THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Mrs M Hazzard
Mr E Maw

BETWEEN:

Miss J Anderson **Claimant**

AND

Easyjet Airline Company Limited **Respondent**

ON: **22 and 23 November 2017 and on 19 January 2018 in chambers**

Appearances:

For the Claimant: **In person**

For the Respondent: **Ms K Ayre, Solicitor**

JUDGMENT ON LIABILITY

The unanimous judgment of the Tribunal is that:

1. The Claimant's claim of direct disability discrimination under S 13 Equality Act 2010 ("Equality Act") fails and is dismissed.
2. The Claimant's claims of discrimination arising from disability under s 15, harassment under s 26 and victimisation under s 27 Equality Act succeed.
3. Remedy remains to be determined at a separate hearing if not agreed between the parties.

REASONS

1. By a claim form presented on 28 June 2016 the Claimant, Ms Anderson, brought claims of disability discrimination against the Respondent, EasyJet. The Respondent resisted the claims and denied that the Claimant was a disabled

person. A preliminary hearing took place before Judge Hall Smith on 14 February 2017 at which the claimant's claims were identified as claims of discrimination arising from disability under s 15 Equality Act 2010 ("Equality Act") and harassment related to disability under s 26 Equality Act and various case management orders were made.

2. The Claimant issued a second claim of unfair dismissal after resigning from her employment in June 2017. At a second preliminary hearing on 16 October 2017 before Judge Corrigan the Claimant clarified that her claims included claims for direct discrimination under s13 Equality Act and victimisation under s27. The unfair dismissal claim was consolidated with the first claim and a list of issues was agreed as set out below. The Respondent conceded at that hearing that the Claimant was a disabled person for the purposes of s6 Equality Act. The Claimant subsequently withdrew her claim of unfair dismissal under s 98 Employment Rights Act 1996 and confirmed that she would pursue her claim that she had resigned because she no longer felt that she could work for the Respondent, as part of her discrimination claim.

3. The full hearing of the claim took place over two days on 22 and 23 November 2017. The tribunal then met in chambers on 19 January to reach its decision. It was unfortunately impossible for the Tribunal to convene any earlier than that and the Tribunal extends its apologies to the parties for the consequent delay in sending them its decision.

4. At the hearing the Claimant gave evidence on her own behalf and called no other witnesses. The Tribunal was impressed by the Claimant's clear and articulate presentation of her case and the lucid manner in which she explained her condition and the way in which she manages it.

5. The Respondent's evidence was given by Kirsty Penn, who is employed by the Respondent as a recruitment manager. We found Ms Penn to be a clear and credible witness. The Respondent also provided a witness statement from Dr Mark Sandler who was engaged by AXA as an aero-medical examiner ("AME") and conducted an examination of the Claimant during the course of her application for employment. Dr Sandler was however unable to give evidence in person which limited the weight that the Tribunal was able to place on his evidence. In her submissions Ms Ayre expressed concern that the refusal of the Respondent's application for a postponement to enable Dr Sandler to give evidence in person at the hearing, had potentially interfered with the Respondent's right to a fair trial under Article 6 of the European Convention on Human Rights. For the reasons set out below, the weight given to Dr Sandler's evidence did not affect the Tribunal's conclusions or the outcome of the case.

6. The witnesses had both prepared written statements which the Tribunal read before the commencement of the hearing. There was also a bundle of documents containing 236 pages and references to page numbers in this judgment are references to page numbers in that bundle.

Relevant law

7. **Direct discrimination**: S 13 Equality Act prohibits direct discrimination. Under s 13(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. The circumstances of the claimant and the chosen comparator must be the same or not materially different. S 4 Equality Act sets out the protected characteristics. These include disability.

8. **Discrimination arising from disability** Section15 Equality Act provides as follows:

> **(1) A person (A) discriminates against a disabled person (B) if—**
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

9. **Harassment.** S 26 Equality Act prohibits harassment related to a protected characteristic, including disability.

> **(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.**

10. **Victimisation**. S 27 Equality Act provides:

> **(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.**

11. **Liability of the Respondent**. S 109 Equality Act provides:

> **(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.**
> **(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.**

12. Ms Ayre also referred us to two authorities on the question of whether an agency

relationship had arisen between the Respondent and AXA: *Yearwood v Commissioner of Police of the Metropolis and another [2006] ICR 1660* and *Various Claimants v Barclays Bank PLC [2017] EWHC 1929 (QB),* the latter of which she wished to distinguish from the facts of this case.We also had regard to the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL* on the question of whether a particular course of action amounts to a detriment.

13. **Burden of proof.** It is also relevant to consider the law on the burden of proof which is set out in section 136 of the Equality Act. In summary, if there are facts from which the tribunal could decide in the absence of any other explanation that the Claimant has been discriminated against, then the tribunal must find that discrimination has occurred unless the Respondent shows the contrary. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in *Igen v Wong and others [2005] IRLR 258* confirmed by the Court of Appeal in *Madarassy v Nomura International plc [2007] IRLR 246.* In the latter case it was also confirmed, albeit applying the pre-Equality Act wording, that a simple difference in status (related to a protected characteristic) and a difference in treatment is not enough in itself to shift the burden of proof to the Respondent; something more is needed.

<u>The issues</u>

14. **Direct discrimination**
    1.1 Did the Respondent treat the Claimant less favourably than it treated or would treat others by:
    (a) requiring the Claimant to provide a psychiatric report; and/or
    (b) not allowing the Claimant to fly; and/or
    (c) not allowing the Claimant's contract to start on 23 February or 8 March 2016?
    1.2 The Claimant compares herself to the others in the same recruitment process whose start dates were not delayed.
    1.3 If so was this less favourable treatment because of the Claimant's disability?
    1.4 If the above alleged discriminatory act was done by AXA rather than the Respondent, is the Respondent nevertheless liable by virtue of section 109 Equality Act 2010?

15. **Discrimination arising from disability**
    2.1 Was the Claimant treated unfavourably by the Respondent because of something arising in consequence of her alleged disability, namely that she was not certified as fit to fly?
    2.2 The alleged unfavourable treatment relied on is not allowing the Claimant's contract of employment to start on 23 February or 8 March 2016.
    2.3 Can the Respondent show that postponing the Claimant's start date was a proportionate means of achieving a legitimate aim namely meeting Civil Aviation Authority requirements?
    2.4 Can the Respondent show that the Respondent did not know and could not reasonably have been expected to know that the Claimant had the disability?
    2.5 If the above alleged discriminatory act was done by AXA rather than the

Respondent, is the Respondent nevertheless liable by virtue of section 109 Equality Act 2010?

16. **Victimisation**
    3.1 Did the Claimant carry out a protected act on 7 and 8 June 2016 in alerting the Respondent at AXA to her intention to see a solicitor about a tribunal claim of disability discrimination?
    3.2 Was the Claimant treated unfavourably as a result? The unfavourable treatment relied upon is the sending of emails joking about her intention to take her issues to the Employment Tribunal.
    3.3 If the above alleged discriminatory act was done by AXA rather than the Respondent, is the Respondent nevertheless liable by virtue of section 109 Equality Act?

17. **Harassment**
    4.1 Did the sending of emails joking about the Claimant's intention to take a claim to the Employment Tribunal amount to unwanted conduct related to the Claimant's disability?
    4.2 Did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

18. Did the Claimant resign because she no longer felt she could work for the Respondent and did she do so because the Respondent had discriminated against her meaning that she should she be compensated accordingly?

Findings of fact

19. The Claimant is a disabled person who was diagnosed with bipolar disorder in 2008. The Claimant manages her condition effectively with medication and at the time of the hearing was in employment with another airline as a member of cabin crew. She was employed by the Respondent as a member of cabin crew form 16 May 2016 until her resignation with immediate effect on 17 March 2017.

20. The background to the claim arises from the Respondent’s process for recruiting cabin crew. This was described in some detail in Ms Penn’s evidence in chief and was not in dispute at the hearing. Ms Penn is responsible for the recruitment of cabin crew, including attracting, selecting and assessing candidates and managing the “on-boarding” process before individuals start work. She described the role of cabin crew as being to ensure the safety and security of passengers on board the Respondent’s aircraft and pointed to the highly regulated nature of the airline industry. The Respondent drew the Tribunal’s attention to *Commission Regulation (EU) No 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council* which was at pages 195-205. The Regulation provides that cabin crew “should be periodically assessed for medical fitness to safely exercise their assigned safety duties. Compliance must be shown by an appropriate assessment based on aero-medical best practice”. It lays down detailed rules for

periodical aero-medical assessment. Sub-part C, dealing with the requirements for medical fitness of cabin crew (page 199) states:

a. **Cabin crew members shall undergo aero-medical assessments to verify that they are free from any physical or mental illness which might lead to incapacitation or inability to perform their assigned safety duties and responsibilities.**
b. **Each cabin crew member shall undergo an aero-medical assessment before being first assigned to duties on an aircraft, and after that at intervals of maximum 60 months.**

It then goes on to lay down the detailed examination requirements. In particular at paragraph (c) under the heading MED.C.025 (page 200) the guidance states:

> **"in the case of any doubt or if clinically indicated, a cabin crew member's aero-medical assessment shall also include any additional medical examination, test or investigation that are considered necessary by the AME, AeMC or OHMP".**

21. The requirements of the Regulation are implemented in the UK via regulations published by the Civil Aviation Authority ("CAA"). In particular Med.C.025 (page 209) provides that:

> **"An applicant should not have any established medical history or clinical diagnosis of any disease or disability, condition or congenital or acquired, that would entail a degree of functional incapacity likely to lead to incapacitation or an inability to discharge their safety duties and responsibilities".**

At page 210 the requirements in relation to psychiatric conditions were set out. These were as follows:

> **"UK AltMOC11 MED.C.025 Psychiatry**
>
> **(a) Cabin crew members with a mental or behavioural disorder due to alcohol or other problematic substance use should be assessed as unfit pending recovery and freedom from problematic substance use and subject to satisfactory psychiatric evaluation.**
>
> **(b) Cabin crew members with an established history or clinical diagnosis of schizophrenia, schizotypal or delusional disorder should be assessed as unfit.**
>
> **(c) Cabin crew members with a psychiatric condition such as:**
> **(1) mood disorder;**
> **(2) neurotic disorder;**
> **(3) personality disorder; or**
> **(4) mental or behavioural disorder should undergo satisfactory aeromedical evaluation before a fit assessment can be made.**
>
> **(d) Cabin crew members with a history of a single or repeated acts of deliberate self-harm should be assessed as unfit. Cabin crew members should undergo satisfactory aeromedical evaluation including reports from their treating clinician(s) before a fit assessment can be considered."**

22. The Respondent incorporates these requirements into its own Cabin Safety Procedures Manual which is provided to all recruits on their first day of training. Extracts were at page 215. The Manual provides that:

a. **Each cabin crew member must be medically fit to discharge the duties set out in**

the Respondent's operations manuals;

b. **Each recruit must pass a medical assessment or examination and be found to be and remain medically fit;**

c. **Cabin crew management may send a member of cabin crew to a company medical adviser for assessment to ascertain their fitness to fly as a member of cabin crew at any time as required.**

23. All participants in the Respondent's assessment centres receive presentations during which they are informed that they will be required to undergo a medical assessment with AXA, the Respondent's provider of occupational health services and aero-medical assessments. Guidelines for recruits undergoing the Respondent's face to face medical examinations were at page 217. The Tribunal was not provided with any documents showing the details of the relationship between AXA and the Respondent.

24. The Claimant applied to be a member of the Respondent's cabin crew on 8 August 2015. She attended an assessment centre on 3 September 2015 and was told on 7 September that she had been successful (page 104A). She chose to work at Gatwick and was placed in the Gatwick "hold pool" of individuals waiting to complete their assessments and training. Individuals were held in the pool until a series of checks were undertaken and training completed. These preliminary matters included the health assessments referred to during the assessment centre.

25. The Claimant then completed an online assessment organised by AXA. Details of the assessment are at page 219. AXA requested further information about some of her responses and the Claimant wrote a letter to her GP in Norfolk who provided the letter at page 109. The Claimant sent that letter to easyjet.admin@axa-icas.com on 5 October 2015. The letter gave information about both the Claimant's heart condition, sinus tachycardia and her bipolar disorder. The Respondent raised queries about the sinus tachycardia but no questions were raised about her bi-polar condition and the Claimant therefore assumed that her bi-polar condition was not an issue and that AXA was satisfied with the information it had been given. We also find that the Claimant assumed that once she had provided the additional information it was known throughout AXA. It therefore came as a surprise to her when she later attended a face to face medical appointment that the examining doctor did not seem to be aware of this additional correspondence.

26. On 4 December 2015 the Claimant received a job offer by email (page 104B). She was informed in that email that her training course would start on 23 February 2016 and that her "Face to Face Medical" would be held on 22 February at London Gatwick. On 18 December she received a letter formalising the offer and informing her that she would be employed on a fixed term contract ending on 2 November 2016. The letter also confirmed that the offer of employment was subject to satisfactory references and to the Claimant undergoing a medical assessment by the company doctor. A copy of her contract of employment was enclosed.

27. The Claimant attended the Face to Face Medical appointment on 22 February

with a Dr Polwin. His report is at pages 107A-C. He identified both of the Claimant's health conditions and declared her not fit, citing AMC 11 Med C 025 and declaring that she "should undergo a satisfactory psychiatric evaluation before a fit assessment can be made". We find that the guidelines to which Dr Polwin was referring were those at page 210 which we have set out at paragraph 21 above. The Claimant's evidence in chief, which was not challenged, was that she showed Dr Polwin the letter at page 109 (witness statement paragraph 4) but he was not receptive and insisted that she must obtain a report from a psychiatrist. We find as a fact that the information available to Dr Polwin when he reached his assessment was the information the Claimant provided when she completed her online assessment and the letter at page 109.

28. In her evidence to the tribunal the Claimant accepted that the Respondent was subject to guidelines issued by the CAA and that it was under an obligation to make sure that cabin crew were medically fit to fly. The Claimant was taken by Ms Ayre to various pages of the guidance, including page 209 which states

> **"An applicant should not have any established medical history or clinical diagnosis of any disease or disability, condition or disorder, acute or chronic, congenital or acquired, that would entail a degree of functional incapacity likely to lead to incapacitation or an inability to discharge their safety duties or responsibilities".**

The Claimant's case was that there was no reason for Dr Polwin to think that this paragraph applied to her. As regards the extract set out at paragraph 21 the Claimant said that she did not think she fell within this guidance either. When it was put to her by Ms Ayre that she fell within paragraph (c) of the guidance at page 210:

> **(c) Cabin crew members with a psychiatric condition such as:**
> **(1) mood disorder;**
> **(2) neurotic disorder;**
> **(3) personality disorder; or**
> **(4) mental or behavioural disorder should undergo satisfactory aeromedical evaluation before a fit assessment can be made**

the Claimant said that there was no reason to think that she was not "satisfactory" as she had had no psychiatric input for five years, and did not need it. She was under the care of her GP. She did accept that her GP was not a qualified aeromedical assessor. When it was put to her that she was not in a position to comment on what a doctor needed to see to satisfy himself that he could assess her as fit to fly, she repeated that there was nothing to show that she was not fit and that Dr Polwin had been unable to say why he needed further information which to her had suggested a prejudiced attitude. When Ms Ayre put it to her that the guidelines did not specify what needed to be done, but left this to the doctor's discretion the Claimant's response was that a psychiatric assessment had not been necessary, it was not possible for her to obtain one because she was not being cared for by a psychiatrist and in any event the idea of a psychiatrist's report was abandoned later on when Dr Sandler had seen the further letter from her GP. Ms Ayre then put it to the Claimant that she was suggesting that she knew better than an AME doctor what is necessary for a satisfactory aero-medical assessment to be obtained. The Claimant replied that it would have been better if Dr Polwin "had worked with me", had not assumed that she was unfit

because she was bipolar and had not insisted on a psychiatrist's report, which was impossible for her to obtain.

29. Following the assessment the Claimant notified Rochelle Higgins at the Respondent that she had not passed the medical assessment (email page 106-7). She acknowledged that she would not be able to start her training the following day and that she had been asked to provide a specialist's report. She was aggrieved that the issue had not been raised in October when she sent the letter at page 109 and pointed out that she had not needed specialist care for years but was under the care of her GP. She said,

    "Unfortunately I haven't been signed off as fit in my medical. I have an existing health condition, which AXAPPP were fully aware of. Apparently they need a report from a specialist doctor. If they'd have let me know this back in October when I was originally corresponding with them this couldn't have been done in good time. For this condition I haven't been under the care of a specialist for years, so I definitely will be signed off as fit when the report is given to the doctor in my next medical."

30. Later that day she sent a copy of the letter at page 109 to Kirsty Penn and Rochelle Higgins at the Respondent. We find as a fact that the Respondent was aware of her two health conditions from that point in time and was therefore aware or ought to have been aware that the Claimant was potentially a disabled person for the purposes of the Equality Act from 22 February 2016 onwards. Rightly in our view the Respondent conceded that point during its submissions.

31. The Claimant maintained that she had raised the question of discrimination at this point. On a balance of probabilities we find that that the Claimant voiced concern over the phone to Rochelle Higgins that the outcome of the medical assessment amounted to unfair treatment because of her bi-polar condition. Although Ms Penn had no recollection of any complaint of discrimination and the Claimant could not recall specifically mentioning it to Ms Penn, she maintained in cross examination that she had conversations with Ms Higgins to that effect. As Ms Higgins did not give evidence we accept the Claimant's evidence that she raised with Ms Higgins the matter of her treatment and her concern that it was connected to her bi-polar condition.

32. The Claimant expressed her concern to the Respondent that she would not be able to comply with the condition being imposed on her, namely that she obtain a psychiatrist's report, because she was no longer under the care of a psychiatrist. The Respondent took the view at that stage that it was the Claimant's responsibility to provide a suitable medical assessment from a specialist. Ms Penn's however raised the issue with AXA and asked them to reschedule the medical assessment to 7 March. An email at page 114 confirms that Ms Penn spoke to Liz Busby at AXA on or around 26 February and Ms Busby replied confirming that a new assessment would take place on 7 March with Dr Sandler (page 113). The Claimant's training course was rescheduled for 8 March (115).

33. On 7 March the Claimant attended the assessment with Dr Sandler. His report is at page 115A. His conclusion was again to declare the Claimant not fit. He said:

    "Not enough detail concerning bipolar disorder. Need to ask client for GP report

detailing initial diagnosis in 2007, severity of disorder, details of treatment, psychiatric involvement. More recently how is patient's condition monitored to confirm compliance with treatment as patient living in London but remains registered in Norfolk. Also need to see all hospital letters from 2007 – 2016 inclusive."

34. The Claimant reported the outcome to Kirsty Penn and Kirstine Collett by email at page 116, which stated

> **"I have yet again not been signed off as fit. The doctor today seemed a lot more competent than the one I saw two weeks ago and has said he required copies of letters from my GP regarding previous psychiatric appointments. He assured me that that is all and as soon as they are received I can be signed off as fit. He agreed that this was something which could have and should have been done two weeks ago.**
>
> **In view of this would it be at all possible to make an exception in my case and allow me to start my training tomorrow, with the condition that I provide the letters AXA require by the end of the week? My GP is very good and quick at responding to any requests. Understandably I'm devastated at yet another setback, through no fault of my own. I have been quick and compliant with all requests for further information made by AXA in the past."**

Ms Penn however made the decision to withdraw the Claimant from the course on 8 March. Her email communicating this internally is at page 118.

35. In her evidence to the Tribunal the Claimant gave a somewhat different account of her response to Dr Sandler than that she had conveyed to the Respondent at the time. When Ms Ayre asked her how she had felt after seeing Dr Sandler she said that she had been upset at having again been signed off as unfit as Dr Sandler had not been updated with any information since her previous medical, that he was making things up and not following the guidelines and that she had a "sixth sense" for discriminatory attitudes. She referred to the fact that he had mentioned the German Wings pilot during the consultation and she had not understood why he had brought that up and that she had formed the impression that AXA's doctors had not been willing to put their name to her fit certificate, although he accepted that Dr Sandler did put his name to her certificate once he had seen the letter at page 235-6. The problem with that part of the Claimant's evidence is that the Claimant did not put her concerns to the Respondent in those terms at the time and nor are these specific concerns reflected in the agreed list of issues in the case. The Tribunal was therefore cautious about placing reliance on this part of the Claimant's oral evidence

36. The additional medical information sought was supplied by the Claimant's GP practice by letter of 14 March which was at page 235-6. The letter gave considerably more detail about the Claimant's bipolar condition and how she kept it under control than the letter at page 109. It includes the following extracts:

> **"Jessica was diagnosed in 2008 with bipolar type 2 disorder. She has experienced episodes of depression and hypomania. She has always been fully aware and insightful into her condition and has always been entirely compliant with her treatment. …The prognosis for her condition is very good and functionality is not limited. With regard to follow up care she no longer has, nor does she require, any psychiatric input at present. …**
> **Jessica is very open and honest about her condition and is willing to disclose and discuss relevant information with her employer to ensure complete transparency. Her**

> **employer should take into account that Jessica's condition is protected by the Equality Act 2010."**

37. Hence the letter concluded with a clear reference to the Claimant's Equality Act rights. The information was reviewed by AXA but it was not until 31 March that AXA confirmed by email at page 121 that a Dr O'Brien had told Liz Busby that Dr Sandler had reviewed the additional information and was now prepared to certify the Claimant as fit to fly. The actual certificate, issued on 6 April, is at page 150. Following the email on 31 March the Respondent placed the Claimant on a new training course scheduled for 21 April which the Claimant did in fact attend. She started flying on 16 May 2016.

38. On 14 March the Claimant had formally raised a complaint against AXA which was set out at page 138. The basis of her complaint was that AXA's doctors had not understood her condition properly and that it was unreasonable for her to be asked for a doctor's report the day before her training was due to start. She also complained of delays in the process and of information not being sought at the appropriate time, which she described as "unfair treatment pertaining to my condition". Her complaint enclosed a copy of UK AltMOC11 MED.C.025 Psychiatry as set out at paragraph 21 and an additional section entitled UK AltMOC12 MED.C.025 Psychology which states:

    > **"Cabin crew members with an established diagnosis of a psychological disorder may be assessed as fit subject to satisfactory aero-medical evaluation".**

    Her complaint contains the following passages:

    > **"I have attached the report and letter copies as requested from my GP.**
    >
    > **As per the CAA guidelines, this information should be more than sufficient for a decision to be made. The relevant points are highlighted below. I have had my condition for nearly 10 years, so it most certainly would be considered as 'established' for which I could have been signed off as fit by an AME doctor. There were no indications of any concern, as my GP attests to in all of their communication. I will of course be requesting to be made aware of the AME doctors concerns when I escalate this matter with regards to their lack of competence regarding mental health. I queried the concerns of the last doctor, Dr Sandler, and he cited the Germanwings pilot who crashed a plane in 2015, telling me that the CAA have since been more strict over mental health conditions. This is not evident, as the CAA guidelines for aeromedical assessment on cabin crew were last updated in 2014 (according to the CAA website).**
    >
    > **I am concerned that whoever was initially requesting my medical information back in October 2015, and/or AXA, aren't aware of what they should have been asking of me. It is unreasonable for me to be told the day before my training is due to begin that I need to obtain a GP report. This is impossible to provide in such a short space of time, so therefore really is unfair treatment pertaining to my condition. Despite this the first doctor I was seen by, Dr Polwin, was completely unaware of what was required too. This resulted in a two week delay until I could be placed on another course, of which in the meantime no further instructions to myself for further information had been made. So yet again I faced another delay from my second start date of 8th March 2016.**

39. The Claimant copied her complaint to the Respondent on 5 April (page 137). She said "I know the subject of me being paid from the 23rd of February has been discussed before and I've been told this won't be possible; but this is clearly an

unusual case where I have been treated unfairly because of an issue directly related to my disability". She went on to criticise the competence of the two doctors involved. On 11 April Rochelle Higgins responded and said "Further to your email below please can you send your complaint to me and this will be raised to my manager and AXA".

40. On 10 May the Claimant wrote to Ms Higgins seeking an update with regard to her complaint (page 135). She repeated that she was seeking payment from her original start date of 23 February and that she was contemplating bringing tribunal proceedings. On 19 May she chased for a response from Kirsty Penn (page 135). Kirsty Penn in turn chased Michelle Parry at AXA on 26 May mentioning the fact that the Claimant had started tribunal proceedings. In fact that was not the case – the proceedings were commenced on 26 June - but we assume that contact had been made with ACAS by 10 May. However we were satisfied that by 26 May at the latest both the Respondent and AXA were aware of the possibility of tribunal proceedings. On 26 May AXA confirmed to the Respondent that Dr Habbab had written directly to the Claimant in response to her complaint (page 132). Unfortunately the Tribunal was not provided with a copy of that letter. We were puzzled by this omission and by the absence of the Claimant's further correspondence expressing her dissatisfaction with the outcome of her complaint. At page 175 there was a further letter from AXA dated 23 June from Glen Parkinson, AXA's managing director, dealing with this further complaint from the Claimant. He reviewed the sequence of events and concluded:

> **"Whilst I appreciate that you may have found these outcomes frustrating, our clinical and operational teams cannot see any evidence that Dr Polwin and Dr Sandler did anything other than properly perform their duties as CAA certified AMEs. Their findings appear consistent and even where you were passed as fit to fly following the receipt of additional information, a clear limitation was imposed by Dr Sandler.**
>
> **AXA cannot therefore accept that there is any evidence of unlawful discrimination or of those doctors failing to meet the required standard.**
>
> **It obviously also goes without saying that it would be grossly inappropriate for I or AXA as a whole to seek to interfere in the decisions of properly certified AME doctors in the course of them discharging a legal obligation. I am sure you would agree that this is a fundamentally unarguable principle….**
>
> **I can assure you that we take all complaints extremely seriously and whilst I empathise with your frustration I respectfully cannot accept the allegation that there is any evidence of unlawful discrimination, nor can I see any evidence that CAA medicals have not been carried out in accordance with applicable legal and clinical requirements".**

41. The Claimant began flying with the Respondent on 16 May. She presented her first claim to the Tribunal on 26 June.

42. Whilst her complaint was being investigated the Claimant had sought from the Respondent by email dated 7 June (page 168) copies of various documents including the two reports from AXA which had deemed her unfit to fly. Her email reads:

> **"Please could I be sent copies of all the medical certificates from both of the medicals where I was deemed unfit to fly and the one that agreed I am fit to fly. I require these for my solicitor to prepare my case for a tribunal".**

We find that this email was a protected act for the purposes of s 27 Equality Act.

43. When AXA sent the reports to her on or around 22 June they sent at the same time a copy of an email at page 171 dated 8 June 2016 from Yousef Habbab to Wendy Smith that stated:

> **"Please be aware of this access request from this EasyJet employee and the mention of needing for solicitor a tribunal!"**

44. The Claimant was very upset by this email and needed to take some time off after receiving it. There is a sick note at page 178 signing her off for three days. Immediately prior to that she had confirmed to the Respondent that she was in fact very happy at work (page 173).The Claimant complains that this email was an act of victimisation.

45. In relation to her victimisation claim the Claimant also suggested in her witness statement that she was relying on a second email dated 12 May from Debbie Mullan at the Respondent (page 158). However she conceded in cross examination that she did not see that email until reading the bundle for the hearing and it cannot therefore have any relevance to her decision to institute proceedings.

46. The Claimant resigned on 17 March 2017. At that point she had known since the Respondent responded to her first claim in October 2016 (for reasons that were not clear to us there was a delay between the Claimant presenting her claim and the Respondent responding to it), that the Respondent was disputing that she was a disabled person. Her resignation letter (page 193-4) stated as follows:

> **"I am writing to inform you that I am resigning from my position of Cabin Crew with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract. I feel that I am left with no choice but to resign in light of my recent experiences regarding the issues from my case against easyJet going through the tribunal process.**
>
> **a. a fundamental breach of my contract**
> **EasyJet were in breach of my contract that stated that my employment was due to commence on 23rd February 2016. I believe an unlawful deduction of wages was made between my original scheduled start date (23rd February 2016) and my eventual start date of 21st April 2016. I had co-operated with the recruitment process and fulfilled all requests for information in a timely manner. The aeromedical examining (AME) doctors chose to deviate from the Civil Aviation Authority guidelines of conducting a medical assessment of cabin crew, thus delaying my start date due to their discriminatory attitude towards my health condition. I should not have been subjected to the financial and emotional suffering caused by this. Hence why I had no choice but to escalate this matter to tribunal.**
>
> **b. Last straw doctrine**
> **EasyJet have repeatedly denied any discrimination against me due to my disability. EasyJet re insisting that I am not, and never was, disabled at any time during my employment. I have provided EasyJet with numerous letters from my doctor and the**

hospital providing psychiatric input. EasyJet are aware of the medications I take to keep my conditions under control, and I have written a detailed impact statement of how my condition affects me, but despite this EasyJet are still insistent that I am not disabled….I wish to work for an employer who is familiar with the law and who feels able to employ someone with a mental health condition without subjecting them to discrimination…"

47. The matters the Claimant refers to in this letter are the only matters she relies on in relation to her decision to resign. She was therefore relying on the manner in which AXA had conducted the face to face medical assessments in February and April 2016 and on the fact that in the course of her tribunal proceedings, the Respondent was denying that she was a disabled person, a fact of which she had been aware since October 2016.

Conclusions

Agency

48. It was clear that the Claimant's concerns derived primarily from the manner in which AXA went about the process of discharging its responsibilities to assess her fitness to fly. We will first deal with the question of whether in principle the Respondent could be held liable for the actions of AXA under s109 Equality Act.

49. The details of the contractual arrangements between AXA and the Respondent were not explained to the Tribunal. The facts of the situation as far as we could ascertain them from the evidence were that the Respondent delegated to AXA responsibility for carrying out initial online aeromedical assessments on its new recruits and face to face assessments on candidates who were selected after an assessment centre. Ms Ayre sought to persuade us that this was not an agency relationship at all, but that even if it were, the fact that the doctors engaged by AXA to carry out the work were self-employed, meant that no agency relationship arose when the doctors were carrying out their work. Her first submission, which we do accept, is that the authorities regard an agency relationship for Equality Act purposes as the same in character as a common law agency arrangement in which the agent agrees to act on behalf of the other and a fiduciary relationship arises.

50. Ms Ayre then seemed to argue that even if AXA were the Respondent's agent, the manner in which it carried out its duties was not under the Respondent's control and was not subject to the Respondent's oversight. This was particularly the case when work was being carried out by doctors who were independent contractors. Consequently, she argued, there was no true agency relationship. However if we did not accept that submission, she argued that there was a clear distinction between the actions of consultants when carrying out their duties and the email at page 171 where, she submitted, AXA was not performing duties on behalf of the Respondent, but simply acting in response to the Claimant's request for copies of documents. Hence for the purposes of that email, she submitted AXA was not the Respondent's agent on normal agency principles.

51. We were unable to accept these submissions. The Equality Act is very clear that

> **(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.**
> **(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.**

It is therefore unnecessary for the Respondent to have a detailed knowledge of how AXA was discharging its obligations, or indeed any knowledge, or for it to specifically to approve of any of them, for liability to arise under s109 – the statute is clear on its face. The key question is whether it authorised AXA to act on its behalf in relation to the matters forming the subject matter of the Claimant's complaints and in our view it clearly did so by delegating to AXA responsibility for the entire process of health assessment in relation to its recruits. Ms Ayre argued that a distinction should be drawn in relation to the email at page 171, which she argued, was not sent in the course of AXA carrying out its delegated responsibilities. We disagree with that analysis. The Claimant complained about the manner in which AXA had carried out its delegated responsibilities and AXA did something in the course of responding to that complaint that caused the Claimant further distress. It seemed to us artificial and wrong in principle to allow the Respondent to avoid liability on the basis that in responding to a complaint about its service, AXA was not acting as the employer's agent. AXA was still acting within the purview of what it was authorised to do. We do not think it would be compatible with the purposes of the legislation to allow such a distinction to be made and doing so might encourage employers to resort to artificial arrangements with their agents with a view to avoiding potential liability. The liability of principals is couched in wide terms in the Equality Act and we think that the intention of the legislation is that in the circumstances of this case the Respondent is liable for AXA's actions.

52. We deploy the same reasoning in disagreeing with Ms Ayre's submission that the Respondent was not liable for the actions of doctors who were self-employed consultants for AXA. The specific arrangements AXA entered into with the doctors it engaged was a matter for AXA and the Claimant should not be deprived of a remedy against the Respondent because of the nature of that arrangement. To decide otherwise would also encourage employers to deploy artificial means of avoiding liability for the actions of their agents, thus potentially frustrating the intentions of the legislation.

53. Further references in these conclusions to the Respondent are therefore references to the Respondent acting through its agent, AXA.

<u>Direct discrimination</u>

54. Turning to the question of direct discrimination, the agreed issues were, by way of reminder, as follows:

    Did the Respondent treat the Claimant less favourably than it treated or would treat others by:
    (a) requiring the Claimant to provide a psychiatric report; and/or
    (b) not allowing the Claimant to fly; and/or
    (c) not allowing the Claimant's contract to start on 23 February or 8 March 2016?

The Claimant compares herself to the others in the same recruitment process whose start dates were not delayed.
If so was this less favourable treatment because of the Claimant's disability?

55. The requirement that the Claimant provide a psychiatric report was ultimately waived by AXA, when Dr Sandler saw the second letter from the Claimant's GP. Nevertheless, for a time the Claimant was given the impression by Dr Polwin that she would be required to furnish a report from an independent psychiatrist and she was upset by this. We have found as a fact that the information available to Dr Polwin at the material time consisted of the Claimant's online assessment and the letter at page 109. We considered whether Dr Polwin's actions in requiring the Claimant to obtain a psychiatric report could have amounted to direct discrimination against the Claimant. It was the Claimant's case that Dr Polwin had jumped to conclusions about her condition, causing him to apply the CAA guidelines incorrectly and to require an independent report where one was not needed. Had he done that, his decision would in our view have amounted to direct disability discrimination as it would have involved inherently discriminatory stereotypical assumptions about the Claimant, leading him to treat her less favourably than a non-disabled person of the same abilities by unnecessarily requiring additional medical information and causing her start date to be postponed. We considered whether Dr Polwin had clearly not applied the guidelines correctly. The Claimant's view was that it was obvious from the information she had already provided that she was fit and Dr Polwin's decision that more information was needed was prejudiced and resulted from a lack of understanding of her condition.

56. We have considered the Claimant's oral evidence as described in paragraph 28. It seemed to us that the Claimant was saying that if there were any doubt about her condition it ought to be resolved in her favour because she knew that with the help of her GP she had her condition under control. A decision not to resolve it in her favour must, she suggested, involve ignorance or prejudice. We can see why the Claimant would take that view. She was remarkably open and well informed about her condition throughout the proceedings and she is rightly sensitised to attitudes that betray ignorance and prejudice. We did not have the benefit of hearing from Dr Polwin and it may well be that he gave the Claimant the impression that he was taking a cautious line simply because her condition is bipolar. That was what the Claimant was suggesting in her evidence. If that had been the case it would have been sufficient to shift the burden to the Respondent to explain its reasons for treating the Claimant as it did as it would have involved a stereotypical assumption about her condition. As the Respondent had chosen not to call Dr Polwin, we therefore decided to approach the evidence on the basis that the Claimant had shifted the burden by presenting us with a factual scenario that could have involved direct disability discrimination.

57. We then turned to the evidence of the Respondent's reasons for acting, through Dr Polwin, as it did. Although we did not hear from Dr Polwin himself, we were furnished with contemporaneous documentary evidence and with the Claimant's oral evidence at the hearing.

58. On the basis of all of that evidence we were satisfied that the Respondent

provided an explanation that showed that its conduct towards the Claimant did not amount to direct discrimination. The facts were that Dr Polwin was discharging an important duty associated with airline safety, and wished to obtain further information before reaching a decision. In doing so he was in our view exercising professional judgment and discretion. He was not needlessly placing obstacles in the Claimant's way as she suggests. What amounts to a "satisfactory aeromedical evaluation" is not set out in detail in the CAA guidelines – and we do not see how it could be. Doctors are employed in these circumstances to exercise professional judgment and to respond using that judgment to the many different health situations that they will be called upon to evaluate. That must include the possibility that they will sometimes err on the side of caution if they are not satisfied in their own minds that the situation is clear. There can be few industries in which erring on the side of caution could be more called for than in the aviation industry and it would be of concern to users of that industry if a conservative line were not taken in these matters.

59. We took into account the fact that Dr Sandler was also not prepared to certify the Claimant as fit until he was in possession of some further information from the Claimant's own GP. Hence two medical practitioners took the view that more information was needed to satisfy themselves of the Claimant's fitness. That strongly suggests that what Dr Polwin was doing was properly exercising professional judgement rather than jumping to conclusions because he did not properly understand the Claimant's condition. We did not accept the Claimant's suggestion that he had not been applying the CAA guidelines correctly – the facts do not support that conclusion. We would be reluctant to agree with the Claimant's analysis that Dr Polwin was prejudiced without very clear evidence that that was the case. In this instance there is a plausible alternative explanation – that the information supplied in the letter at page 109 was insufficient to satisfy him that the Claimant was fit to fly. Had Dr Sandler reached a different conclusion on the basis of the same information our conclusion might also have been different. But on the facts of this case both doctors were agreed that more information was necessary. We conclude that Dr Polwin did not directly discriminate against the Claimant by asking her to provide a psychiatric report. He was not satisfied with the information in front of him and he acted as he did not because of the Claimant's disability, but because he considered that to be the proper way to discharge his professional responsibility and comply with the CAA guidelines.

60. The Claimant also complained that asking her for something that was "impossible", namely the obtaining of a report from a psychiatrist was detrimental to her. This requirement was ultimately waived and AXA accepted the report of the Claimant's GP. The Claimant was not therefore actually subjected to the detrimental treatment of which she complains in this aspect of her claim.

61. The decision by the Respondent not to allow the Claimant to commence her training in the absence of clearance from AXA was not an act of direct disability discrimination. The Respondent would not have allowed any person who lacked a medical certificate from AXA to commence their training. It did not therefore treat the Claimant less favourably than others because of her disability by refusing to allow her to commence her training in advance of medical clearance being

available. For the same reason the Respondent did not directly discriminate against the Claimant by refusing to allow her to start her training on 23 February or 8 March in the absence of medical certificates.

Discrimination arising from disability

62. In relation to discrimination arising from disability the agreed issues were as follows:

    Was the Claimant treated unfavourably by the Respondent because of something arising in consequence of her alleged disability, namely that she was not certified as fit to fly?
    The alleged unfavourable treatment relied on is not allowing the Claimant's contract of employment to start on 23 February or 8 March 2016.
    Can the Respondent show that postponing the Claimant's start date was a proportionate means of achieving a legitimate aim namely meeting Civil Aviation Authority requirements?
    Can the Respondent show that the Respondent did not know and could not reasonably have been expected to know that the Claimant had the disability?

63. We have found as a fact that the Respondent knew or ought to have known by 22 February that the Claimant was a disabled person. We have also concluded as a matter of law that AXA was the agent of the Respondent. The decision by both doctors not to certify the Claimant as fit to fly in the absence of further information was unfavourable treatment because of something arising in consequence of the Claimant's disability. The treatment was plainly a response to the fact that the Claimant is bipolar and it resulted in the unfavourable consequence that her start date was twice delayed. The question is whether the Respondent can show that postponing the Claimant's start date was a proportionate means of achieving a legitimate aim. The aim it relies on was meeting Civil Aviation Authority requirements and we do not see how it could be said that that is not a legitimate aim in the airline industry.

64. Was the means it chose proportionate on the facts of this case? The Claimant complained at the time that Dr Polwin should have reached the conclusion that she was fit to fly on the basis of the information she had already supplied to AXA and the letter from her GP at page 109, which we have found as a fact was the information available to Dr Polwin at the time. For the reasons set out above in our conclusions that Dr Polwin did not directly discriminate against the Claimant in deciding that further information was necessary, we do not think that the requirement for further information was itself disproportionate. It was a means chosen by the medical expert to satisfy himself that the Claimant was fit to discharge her duties and we have not accepted the Claimant's case that he departed from the CAA guidelines in reaching that decision. Those guidelines are not overly prescriptive and leave the medical practitioner a margin of discretion in which professional judgment can be exercised. The decision to seek further information was proportionate on the facts of this case.

65. There were two aspects of AXA's process that caused us concern however. The first was the fact that after the Claimant had submitted her online medical

assessment AXA asked her for further details of her heart condition, but did not ask her any further questions about her bipolar condition. The Claimant therefore quite understandably believed the Respondent and AXA to have been satisfied with the information she had already provided and she was therefore exasperated to discover at the face to face assessment that that was not the case. She argued, persuasively, that had she known there was a problem at an earlier stage she could have arranged to obtain further details from her GP sooner than she did. It is difficult to disagree with that analysis and the Tribunal was puzzled as to why the bipolar condition did not trigger a request for further information at the outset but did trigger a concern later on. We were not privy to the detailed arrangements at AXA for the dissemination of information, but there seemed to us to be something wrong with this aspect of its processes, which resulted in an unfavourable situation for the Claimant. The burden is on the Respondent to explain what the processes operated in that way that they did and why that was proportionate in this case. As no such explanation was proffered we conclude that this aspect of the Claimant's case succeeds – the process by which AXA obtained medical information from the Claimant was disjointed, resulted in her start date being delayed and the Respondent has not discharged the burden of showing why this was proportionate.

66. We bore in mind at this point in our reasoning Ms Ayre's submission that the Respondent's right to a fair trial may have been compromised by the inability of Dr Sandler to attend the hearing and the refusal of the Respondent's postponement application. However Dr Sandler did not address this specific point in his witness statement. His statement explained that his role in the process began only once he met the prospective employee at the face to face assessment. As he was a self-employed contractor he was not involved in the earlier stages. His evidence would not therefore have made any difference to our conclusions on this point.

67. The second aspect of the process that caused the Claimant concern was Dr Polwin's insistence that a report from a psychiatrist (as opposed to her GP) was required and the Respondent's initial agreement that the Claimant must comply with this requirement. The requirement was shortly afterwards relaxed by Dr Sandler who was prepared to accept the information provided by the Claimant's GP. The Claimant was in the meantime upset by Dr Polwin's stance and we accept her case that she tried to explain the situation to Dr Polwin but he was not receptive. Again the burden is on the Respondent to explain why a particular course of action is proportionate and no such explanation was forthcoming in this case as Dr Polwin did not give evidence. Although the disadvantage to the Claimant was short lived, she was upset, albeit temporarily and suffered injury to feelings by the apparent imposition of this requirement. This amounted to unfavourable treatment for a reason arising from a disability and the Respondent has not shown it to have been a proportionate means of achieving the legitimate aim of ensuring that the CAA guidelines were followed. We are satisfied that because of the difference in the applicable statutory tests there is no contradiction in deciding this aspect of the Claimant's claim in her favour, but rejecting her claim that Dr Polwin's actions amounted to direct discrimination.

68. For completeness we accepted the Respondent's case that it would not have

been proportionate for it to put in place arrangements whereby there was a longer period of time between a face to face medical assessment and the start of a recruit's training (which would have allowed time for any additional medical reports to be obtained without the candidate losing the allotted start date). We heard evidence of the high level of withdrawals from the training programme in the three month period following the offer of a place (page 221). The timing of the medical assessments, the vast majority of which did not give rise to any need for additional information, ensured that face to face appointments were not carried out in relation candidates who would not go on to take up a training place. Those arrangements were in our judgement a proportionate means of achieving a legitimate aim.

Victimisation

69. In relation to discrimination arising from disability the agreed issues were as follows:

    Did the Claimant carry out a protected act on 7 and 8 June 2016 in alerting the Respondent at AXA to her intention to see a solicitor about a tribunal claim of disability discrimination?
    Was the Claimant treated unfavourably as a result? The unfavourable treatment relied upon is the sending of emails joking about her intention to take her issues to the Employment Tribunal.

70. The act the Claimant relies on is the email at page 168 which we have found to be a protected act. In response to it AXA sent the email at page 171 the text of which is set out at paragraph 43 above. We have found as a fact that the Claimant was very upset by this email. We considered whether composing the email in the particular way in which it was composed amounted to a detrimental act, applying the test laid out the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL*. The problem with the email in our view was the inclusion of an exclamation mark at the end of a sentence that would otherwise have simply been informative. The inclusion of an exclamation mark would, reasonably in our view, have given the Claimant the impression that the author of the email was making light of her request. The email was therefore detrimental in its impact on her. Secondly, sending the email to the Claimant at all was detrimental. There was no explanation as to why the email was included amongst the documents sent to her and it seemed to the Tribunal that it was not necessary to have sent it. Its inclusion may have been accidental, but that does not alter the fact that including it upset the Claimant severely enough that she needed to take three days off work. The exclamation mark suggested that what was for her the serious matter of enforcing her rights was being trivialised by the very organisation whose conduct towards her formed the subject matter of her claim.

71. On the question of causation under s27 – whether the email was sent because the Claimant had done a protected act the Respondent has not discharged the burden of showing why the email was sent. No explanation is put forward and as we have observed, the Claimant's request for information could have been dealt with without including it at all. Applying the burden of proof provisions in s136

Equality Act the Tribunal is therefore bound to infer that there was a causal link between the Claimant's protected act and the Respondent's detrimental conduct and her claim of victimisation in relation to this email therefore succeeds.

Harassment

72. For substantially the same reasons as those applicable to the Claimant's victimisation claim we find that the email at page 171 amounted to harassment under s 26 Equality Act. The conduct was unwanted and it tended to have the effect of creating an environment for the Claimant in which she felt humiliated by the light hearted approach seemingly taken to a matter related to her disability that for her was of great importance and sensitivity.

Resignation

73. Did the Claimant resign because she no longer felt she could work for the Respondent and did she do so because the Respondent had discriminated against her, meaning that she should she be compensated accordingly? We have set out a long extract from the Claimant's resignation letter at paragraph 46 and note in paragraph 47 that in resigning the Claimant was relying on the manner in which AXA had conducted the face to face medical assessments in February and April 2016 and on the fact that in the course of her tribunal proceedings, the Respondent was denying that she was a disabled person, a fact of which she had been aware since October 2016. Hence in our view she was not responding to any fresh breach of duty by the employer that she had not waived by continuing in employment. The Claimant had already complained about these matters by bringing a claim to the Tribunal in June 2016. She had put her claim as one of discrimination under various sections of the Equality Act as already dealt with in this judgment. What she did not do however was resign in response to those breaches and bring a claim under s39(7)(b) at the time. She continued in employment for ten months and therefore in our view waived her right to complain that the matters she relied upon were serious enough to entitle her to resign without notice and rely on s 39(7)(b). There was no fresh act of discrimination on which she could rely – there were only the matters about which she and the Respondent were already in dispute.

74. Her second ground for resigning at that juncture was the Respondent's decision to continue to dispute that she was a disabled person for the purposes of s6 Equality Act. There were two problems with this as a potential basis for a claim under s39(7)(b). The first was again a question of waiver – the Claimant had been aware since the Respondent filed its response to her claims in October 2016 that it was disputing that she was a disabled person but chose not to act at an earlier stage. The second is the nature of this complaint. What the Claimant was in effect saying is that she was finding the process of litigating with the Respondent very difficult and that she was beginning to be adversely affected by the inevitably harsh environment of litigation. That does not seem to us to be a complaint about the Respondent's conduct that can properly form the basis of a complaint under s 39(7)(b).

75. We accepted Ms Ayre's submission that Ms Penn herself had acted

irreproachably toward the Claimant and regardless of the fact that the Claimant had raised a complaint that later evolved into an employment tribunal claim, Ms Penn continued to act correctly towards her by ensuring that as soon as possible in the circumstances the Claimant was able to start her training. We found no reason in any of the evidence presented to us to criticise any of Ms Penn's actions towards the Claimant.

76. As the Claimant has succeeded in relation to a number of her complaints it will be necessary to list the matter for a one day remedy hearing unless the parties are able to resolve remedy without the assistance of the Tribunal. The parties are asked to indicate within 28 days of this judgment whether a hearing for remedy should be listed and at the same time to give details of any dates that should be avoided.

____

Employment Judge Morton
Date: 16 February 2018