chickens, however she was not denied the agreed assistance and it was in fact Thomas who removed the chickens on that day.

189. The Claimant presented no evidence that she had requested or that she had been removed from all heavy lifting for a period of approximately 6 months. The contemporaneous documentary evidence, including the wellness form completed in March 2022 and the evidence of Mr Miah, her line Manager at the relevant time does not support this assertion from the Claimant.
190. We conclude that the Respondent took all reasonable steps to put in place appropriate arrangements including Mr Miah offering the Claimant an adjustment by carrying out light duties and moving away from the meat/fish and bake off counter. The Claimant refused this proposed reasonable adjustment as she wanted to await the outcome of her physiotherapy appointment. In the meantime, she stated that she was fit to carry out her duties with the agreed the adjustments of an additional person assisting her in the mornings.
191. The Claimant's claim for a failure to make reasonable adjustments does not succeed.

### **Unfair dismissal - The principal reason**

192. We conclude that the Claimant was dismissed by reason of misconduct, which was a potentially fair reason for dismissal.
193. The next question is the three stages in the BHS v Burchell case. First, did the respondent reasonably believe that the claimant committed the misconduct? We conclude that Mr Abai clearly believed that the Claimant was guilty of serious misconduct and had reasonable grounds on which to sustain that belief. The Claimant has not sought to challenge that.
194. Second, was that belief held on reasonable grounds? We conclude that Mr Abai held that belief on reasonable grounds. Mr Abai considered that throughout the two hours of the Claimant shouting and screaming, Mr McIntosh was trying to help her, for which the Claimant refused. He clearly considered the impact of the Claimant's back pain but felt this did not justify the aggressive nature of her behaviour, particularly screaming and shouting at Mr McIntosh.

We accept that a factor in Mr Abai's mind was that this was not the first time the Claimant had reacted aggressively by shouting at a manager. The Claimant had shouted at Mr Gilbert a few weeks prior to this incident, this was put to her in her interview with Mr Mason and she was given a full opportunity to respond. In respect of this incident the Claimant admitted to raising her voice because of her emotions as she felt she was not being listened to.

195. Third, was there a fair and reasonable investigation? We find that there was. Mr Mason carried out a thorough investigation and obtained statements from all relevant witnesses. The Claimant confirmed under cross examination that there were no other witnesses, who should have been spoken to.
196. We conclude that the Respondent carried out as much investigation as was reasonable in the circumstances. This is exemplified by the fact that the investigation meetings and the disciplinary hearings were both adjourned in order for further witness evidence and, in the case of the disciplinary hearing, further occupational health advice to be obtained.
197. Finally the question is whether dismissal was a fair sanction and within the band of reasonable responses. On the evidence before us we conclude that the dismissing officer did not act unreasonably and reached a conclusion open to a reasonable employer in all the circumstances.
198. Whilst a reasonable employer may well have given the Claimant a final warning, given the Claimant's length of time with the employer and the mitigating circumstances surrounding the Claimant's back pain, an equally reasonable employer in our view could choose not to, given the facts before them. In the opinion of the Respondent, the information before it, gave rise to serious conduct concerns. The Claimant did not accept that her behaviour was inappropriate and the Respondent could not be satisfied that it would not be repeated.
199. Given the circumstances, we concluded that the Respondent acted fairly and reasonably in dismissing the Claimant.



### **Procedural unfairness**

200. The Claimant complains of procedural unfairness in relation to her dismissal in that she was only given 7 days to Appeal and she advised Mr Abai that she was going on holiday and would be out of the country. We concluded in our findings earlier that the Claimant remained in the country for a few days prior to her flying abroad. If she had trouble accessing the respondent's Appeal portal, she could have made contact in some other way or she could have requested an extension of time in which to respond. She did neither and an appeal was never presented. In light of this we do not find any procedural irregularities in relation to the dismissal process.

### **Discrimination arising out of disability – Section 15**

201. There are two pleaded 'things' which are said to arise in consequence of the Claimant's alleged disability:

- The need for an adjustment to her duties
- The Claimant's conduct on 24 April 2022 (including screaming and crying)

202. We find that both matters arose out of the Claimant's disability. The need for an adjustment to the Claimant's duties clearly arose out of her disability, although we have concluded earlier that the Respondent did not fail in its duty to make reasonable adjustments on 23 April 2022.

203. In relation to the Claimant's conduct we find that her disability had more than a trivial influence on her conduct and are thus satisfied that it arose in consequence of her disability. We conclude however, that the Claimant's disability was not the only cause of the Claimant's conduct and whilst pain may have caused some of the screaming and crying, we do not accept the shouting and aggressive behaviour displayed towards Mr McIntosh was caused by the Claimant's back pain. The Claimant has presented no evidence, medical or

otherwise to support any conclusion that her back pain caused her to behave as she did.

**Was there unfavourable treatment**

204. The Claimant states that Mr McIntosh's actions on 24 April 2022 have been done to her because of her need for an adjustment. As per our findings earlier, the only allegation that remains for consideration is that relating to the police being called. In terms of the police being called because of the Claimant's requirement for adjusted duties, we accept the Respondent's submissions that Mr McIntosh did not tell the police that the Claimant had said she would kill herself because she needed adjusted duties. The Claimant has presented no evidence to support her assertion that Mr McIntosh did the things that she alleges because he was trying to cover up his actions from 23 April.

205. The Claimant states that she was dismissed because of her actions on 24 April 2022. It is accepted that the Claimant's conduct on 24 April 2022 was the reason for dismissal. We have concluded earlier that the Claimant's disability had more than a trivial influence on her conduct, as a result we then went on to consider whether the dismissal was a proportionate means of achieving a legitimate aim.

**Justification – Legitimate aim**

206. The following legitimate aims were identified by the Respondent:

- (a) Ensuring a safe and appropriate working environment for employees and others
- (b) Protecting employees and others from violence or threats of violence
- (c) Ensuring employees maintain standards of conduct
- (d) Protecting reputation, brand and business interests
- (e) Ensuring employees aren't subjected to unnecessary health risks
- (f) Ensuring safety in the workplace

207. We were acutely aware of the impact dismissal had upon the Claimant and we balanced that as against the impact upon the Respondent
208. We considered matters objectively bearing in mind that the onus is on the Respondent to show that the dismissal was a proportionate means of achieving a legitimate aim. We reached our own judgment as to whether the measure was reasonably necessary in light of the aims relied upon.
209. In our judgment, the Claimant was dismissed because of her inappropriate conduct. In terms of the legitimate aims being pursued, we find that aims a, b, c and f were met. For completeness, we are not satisfied that aims d and e, relating to brand reputation and health risks to employees were relevant legitimate aims in relation to the facts of this matter.
210. The Respondent sought to apply their policies and procedures in a manner which was consistent with the way in which they treated others. There is no evidence that the Claimant was treated inconsistently. The Respondent had considered steps short of dismissal i.e. a final written warning, however it had ruled this out on the basis that as the Claimant did not accept her behaviour was inappropriate and the Respondent had no assurance that the conduct would not repeat itself.
211. We repeat our conclusions in paragraphs 192 and 196 and conclude that it is credible that Mr Abai dismissed the Claimant for these reasons because of the evidence before him.
212. In light of our conclusions above, it is our judgment that the Claimant's dismissal was a proportionate means of achieving a legitimate aim, and the claim under section 15 is accordingly dismissed.

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Employment Judge **Akhtar**

22 March 2024

Sent to the parties on:

5 April 2024

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For the Tribunal Office:

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**Note**

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