Case Number: 2302352/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms V Cvetek	**v**	**Southwark Citizens Advice Bureau Service**

Heard at: London Central
On: 30 October to 1 November 2018

Before: Employment Judge Hodgson
Mr G Bishop
Ms S Plummer

Representation

For the Claimant: in person
For the Respondents: Mr P Collyer, consultantl

JUDGMENT

1. **The claim of failure to make reasonable adjustments fails and is dismissed.**

2. **The discrimination arising from disability claim (section 15 Equality Act 2010) fails and is dismissed.**

3. **The claim of unlawful harassment fails and is dismissed.**

4. **The claim of direct discrimination fails and is dismissed.**

5. **The claim of victimisation fails and is dismissed.**

6. **The claim of breach of contract fails and is dismissed.**

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on the claimant brought claims direct discrimination, harassment, victimisation indirect discrimination, breach of contract, failure to make reasonable adjustments and discrimination in consequence of something arising from disability.

The Issues

2.1 At the commencement of the hearing we noted that there were difficulties with the issues. We confirmed that we would review the nature of the claims and give the parties a written document detailing the issues. At the beginning of day two, this document was provided to the parties. Neither party sought to dispute it or amend it. There were no applications to include any further claims. That document is set out at appendix 1 and it contains the issues in this case.

Evidence

3.1 We heard from the claimant, C1.

3.2 For the respondent we heard from Mr Aiman Elal, Mr Christopher Green, Ms Fiona Crowe, and Ms Sarah Brooks.

3.3 We received a bundle and various further documents.

3.4 Both parties gave written submissions.

Concessions/Applications

4.1 On day one of the hearing, the claimant indicated that she wished to apply for an adjournment. The claimant stated she had anxiety and depression, and had difficulty sleeping. She had had a number of panic attacks.

4.2 We indicated it would assist if we had medical evidence demonstrating any particular condition, the effect of that condition, how it affected her ability to conduct the hearing, and when and why she would be able to continue in the future.

4.3 The claimant had a statement of fitness for work certificate which recorded that she had anxiety and stress related problems; it indicated she should refrain from working for two weeks. We noted that it did not provide the information we needed.

4.4 The claimant stated that if we allowed an adjournment, she would be able to complete preparations, which she described as almost complete. On further enquiry, she confirmed that there were only two areas where the preparation not been completed. First, she had served today an amended witness statement, and she believed the respondent should have an opportunity to consider it. Second, the respondent, three weeks previously, had served some additional notes of a meeting.

4.5 The respondent did not request an adjournment. We indicated we would read the statements for the remainder of day one and that would give the respondent an opportunity to read her amended statement carefully.

4.6 The respondent agreed that it would not seek to rely on the additional documentation unless there was a specific reason. We indicated we would consider any application to rely on the additional documents during the course of the hearing and if necessary, allow an adjournment.

4.7 In the circumstances, we suggested it may be appropriate to proceed. We confirmed we would read the statements and review the matter the next day.

4.8 At the start of day two, both parties confirmed they were ready to proceed. There was no further request for an adjournment. We confirmed we needed to discuss adjournment no further.

4.9 On day two, the claimant asked to exclude from the tribunal the respondent's witnesses while she was giving evidence. We granted the claimant's application and gave full oral reasons. In summary, we did not consider that open justice required the witnesses to be present prior to the giving evidence. Whilst commonly witness are not asked to remain outside until their evidence is given, excluding the witnesses is not itself an inappropriate infringement on the principle of open justice. We were concerned, even though there was a lack of supporting medical evidence, that the claimant may feel inhibited in her ability to answer questions. We did not consider there was any prejudice caused to the respondent. We explored the possibility of changing the arrangements in the room, but this appeared to make little difference. In the circumstances we excluded the witnesses until after the claimant had given her evidence.

4.10 Shortly after excluding the witnesses, a member of the press attended. The claimant asked that he be removed. We refused for the reasons given at the hearing. In summary, excluding the press from an open hearing was a serious infringement on the principal of open justice. In the absence of clear medical evidence demonstrating the need for a private hearing, the balance fell in favour of allowing the press to remain.

4.11 We received in evidence further documents, which included evidence that the claimant's probation period was extended and a copy of the alleged original advert for her post. Neither document was objected to, but the claimant did not admit their authenticity.

The Facts

5.1 Southwark CAB is a charity. It provides an advice service to the public. It has volunteers. It employs advisers, including advisers who specialise in particular areas. It has a number of sources of funding.

5.2 In April 2014, the respondent applied for funding, via the City Bridge Trust, for a full-time role of a welfare benefit caseworker. City Bridge Trust is the funding arm of Bridge House Estates, which provides grants totalling £20 million towards charitable activity in Greater London.

5.3 Welfare benefits advice had been removed from the scope of Legal Aid, despite a 20% increase in the service's demand for welfare benefits advice. In July 2014, the respondent secured a three-year grant to fund a senior welfare benefits case worker.

5.4 On 24 November 2014 Mr Matthew Howell was appointed. He performed the role well and met his targets. In November 2016, Mr Howell resigned to take up another job offer. The job was then advertised. The advert was produced to us during the course of the hearing. We do not accept the claimant's assertion that it was not the original advert. Her objection was based entirely on her recollection of the advert. She did not keep the original. There was an advert. There is no good reason to conclude that the advert as shown to use was not the original. The post was for a welfare benefit caseworker with a starting salary of £31,223 + 5% pension supplement for a working week of 35 hours. It states:

> **We are seeking to recruit a full time welfare benefits caseworker who will be based between our two main offices in Peckham and Bermondsey. You will assist with completing benefit claims, advocating on behalf of clients, and submitting reviews and appeals. The caseworker will also act in a consultancy role for other advisers and frontline workers in the borough.**

5.5 The advert made it clear that the candidate needed experience in preparing for tribunals and representing clients, good communication skills, ability to handle a caseload, and effective time-management skills.

5.6 Mr Christopher Green was the chief executive officer for the respondent. He knew there was limited funding. He chose not to refer, in the advert, to the limited funding, or the need for a fixed term contract, as he thought it may put off candidates.

5.7 The claimant applied on 11 November 2016. Her application was impressive. She stated she had experience of preparing for tribunals and representing clients. She had been a representative with the Free Representation Unit and had completed the Bar Professional Training Course. She stated she had represented clients at Social Security Tribunals since 2007, and had represented clients at Employment Tribunals. She stated she had experience of managing her own caseload since 2012. She described herself as having good communication skills and noted she made frequent representations to third parties, including HMRC, and would in addition "get involved in additional issues for which

clients often do not originally seek support." The claimant, who is Croatian, stated she had A-level equivalents in various subjects at grades A and B. She had a 2.1 BSC (Hons) in computer science. The claimant gave two referees, but neither was from her current employment. The application did not indicate the claimant had any disability. It did not mention any difficulties with depression or anxiety or otherwise. She was shortlisted.

5.8 The recruitment panel consisted of Mr Green, Ms Fiona Crowe, and Ms Patricia Boyer. The claimant was interviewed on 18 November 2016 she made no mention of any disability or medical condition which would affect her ability to undertake the role. Mr Green indicated he would wish to offer the claimant the role subject to satisfactory references.

5.9 Mr Green spoke with the claimant after the interview on 18 November 2016 (a Friday). At that stage he did not say that the contract would be fixed term. We accept the claimant thought the contract was in some manner permanent. However, we accept Mr Green's evidence that he did not specifically state that. They did discuss referees. The subsequent email of 21 November 2016 refers to that discussion. Mr Green requested an additional referee because the claimant had not included a referee from her current employment. The claimant confirmed that she would provide one, and subsequently did.

5.10 He did not discuss whether the role would be fixed term or permanent during his conversation with the claimant. Mr Green did give further consideration as to the nature of the contract, and it was decided to offer the claimant a fixed term contract. We accept that his reason for this revolved around the limited funding. The funding would last for another year and there was no guarantee that it would be renewed. It is the claimant's evidence that there she was aware that the funding was limited.

5.11 On Monday, 21 November 2016, Mr Green sent an email to the claimant confirming that the respondent wished to progress her application, subject to satisfactory references. His email stated "Please also note that the advert for the post omitted to state that due to funding the post is initially offered on a fixed term basis until 23 November 2017. I hope this is not a problem but please get back if you would like to discuss." There is no doubt the claimant understood, before she accepted the post, that it was for a fixed term.

5.12 The contract of employment confirmed she would be employed at Bermondsey but may be required to work at different locations. Her hours of work were 9:30 to 5:30, Monday to Friday. The salary was £32,857. The probation period was six months during which there would be regular reviews. The probation period could be extended beyond 2 July 2017 at the respondent's discretion if performance was not satisfactory. There would be a period of one week's notice during the normal or extended probation period.

5.13 The claimant commenced her employment on 3 January 2017 working three days at Bermondsey and two days at Peckham. She was given an induction during which it was confirmed that the respondent operated a hot-desking policy.

5.14 Ms Fiona Crowe had management responsibility for the claimant. Ms Crowe had concerns about the claimant's performance at an early stage. Within a few weeks of starting, the claimant made a request that she should be allowed to work three days a week, for the same salary, so that she could take up a second two-day post with another organisation. Ms Crowe found this request surprising. She was particularly surprised that the claimant represented that she could complete all of her duties adequately within three days.

5.15 Ms Crowe had no concern about the claimant's technical knowledge, but was concerned the claimant needed to be reminded about other aspects of the job, such as the fact she was the "go to person" for fielding technical questions. She was concerned about how much guidance needed to be given to enable the claimant to manage routine requests. One example was the claimant had been asked, late in the day, by another member of staff for advice and the claimant expressed negative feelings such that Ms Crowe formed the view that the claimant thought she had been put out.

5.16 A formal first support supervisory meeting took place on 25 January 2017. During that interview, Ms Crowe raised a number of concerns. Those concerns were put in writing and the claimant provided her comments. Ms Crowe wanted the claimant to prepare and plan more carefully, and in particular, at the end of each day, to look at tasks to be completed and the documents to be collected. The claimant was sent notes of the meeting. The claimant provided her comments as tracked changes. The claimant's comments do not appear to suggest that there was no problem, but instead she sought to deflect blame onto others including Miss Sarah Brooks. The claimant described Ms Crowe as critical.

5.17 To assist the claimant, Ms Crowe extended the time for each appointment to 1.5 hours, she suggested the length of the submissions should be reduced, and she confirmed the claimant should do 8 appointments per week with one day for writing up. Ms Crowe hoped that the feedback would help the claimant to settle into her role.

5.18 It is clear there had been difficulty around the hot-desk policy. The claimant's comments were to the effect that she had been told she could use Mr Howell's desk. It is apparent that during the remainder of her employment she did not accept the policy, and that has remained a source of dissatisfaction throughout.

5.19 In summary, there were concerns about the claimant's time-management, file management, and her interaction with other individuals.

5.20 There was a second supervision meeting on 17 February 2017. It is clear that difficulties remained. Again, written notes were provided, and the

claimant returned the notes annotated with her comments. In particular, Ms Crowe advised that there needed to be greater focus on better communication with clients and with staff. It is apparent from the claimant's comments that she did not accept the criticism stating there was overwhelming evidence of communication between staff and clients. There are other more technical issues raised about the way the claimant was recording information and preparing documents. We do not need to set out the detail. It is clear that Ms Crowe remained concerned. In particular she had reservations about the claimant's overall communication with, and attitude towards, clients and members of staff.

5.21 There was a further supervision meeting on 24 March 2017. This supervision meeting was lengthy and it was spread over two dates. There had arisen a difficulty between the claimant, and another member of staff, Ms Nicola Smith. The claimant believed Ms Smith was making incorrect assumptions without making appropriate checks. This related to the making of appointments. The claimant alleged that Ms Smith had made an appointment for her to see a client concerning debt. It is clear that Ms Crowe had difficulty understanding the exact nature of the complaints raised by the claimant. The claimant's own notes states that she wished to raise a formal complaint concerning Ms Smith. The claimant expressed the view that she would be penalised if she did so. Ms Crowe sought to reassure her.

5.22 The complaint was referred to Mr Aiman Elal. On 31 March he stated he would treat the complaint as a formal complaint. He proposed a meeting. There was further correspondence and the claimant withdrew the complaint. However, there was an informal mediation meeting on 18 May 2017.

5.23 A further interim review took place on 30 March 2017. Ms Crowe had a number of matters she wished to raise. One concerned a complaint from a service user; the second concerned the claimant's issues with seating. The claimant explained to us that there had been a number of issues with clients. One issue revolved around a client who the claimant did not wish to see. She explained to us that the client was turned away because her presentation included not only welfare benefits, but also debt matters. Debt matters should be dealt with by a different team. We do not need to consider the exact details of this, or any other difficulties the claimant had with specific appointments. It is clear that the claimant's role concerned her giving advice and preparing tribunal submissions for individuals. Many of those clients were vulnerable and had multiple difficulties. Some of their concerns related to welfare benefits. It was not unusual for those individuals to also have difficulty with debt. The fact that a client may present with a number of difficulties should not necessarily prevent the claimant undertaking her role. In any event, the needs of the client should be addressed and managed. Ms Crowe was concerned about the way the claimant dealt with the client, and more generally remained concerned about the way in which the claimant behaved in communicating with clients and communicating with staff.

5.24 We note that whilst the claimant's role concerned welfare benefit advice, her CV records that she has experience advising clients about debt.

5.25 A further issue raised was the claimant concern she wished to have a desk allocation, as she preferred not to sit in the centre of the room. She said it was a preference. The claimant did not mention disability. The claimant did not say that she had any difficulties arising from anxiety, depression, or any other condition. The claimant was invited to say whether there was anything else she wished to bring to Ms Crowe's attention. The claimant did not take this opportunity to refer to any health impairment.

5.26 Ms Crowe still had concerns about the claimant's case management and timekeeping. The claimant did accept there were issues, but did not state that any issues related to any health condition.

5.27 The meeting was wide ranging. At the conclusion, Ms Crowe set out expectations for areas of improvement, which included: better time-management; improved communication with clients and staff; professional communications with clients and staff; not turning clients away; seeing at least eight appointments in a week; writing appointments in a timeframe of no more than 48 hours; and taking responsibility for the project and for her own actions.

5.28 At this time, Ms Crowe was increasingly concerned that the claimant needed to demonstrate significant improvements in her performance or she may not make it past the probationary review. She was concerned the claimant lacked the experience to cope with the demands of the role. The lack of experience was compounded by a lack of organisational and communication skills. She perceived the claimant as reluctant to accept responsibility or to engage with the necessary process of improvement.

5.29 In May 2017, there was a further incident involving the claimant which caused Ms Crowe concern. On 10 May 2017, another welfare benefits adviser, Mr Kim Goh was working at a desk. The adviser was speaking to a client and preparing a form. The claimant placed files on top of Mr Goh's papers and refused to accept his indication to use another desk. Ms Crowe was concerned that the claimant's attitude and behaviour had been unprofessional.

5.30 On 11 May 2017, Ms Crowe observed the claimant being rude to a client in the reception at the Peckham office. The client had been late for an appointment. Ms Crowe observed the claimant's behaviour when she stated, "You have missed your appointment" and spoke over him when he tried to speak. She thought the behaviour was unprofessional and lacked warmth.

5.31 The claimant's probation period was extended by email of 26 June 2017. The new probation period was due to terminate on 2 August 2017. The claimant has disputed receiving the email. It is clear that there was significant concern about the claimant's employment, and the expiry of her probation period. Management did have a discussion. Mr Aiman Elal was

instructed to send the email. On the balance of probability, we find it was sent.

5.32 The claimant was invited to a probationary review on 25 May 2017. The letter stated, "This meeting may lead to your employment being terminated." The claimant was told there were three points of concern including the following: communication and conduct with clients; communication with staff and general professionalism; and taking reasonable responsibility for relevant self-supervision. She was given some broad details of those matters. The claimant asked for further details and they were sent.

5.33 The meeting had been scheduled for 2 June 2017. On 29 May 2017 the claimant raised a lengthy complaint about Ms Crowe accusing her of not respecting the claimant's dignity at work, victimisation, bullying, excessive monitoring, and harassment. This matter was investigated by another manager, Mr Aiman Elal, who met with the claimant on 2 June 2017. He dismissed the claimant's grievance by letter dated 27 June 2017. He gave full and careful reasons.

5.34 The probation review took place on 27 July 2017. The hearing was attended by Ms Crowe, Ms Sarah Brooks (as notetaker), and Mr Nick Stott (an employment law adviser). The review was lengthy, and Ms Crowe explained her concerns. During the meeting, the claimant did not suggest that she was disabled. She did not identify any specific medical condition or say any medical condition was causing her difficulty. Following a short adjournment, the claimant was advised that her employment was being terminated. Ms Crowe determined that there were continuing concerns about the claimant's communication with, and conduct towards, clients. She concluded that the claimant's conduct had not improved. She concluded that the claimant failed to treat members of staff with respect and that her communication had not been clear and professional. Ms Crowe concluded that the claimant failed to take responsibility for the project and for her own actions, and failed to ensure that she communicated clearly and effectively with staff. The claimant was dismissed. Those points were reiterated in Ms Crowe's letter of 28 July 2017. The claimant appealed that decision.

5.35 Initially she had been told that there was no right of appeal. However, after the claimant raised an appeal, the decision was taken to hear it.

5.36 In her appeal of 3 August 2017, the claimant then referred directly to the Equality Act 2010. She specifically alleged discrimination including less favourable treatment because of disability, failure to make reasonable adjustments, harassment, and victimisation. The claimant further amended that letter on 8 August 2017 alleging that she had mental and physical impairments, about which she alleged she had put the respondent on notice. She does not specify in the letter what are the material impairments. She also alleged a number of detriments.

5.37 We have considered whether there is any evidence of the claimant disclosing her medical condition during the course of her employment.

5.38 The impairments the claimant relies on are set out in the issues. They include depression, anxiety, an underactive thyroid, and abdominal pains.

5.39 There is some evidence that there were occasions when she indicated that she had abdominal pain. She took painkillers and asked for, and received, breaks. However, there is no evidence that she went into detail or suggested that in any sense it was long term or disabling. There is no credible evidence that she mentioned depression or anxiety. It is the claimant's evidence that she did not expressly mention any of these conditions, but that in some manner the respondent ought to have realised the difficulty she was having. At its highest, the claimant appears to say that the respondent should have inferred some form of mental health difficulty because the claimant indicated, at times, she was struggling. We find this would not have been a reasonable inference for the respondent to make. As regards the claimant struggling with her work, her position was always equivocal. She was largely defensive and suggested that to the extent there were difficulties they were caused by the respondent's staff, and the unreasonable practices of others. It was her position to the tribunal that her work was always of an appropriate standard, and while she may have found it stressful, she never fell below an appropriate standard, and was unfairly criticised. To the extent the claimant acknowledged there were difficulties with the work, it was her consistent position that it was the fault of others. In no sense whatsoever did she accept, or suggest, that any difficulties were caused by limitations she experience as a result of the medical condition.

5.40 The claimant's appeal against dismissal was heard by Mr Aiman Elal. He refused the appeal and sent the outcome on 20 July 2017. It carefully dealt with all the points raised. He rejected the claimant's contentions which revolved around bullying, harassment, victimisation and unreasonable requests. He gave explanations for all of his decisions.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

> **Section 13 - Direct discrimination**
>
> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **"employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)**

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept the there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 Harassment is defined in section 26 of the Equality Act 2010.

> **Section 26 - Harassment**
>
> **(1) A person (A) harasses another (B) if—**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are — age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.**

6.5 In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.6 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the prohibited grounds.

6.7 In **Dhaliwal** the EAT noted harassment does have its boundaries:

> **"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if**

it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award."

6.8 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

6.9 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.

6.10 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

6.11 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

6.12 Victimisation is defined in section 27 of the Equality Act 2010.

Section 27 - Victimisation

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

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

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

(a) bringing proceedings under this Act;

> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**
>
> **(4) This section applies only where the person subjected to a detriment is an individual.**
>
> **(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.**

6.13 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.14 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases may still be helpful. It is not in our view necessary to consider the second question, as posed in Derbyshire below, which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason for the treatment.

6.15 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. However as noted above there is no requirement now to specifically consider the treatment of others.

> **"37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental… Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'.**
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> **40. The second question focuses upon how the employer treats other people…**
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> **41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan*'s case [2001] IRLR 830, 833, paragraph 29, this**
>
> > **'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a**

subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'"

6.16 Detriment can take many forms. It could simply be general hostility. It may be dismissal or some other detriment. Omissions to act may constitute unfavourable treatment. It is, however, not enough for the employee to say he or she has suffered a disadvantage. We note an unjustified sense of grievance is not a detriment.

6.17 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law.

6.18 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. Of course, the questions of reason and detriment are often linked. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.

6.19 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire police v Khan 2001 IRLR 830 HL** is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.

6.20 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act.

6.21 Lord Nicholls found in **Najarajan v London Regional Transport 1999 ICR 877**, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others 2005 ICR 931** that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.

6.22 The House of Lords in **Nagarajan** rejected the notion that there must be a conscious motivation in order to establish victimisation claims. Victimisation may be by reason of an earlier protected act if the discriminator consciously used that act to determine or influences the

treatment of the complainant. Equally the influence may be unconscious. The key question is why the complainant received the treatment.

6.23 Section 23 refers to comparators in the case of direct discrimination.

> **Section 23 Equality Act 2010 - Comparison by reference to circumstances**
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> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**

6.24 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **Section 136 - Burden of proof**
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> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(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.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal;**
> **(b) …**

6.25 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

> **Appendix**
> **(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**
>
> **(2) If the claimant does not prove such facts he or she will fail.**
>
> **(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex**

discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

6.26 The law relating to reasonable adjustments is set out at section 20 of the Equality Act 2010.

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.**
>
> **…**
>
> **(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.**
>
> **(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.**
>
> **(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.**
>
> **(9) …**

6.27 In considering the reverse burden of proof, as it relates to duty to make reasonable adjustments, we have specific regard to **Project Management Institute v Latif 2007 IRLR 579** we note the following:

> **"… the Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be evidence of some apparently reasonable adjustments which could be made.**

Discrimination in consequence of something arising from disability

6.28 Section 15 - Discrimination arising from disability 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.**

The 'justification' test

6.29 The classic test was set out in **Bilka-Kaufhas GmbH v Weber Von Hartz** (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality principle. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see **Rainey v Greater Glasgow Health Board (HL)** [1987] ICR 129 per Lord Keith of Kinkel at pp 142-143.

6.30 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax** [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.

6.31 It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: **Hardys & Hansons plc v Lax** [2005] IRLR 726, CA.

Conclusions

7.1 We should deal first with the question of disability. In her submissions the claimant states:

> **45) It is evident from medical records that the claimant was diagnosed with anxiety and depression in 2004 and has being on medication including sleeping tablets. The claimant is under the regular care of the primary services but in the past was under the care of primary care psychiatric services as well as secondary care mental health services.**
> **46) In addition the claimant has other physical impairment that among others are capable of having effect on the mental health and general disability. One of them is underactive thyroid 2009 and also debilitating abdominal pain.**

7.2 The claimant told us in oral evidence that she had had depression and anxiety since approximately 2004. She has had a number of episodes and she has been on medication, although at present she is taking no prescription medication for depression or anxiety, and as we understand it, she was not taking such prescription medication during the time she was employed by the respondent.

7.3 We accept that she has an under active thyroid and is treated with thyroxine. She has severe abdominal pains and cramps associated with menstruation. We accept the claimant has dermatitis, which may be particularly problematic in hot environments.

7.4 The depression and anxiety may lead to a diminution in concentration and her general ability to cope. We have seen a letter of 4 March 2015 indicating the claimant was discharged from secondary to primary care. The medical notes we have received are incomplete. We have no medical notes which assisted with what happened around 2004. It is also apparent that the claimant has continued to have regular assessments by her GP. There is an entry from 17 October 2017 which is described as a review of her mental health care plan. It records the claimant reported an improved mood and a good level of mental health. She did not subjectively report mental health difficulties. It appeared she could interact appropriately. She was on no relevant prescribed medication.

7.5 Depression and anxiety may lead to difficulties. There may be a loss of concentration and there may also be a loss of energy.

7.6 We can say on the balance of probability that the mental health impairments have lasted for more than a year. At the time the claimant was working for the respondent, there is no specific evidence of any particular adverse effect on day to day activity. However, taking the claimant's evidence as a whole, historically she has had difficulties. We accept on the balance of probabilities those difficulties lasted for at least a year. It follows the claimant is disabled.

7.7 The position relating to the thyroid condition is less clear. There is no clear evidence confirming what would be the claimant's condition, should she not be taking medication. It is not necessarily the case that her day to day activity would be materially affected. It is for the claimant to provide some evidence, and we can't make assumptions when there is no clarity and insufficient evidence. We have to reach a decision on the available evidence, and on the balance of probability. It is well recognised that under production of thyroxine may lead to lethargy, and weight gain. Lethargy could have a significant impact on day today activity. Without the medication, this would be a persistent condition, and one which is likely to last for the remainder of her life. However, there is insufficient evidence to establish the likely effect absent the medication. Whilst, it is possible that there would be a substantial adverse effect on day to day activity, it is also possible there would not be. It follows there is insufficient evidence to establish the thyroid condition was a disability. In any event, the condition was controlled by the use of Thyroxin, and even if it was a disability, the medication controlled any substantial adverse effect.

7.8 The claimant has abdominal pain. There is insufficient evidence to demonstrate that this is a disability. It is the claimant's case that on occasions she would take painkilling medicine, and would need a break before continuing at work. This falls short of establishing the substantial adverse effect necessary to establish disability.

7.9 It is the claimant's case that the physical conditions caused the same difficulties, or exacerbated the difficulties, caused by the underlying mental health conditions.

7.10 Prior to the hearing the claimant had referred to PTSD, on several occasions. She has not mentioned PTSD during the hearing, and it is not mentioned in her submissions. We have no evidence on which we could find that it constituted a disability.

7.11 It is the claimant's case to us that none of her impairments had a material effect on her ability to undertake her work. It is her case that to the extent there were difficulties with concentration and energy, these were matters which caused distress generally, but did not affect her ability to undertake her duties. Before we consider in detail the claims raised, it is necessary for us to reach a conclusion as to whether the claimant was right in her perception that she was undertaking her duties appropriately and competently and that any criticism of her was undeserved.

7.12 The claimant's role was a senior position. It required a highly skilled, experienced, and well organised caseworker. Contrary to the claimant's claim before the tribunal, it was clear at all times that the role required a significant degree of leadership and provision of assistance to others. This was a specialist role. It was expected that other caseworkers, with less experience and less knowledge, would seek advice and that she should provide it. That requirement was reflected in the wording of the job application and given the seniority of the position, it was implicit that she would be called upon to assist colleagues generally.

7.13 It is also clear that the claimant's role was very important. The Legal Aid franchise had been removed. That did not diminish the needs, of vulnerable people, for advice and representation. Such important roles are always going to test the incumbent. In order to deliver in the role, it is necessary for the individual to have good knowledge and experience. Perhaps more importantly, the individual must have good communication skills with clients, colleagues, and third parties. Underpinning all of this will be a requirement for efficiency and organisational skills. Experience is vital because it is unrealistic to expect detailed training and supervision when in this senior post. The role calls for leadership and resilience.

7.14 Difficulty arises if the individual appointed does not have the appropriate skill set. The net result is that the service to the clients is impaired. The impairment happens for many reasons. There may be a direct effect on the quality of representation, there could be a reduction in the number of clients seen, and the quality of work may be comrpomised. There may be an indirect effect because more pressure is put on colleagues, and colleagues may not obtain the expert advice which will help them undertake their duties.

7.15 The claimant's role was critical. The direct effect of any underperformance would be an impairment of delivery of service.

7.16 Ms Crowe was the person most directly responsible for dealing with the claimant, and she was responsible for the dismissal. She, and the other

managers, were entitled to have in mind the importance of delivering the service.

7.17 It is clear that, despite her initial concerns about the claimant's performance, Ms Crowe set about seeking to support the claimant. She had a series of supervision meetings. At the initial meetings, there was exploration of the potential problems and sound constructive advice was given about dealing with colleagues and managing time. Ms Crowe was entitled to assume that the claimant would respond well and that her performance would improve.

7.18 Instead of an improvement in performance, it is clear that there was an escalation of difficulty. The claimant had difficulties with a number of members of staff. Some matters caused her concern. For example, the claimant had been asked, by at least one member of staff, for advise late in the afternoon. It was reasonable for the claimant to delay giving that advice, as she needed to leave the office. However, it was not reasonable for the claimant to take the view that the advice should not have been sought. The claimant's failure to interact with the member of staff, or to manage the staff member's expectation and agree a time when the advice would be given, demonstrates a lack of judgement and perception. Ms Crowe recognised this.

7.19 Adjustments were made for the claimant. The normal appointment length was extended to 1.5 hours. There were attempts to find out what the difficulties were, so that further remedial action could be taken. Guidance was given during the supervision meetings.

7.20 Despite the appropriate and reasonable attempt at positive management, the claimant was unable to react constructively. She became increasingly involved in blaming others. She was critical of Ms Smith. When a client wished to raise issues relating to debt, rather than concentrating on finding a constructive resolution, the claimant refused to proceed with the interview.

7.21 There were concerns about her drafting of documentation. There were concerns about time-management and file management.

7.22 It is fair to say that it does appear the claimant had some insight into the difficulties; however, to the extent that she had insight she sought to deflect blame by suggesting that it was the fault of others: the fault of the respondent for not training her properly; general circumstances including the need to hot-desk; and the need to be between two offices.

7.23 Those involved in giving advice, such as welfare benefits advice, are likely to advise clients who may have numerous issues and may be vulnerable. The clients may attend late for interviews, fail to attend at all, or leave matters to the last minute. They may have communication difficulties. Those advisers who deal with them need resilience and will often need to be inventive in order to deliver a service. The claimant was poorly equipped to deal with this high-pressured and important role.

7.24 When considering underperformance, it is not necessary for a manager to forensically identify every potential piece of evidence supporting the general perception of inadequate performance. Those working in the relevant environment are well placed to understand what is required, and equally well placed to make a judgement as to whether the required standard is being achieved. When it is clear that the standard is not being achieved, it does not follow that there is an obligation on the same managers to undertake remedial training to try and equip an individual with the skills which the individual claimed to have when making the application for employment.

7.25 In this case, there was overwhelming evidence that the claimant was underperforming. That does not mean that the claimant was failing completely. It is clear that the claimant is well-qualified. It is accepted that she has a good knowledge of the relevant area of law. Despite reservations about the way she drafted submissions, there is no suggestion that those submissions were inappropriate in any manner. She did see clients. Ms Crowe recognised these points, but it was appropriate for her to form a judgement as to whether the claimant was showing sufficient skill. When she concluded that the claimant was not, it was appropriate for her to bring it to the claimant's attention, and to give the claimant an opportunity to improve. When that improvement did not occur, it was appropriate to consider whether the employment should continue.

7.26 We have spent some time setting out these matters because they are at the heart of this case. We have concluded that the claimant's perception that she was performing her duties to such a level that she should not have been criticised is not objectively justified. The criticism was proportionate, reasonable, and warranted.

7.27 What is less clear is why the claimant was underperforming in the role. It is the claimant's own perception that it was not because of any matter arising in consequence of disability. Whilst the claimant says that she found it more stressful to do the work because of lack of concentration, it remains her case that she did the work well.

7.28 It cannot be assumed that when an individual is disabled, in this case principally because of underlying depression and anxiety, that any shortcoming in performance occurs because of the impairment, or because of a consequence of the impairment. There are occasions when people are just unsuitable for the work. There is no specific evidence from which we could find that the claimant was having any particular difficulty arising out of depression or anxiety. She did not need time off and she tell us she was not taking prescription medication. It is fair to say that she had some abdominal pain and therefore required some breaks. However, breaks were given as the difficulties arose, and there is no evidence that abdominal pain led to a general lack of performance. We should note that even if the thyroid condition was a disability, it did not have any effect on her work, as it was controlled by drugs.

7.29 There is no medical evidence in support of the proposition that the depression and/or anxiety, and any consequential lack of concentration or other difficulty arising, led to the poor performance.

7.30 There is always a possibility that the medical picture is incomplete. There is a possibility that there is an impairment which may help explain difficulties in performance. However, whilst the possibility exists, that is not the claimant's case, and there is no medical, or other evidence, in support.

7.31 We can now consider, in the context of our findings and conclusions, the allegation that there was a failure to make reasonable adjustments.

7.32 In order for a duty to arise, it is necessary for the respondent to have actual or constructive knowledge of the disability. The claimant did tell the respondent about her abdominal pain, but the abdominal pain was not a disability. She told the respondent nothing about depression, anxiety, or the thyroid issue. It is the claimant's case the respondent should have had constructive knowledge. During her supervision with Mrs Crowe, the claimant stated she referred to the fact that she was nervous. This is not enough to put Ms Crowe on notice. Ms Crowe specifically asked the claimant to confirm whether there were any other matter she wished to raise. This is a reasonable, general, and open question. The claimant did not tell Ms Crowe about any of her potential disabilities. The fact that the claimant was underperforming, and the fact that she indicated she had a degree of nervousness, is not enough to put the respondent on notice of a disability. It would not have been appropriate for the respondent to seek medical evidence, or to refer the claimant to occupational health, or to speculatively raise the possibility with her. The claimant had taken no time off work. In the absence of the claimant making reference to her own potential disabilities, the respondent could not have been reasonably expected to know that the claimant had a disability that was likely to place her at a disadvantage. It follows that the duty cannot arise for the purposes of reasonable adjustments.

7.33 We have heard all the relevant evidence, and therefore we should set out what the position is, should we be wrong and respondent had come under a duty.

7.34 The claimant submissions do nothing to identify the provision criterion or practice relied on or the alleged disadvantage. The provision criterion or practice appears to be requiring the claimant to undertake duties. The disadvantage remains unclear. It is the claimant's case there was no disadvantage, because she was able to perform her duties appropriately at all times, and should not have been criticised. It is her case that she performed her duties to the same standard as a person without her disability. In those circumstances, there is no disadvantage and the duty does not arise.

7.35 The claimant did not put to any of the respondents witnesses the specific adjustments she required. She makes reference to adjustments in her

submissions. There is reference to the number of appointments. In fact, the respondent did discuss with the claimant the number of appointments and it was agreed she would undertake two a day. This in itself was an adjustment. The claimant makes reference to being asked to undertake a third appointment. We can find evidence of only one occasion when it was indicated the claimant may take a third appointment in a day. She was not forced to do so. That in itself was an adjustment. There is reference to the claimant being asked to do written submissions only. The claimant appears to complain that there was a lack of variety. However, focusing on written submissions was a way of reducing the claimant's workload and thereby assisting her to improve. This was an adjustment.

7.36 The respondent is only required to make adjustments which remove the disadvantage experienced by the disabled person because of the application of the provision criterion or practice. The point of the adjustment is to enable the disabled person to undertake the work and overcome the disadvantage. The respondent is not required to make such adjustments that the role becomes fundamentally different. It is unclear what the claimant actually has in mind. The reality is that the respondent did limit the amount of work the claimant had to do in order to assist her to work in a more efficient and effective manner. We can identify no further adjustment which would have assisted the claimant to improve her performance. Asking the respondent to remove more duties would not have been a reasonable adjustment, as it would have, effectively, created a fundamentally different position for the claimant.

7.37 We next consider the section 15 claim (discrimination in consequence of something arising from disability). The unfavourable treatment alleged is dismissal. It is clear the claimant was dismissed; dismissal is capable of being unfavourable treatment. Had it been the claimant's case that she was dismissed because her performance was affected as a consequence of her disability, discrimination arising from disability would be made out, subject to the justification defence. However, the claimant stated case is the opposite. It is her case that her work was not adversely affected in consequence of the disability. It follows that the case could not succeed on the basis of the claimant contentions.

7.38 However, regardless of the claimant's view, there is a possibility that her underperformance was, in whole or part, adversely affected by her disability. The evidence in support is very poor. The claimant was not taking any prescription medication at the time. She does not accept that her concentration, or general organisational skills were adversely affected.

7.39 If it were possible to say that the claimant had established she was dismissed because of her performance which had been affected by her disability, it would be necessary then to consider justification: was dismissal a proportionate means of achieving a legitimate aim.

7.40 The aim is clear. It revolves around fulfilling a contract for provision of a specialist welfare adviser service. Part of that aim includes the provision of the service itself, and part includes fulfilment of the relevant funding

contract. There is no suggestion that the aim was anything other than legitimate.

7.41 The means employed was to have in place a person with sufficient experience and skill to deliver the service required. The potential for dismissal is the flipside of the need to employ, and in is therefore part of the means.

7.42 Both employing a sufficiently experienced and skilful individual, and dismissing an individual who is not sufficiently experienced or skilful, are appropriate means of achieving the aim. The question in this case is whether the dismissal was proportionate. We have to weigh the discriminatory effect against the needs of the business. The discriminatory effect here is significant for the claimant as it involves losing her job. The respondent recognised its duty to the claimant. There were three specific supervision meetings which identified the difficulties and sought improvement. There was general day-to-day management, and support was given to the claimant. She was encouraged to focus and she was given advice as to how to achieve it. The respondent was entitled to assume that the claimant was technically competent, and had relevant experience in order to handle a caseload, adapt to the needs of clients, and support colleagues.

7.43 It has been the claimant's case that she was undertaking the core parts of her work appropriately. She has focused on the number of clients that she saw and the fact that she provided a service to them. As we have noted, there is no suggestion that the claimant is fundamentally incompetent. On the contrary, it is recognised that she has good technical knowledge and she conscientiously sought to provide a proper service to the clients that she saw. However, there were difficulties, the degree of competence shown may have been sufficient for a junior employee. The claimant, however, took a senior position. The respondent took the view that it was reasonable to expect the claimant to perform all of her duties at a competent level. Competent performance involved more than the core service to clients. It was necessary to interact appropriately with other members of staff, and provide detailed expert assistance to them when necessary. It was also necessary to be flexible, and to manage her time appropriately when faced with competing demands and the need for a flexible response. As we have observed, the net effect of underperformance was to inhibit the ability to deliver a service to the clients. Where there are many individuals involved in providing service, the underperformance of one may not justify dismissal. However, when there is only funding for one specialist position, underperformance in that position can have a materially detrimental effect on the service provision. There was evidence of material underperformance. In those circumstances we find it proportionate to dismiss.

7.44 We next consider the victimisation claim. It is the claimant's case that she was treated detrimentally because she made a complaint against Ms Nicola Smith. She clarified in evidence that the date of the complaint was 6 March 2017. We have considered the relevant letter. The claimant

states “I continue to have problems with the management of appointments and treatment I have received and continue to receive from Nicola making me very distressed.” She then refers to making a formal complaint. There is no mention whatsoever of discrimination. There is no indication that the claimant is doing anything for the purposes of the Equality Act 2010. There is no protected act.

7.45 The fact there is no protected act is not fatal to the claim. It may be possible to argue that the respondent feared the claimant would undertake a protected act. However, that is not the way in which the claim is advanced.

7.46 There is one allegation of victimisation: the failure to uphold the grievance against Ms Fiona Crowe. That decision was made by Mr Aiman Elal. The claimant did not suggest to Mr Aiman Elal when he gave evidence that the reason he did not uphold the grievance was because of any protected act, or fear the claimant may undertake a protected act. We find Mr Aiman Elal did consider each of the claimant’s complaints. He sought to interview witnesses. He examined relevant notes. In relation to each of the matters raised by the claimant, he set them out carefully and explained why he did not uphold the grievance. It is clear that the claimant does not agree with his conclusions. The claimant annotated his letter with her own comments by way of objection and/or appeal.

7.47 We accept the respondent has established, on the balance of probability, an explanation which in no sense whatsoever was because of any protected act, or any potential protected act. The grievance was not upheld because it was not supported by evidence.

7.48 We next consider the direct discrimination claim.

7.49 The claimant relies on the protected characteristics of disability, race, age, and sex. The claimant applies all four protected characteristics to all four allegations. We have considered the evidence as a whole. We should deal with a number of points which are said to be matters which directly turn the burden or from which it is said we could draw inferences.

7.50 First, it is said that the respondent removed from its minutes complaints about discriminatory treatment raised during the probation meeting. During cross-examination, we invited the claimant to put to the relevant witnesses the specific wording she said was withdrawn. She should have been able to do this because the claimant had, without the respondent’s consent, recorded the meeting. She then produced a transcript. However, she was unable to point to any wording in her own transcript which indicated a complaint about discriminatory treatment. It follows there is no evidence that any such allegations were removed by the respondent. This alleged fact cannot turn the burden.

7.51 She alleges she complained of discrimination and less favourable treatment since the beginning of employment. This is not true and so cannot turn the burden or lead to an inference.

7.52 The claimant makes general reference to the fact that the respondent is required to look for signs of disability. It is unclear what the claimant means by this. We have concluded that it cannot be said the respondent should have had constructive knowledge of any disability. This cannot turn the burden or provide any basis for drawing an inference.

7.53 The claimant alleges that she was initially told the employment would be permanent and then she was offered a fixed term contract. We found that this is untrue. It was never made clear to the claimant the contract would be permanent. It was always envisaged that the contract would be fixed term. It may have been unfair not to set this out in the original advert. However, the role was always going to be fixed term. It was fixed term because of the limited funding. There is clear cogent evidence in support of the need for a fixed term contract.

7.54 The claimant suggests she was required to take on extra work. There is no evidence in support of this, and we will explore this a little further when looking at the specific detriments relied on. The reality is the claimant was supported and her responsibilities were, if anything, reduced.

7.55 There is suggestion the claimant was required to see more clients than others would have been. There is no credible evidence in support of this. The claimant was only able to describe one occasion when she was potentially asked to undertake a third appointment on the day. Given the nature of the clients' needs, it is very likely that whoever occupied the post would have been asked to do additional appointments occasionally.

7.56 There is a suggestion she should not have been asked for a 'third' reference. It was standard practice to seek a reference from the current employer. The request for the reference from her employer does not turn the burden.

7.57 We now consider the specific allegations of detriment.

Allegation one

7.58 We have considered the reason for dismissing the claimant in detail in the section on reasonable adjustments. It is clear that the respondent had a reason for dismissing the claimant which revolved around fulfilling the respondent's obligations to its funders and the provision of service to clients. The respondent has established its explanation on the balance of probability. The dismissal in no sense whatsoever was because of any protected characteristic.

Allegation two

7.59 The claimant explained during her evidence that the additional work she was required to undertake was to provide specific welfare benefits advice to members of staff who came to her for support. In no sense whatsoever was this additional work. It was always part of her duties. It follows she

was not give additional work. In any event we accept the explanation that anyone appointed to the claimant's post would have been required to undertake this alleged additional work.

Allegation three

7.60 During her evidence the claimant explained that the additional task she was required to undertake in the 1.5 hour appointments was to deal with the debt issue. The claimant gave only one example. There can be no doubt that clients seeking benefits advice may present with numerous other difficulties. Many of those individuals will have debt related problems. The claimant is expected to manage the client's expectations, deal with the issues relevant to her specialism, and refer the individual as necessary. She was not in any sense forced to undertake work which was inappropriate for her. The respondent has established its explanation. First, in no sense whatsoever was the claimant forced to undertake additional tasks. Second, redirection of debt matters was part of her role.

Allegation four

7.61 It appears to be the claimant's case that there should have been some form of performance discussion before the probation meeting. There were three separate reviews. Each of those identified performance matters and required improvements. It was appropriate to have a probation meeting at the end of the probation period. The respondent's explanation is that a probation meeting was needed because it had sought to assist the claimant to reach the requisite standard, and there were concerns that she had not reached the relevant standard. She was invited to a meeting and told that she may be dismissed. We find probation meeting was the appropriate forum and the explanation is made out.

7.62 Finally, there is a claim of harassment. There is one allegation relied on and that is by having a probation meeting on the 27 July 2017.

7.63 We have set out above the reasons why there was a need for the probation meeting. We have already determined that it was the appropriate forum to continue discussions about the claimant's work and the possibility of her dismissal. In no sense whatsoever was it the purpose to harass the claimant. There can be no doubt that the claimant felt harassed, as she was facing dismissal. However, it is necessary to consider the matter objectively. The meeting could not be said, objectively, to have the effect of harassing her.

7.64 There is no basis on which it could be said that the holding of the meeting related to any protected characteristic of age, sex, or race. If it were possible to argue that the claimant's performance had occurred because of her disability, it may be possible to argue that there was some relation to disability. However, it was necessary, reasonable, and appropriate, to have a probation meeting to consider terminating the claimant's employment. During that meeting the claimant denied any underperformance, and to the extent she accepted there were issues, she

sought to blame others. In the circumstances, it was appropriate to explore those matters and ultimately to come to a conclusion that the claimant should be dismissed. We can find no basis for saying that there was any impropriety in any of the process. It follows that calling the meeting, the content of the meeting, and the result of the meeting, cannot be said to have been harassment.

7.65 Finally, there is the contractual claim. This turns on a simple point. The contract is clear, if the claimant was dismissed because she failed probation, and that dismissal occurred during the probation period, the relevant notice was one week. The contract makes it plain that that period can be extended. The period was extended by email, as we have found. The claimant was dismissed during the extended probation period. We note that the only reason why the period was extended was because the claimant had filed a grievance, and it was necessary to deal with that grievance. There was, therefore, appropriate reason for extending the probation period. It was envisaged, before the extension of the probation period, that dismissal may be necessary. It follows that the contractual notice period relevant at the time was one week. The claimant was paid one week's pay. The contract claim fails.

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Employment Judge Hodgson

Dated:. 22 January 2019

Sent to the parties on:

29 January 2019

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For the Tribunal Office

Appendix 1

1. This claim had been considered at two previous case management hearings. On 18 April 2018, Employment Judge Grewal noted that there were a number of complaints including direct discrimination, harassment, victimisation, and breach of contract. She recorded she had not been able to clarify the complaints. She stated, "The gist of the complaint appears to be that she was given excessive work without support, that put her at a substantial disadvantage in comparison a non-disabled people, that in turn led to poor performance which led to the probationary meeting and her dismissal." Employment Judge Grewal suggested the claimant seek legal advice to assist a to set out a claim is clearly and concisely.

2. The matter was next considered by Employment Judge Wade on 16 May 2018. She reviewed the claim at some length, but it is apparent she too was unable to clarify the claims. She was not able to identify the specific allegations of direct discrimination, harassment, or victimisation. She was unable to identify the relevant allegations of discrimination arising from disability, or failure to make reasonable adjustments.

3. There was no further attempt prior to the hearing to clarify the claims. The claimant did not apply to amend. It follows that there was no statement of issues.

4. At the commencement of the hearing, the tribunal clarified the nature of the alleged disability, as far as was practicable. It is claimant's case that she has a mental health condition being her anxiety and depression. In addition, she has a number of physical conditions. She has an underactive thyroid and she has abdominal pain associated heavy menstruation. In addition, she has developed dermatitis which is associated with heat. The claimant did not specifically mention PTSD, although it is apparent that has been referred to in a number of documents.

5. In general, it is the claimant's case that the conditions lead to difficulties with concentration, lack of energy, and mood swings.

6. The claimant confirmed that she believed that she undertook her duties well and efficiently, such that she should not have been criticised for her performance. Despite working efficiently, and because of her conditions, she found the work stressful. She confirmed that she was not alleging that the alleged disabilities prevented her from performing her work to the same standard as someone without her disabilities.

7. We confirmed that we would review the claimant's claim form and identify, as far as practicable, the claims actually made. We have set out below the claims as they appear to be in the claim form. In identifying these claims, we have noted that it is not necessarily sufficient to refer to a particular fact at some point in the claim form, and refer, in general, to a cause of action, it should be possible on a fair and purposeful reading of the claim form to understand that a specific fact is being advanced as a specific cause of

action. Whilst it is important not to take an unnecessarily restrictive view, it is equally important to avoid reading into a claim form claims which have not been advanced.[1]

8. This document will be given to the claimant and the respondent on day two of the hearing. If either party disagrees with the tribunal's analysis of the claim, that party should make representations at the hearing. If we have failed to include claims which are properly pleaded, they should be identified and we will insert them. If there are claims which have not been properly set out that require further clarification, it may be necessary to seek an amendment if they are to be pursued. The parties should note that until we allow any additions to these issues, or allow any amendment of the claim, the matters as set out below are the only claims which the tribunal accepts are identified in the claim form and which may proceed.

9. The issues to be determined are now definitively recorded as set out below.

Direct discrimination - section 13 Equality Act 2010

10. Did the respondent treat the claimant less favourably than it treats or would treat others?

11. If so, was such treatment because of a protected characteristic?

12. The protected characteristics relied on are disability, race, age, and sex.

13. The allegations of detriment relied on are:

    a. allegation 1: by dismissing the claimant;
    b. allegation 2: by forcing the claimant from the beginning have employment take additional work. (The claimant does not identify what work is said to be additional, who forced her to take additional work, or how.);
    c. allegation 3: by forcing the claimant at the time not specified to take "one kind of work or additional tasks during 1.5 hour appointments. (The nature of the work envisaged and the relevant factual circumstances relied on are not identified.); and
    d. allegation 4: by requesting the claimant to attend at a probation meeting. (It appears to be the claimant's case that performance was discussed and this should have been discussed in a performance meeting. It also appears to be a case that performance issues were not sufficiently particularised.)

14. The tribunal has included those allegations which appear to have some factual basis. We have not included matters which appear to be bare

[1] See for example *Housing Corporation v Bryant 1999 ICR 123* Buxton LJ put it as follows: "...it is not enough to say that the document reveals some grounds for a claim of victimisation, or indicates that there is a question to be asked as to the linkage between the alleged sex discrimination and the dismissal. That linkage must be demonstrated, at least in some way, in the document itself."

allegations where it is not possible to identify, even in general terms, the factual basis relied on. If any of the general allegations are to proceed, it would now be necessary to apply to amend and include the relevant factual basis.

Harassment - section 26 Equality Act 2010

15. Did the respondent engage in unwanted conduct which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

16. If so, was it related to a relevant protected characteristic?

17. The protected characteristic relied on is disability. (It does not appear that any other protected character realistic is relied on.)

18. It is difficult to identify what specific matters are said to constitute harassment. The allegations made are vague, generic, and lack specific detail. There is reference to conduct by several members of staff. This cannot proceed as the individuals, and their alleged actions, are not identified. There is reference to Fiona Crowe making "allegations… during the discriminatory meetings." This does not identify any specific act of harassment and cannot proceed without any amendment. There is reference to harassment at a meeting on 27 July 2017, whilst that does not give any specifics, we will take it is an allegation that the entirety of the meeting on 27 July constituted harassment. The following specific allegation of harassment is relied on:
    a. allegation 1: by having a meeting on 27th of July 2017.

Victimisation - section 27 Equality Act 2010

19. Did the respondent victimise the claimant by subjecting the claimant to a detriment?

20. If so, was such treatment because of a protected act?

21. It appears that the protected act relied on is the claimant's alleged complaint against Nichola Smith. The date is unclear.

22. It is difficult to identify what matters are advanced as allegations of victimisation. There are a number of generalised assertions referring generally to "allegations" and "false statements." However, these allegations are so lacking in detail that they cannot proceed without further clarification (which would require amendment), as it is not feasible for the respondent to deal with them. Reading the claim as a whole, the complaint about Nicholas Smith appears to be the protected act. It then appears to be the claimant's case that she raised a grievance against Fiona Crowe which was not upheld or was not considered. In the circumstances, the only identifiable allegation relates to the failure to uphold the grievance against Fiona Crowe and that allegation may proceed.

23. The specific detriments relied on are:

    a. allegation 1: by not upholding the claimant's grievance against Fiona Crowe.
    b. allegation 2: it appears to be the claimant's case that the meeting of 27 July 2017, and the subsequent letter 28th of July 2017 act of victimisation

Indirect discrimination - section 19 Equality Act 2010

24. The claim of indirect discrimination has been withdrawn and dismissed.

Discrimination arising from disability – section 15 Equality Act 2010

25. Did the respondent treat the claimant unfavourably?

26. If, so was it because of something arising in consequence of the claimant's disability? The claimant does not identify clearly what is said to be the matter arising in consequence of disability.

27. It appears to be the claimant's case that she was able to undertake her duties adequately, but because of her disabilities found the work stressful and difficult.

28. The nature of the unfavourable treatment relied on is unclear. There is reference to forcing her to undertake additional work and giving her work which was demanding and stressful. There is also reference to doing additional tasks within 1.5 hour appointments. However, these matters are then generally cited as being the "reason for the dismissal." Read as a whole, it appears that the true claim of unfavourable treatment is only the dismissal. Whilst there is reference to other matters such as desk allocation, it is not possible to read the claim form suggesting that treatment relating to, for example, desk allocation occurred because of something arising in consequence of disability. We therefore take the view that the only identifiable claim of unfavourable treatment is the dismissal.

    a. allegation 1: dismissal.

Duty to make adjustments – section 20 Equality Act 2010

29. Whilst there is reference in the claim form to failure to make reasonable adjustments, it is difficult to identify the relevant elements. There is no clearly identified provision criterion or practice. Viewed broadly, it appears to be the claimant's case that the relevant provision criterion or practice was the requirement to undertake her duties.

30. It is unclear what is said to be the disadvantage. Taken as a whole, it may be possible to view the claim form as suggesting that the disadvantage was the failure to complete the tasks which thereafter led to criticism of the claimant's work and ultimately her dismissal. However, on day one of the

hearing, the claimant denied that her disabilities had compromised her ability to undertake duties.

31. It is unclear what the claimant says should have been the adjustments. The logic of the claim form may suggest that there should have been a reduction in the duties required. However, that is not set out in terms.

Contract

32. The claimant alleges that she should have received notice for one month and has not been paid for that period.

Draft 01 [2]
31 October 2018
EJ Hodgson

[2] Minor typographical changes have been amended.