Case Number: 3347665/2016, 3347619/2016, 3330856/2018, 3330857/2018, 3332224 & 3332225/2018

EMPLOYMENT TRIBUNALS

Claimants **Respondent**

(1) Miss Helen Tewkesbury v CPM Field Marketing Limited
(2) Mr Dayle Tewkesbury

Heard at: Watford **On**: 19, 20,21,22, 25, 26 & 27 November 2019

Before: Employment Judge Bartlett
Mr Sutton and Mr Bury

Appearances

For the Claimants: Miss Tewkesbury
For the Respondent: Mr Brotherton

JUDGMENT

1. The first claimant's claims that the respondent failed to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 fail.

2. The first claimant's claims that she suffered discrimination arising from disability under section 15 of the Equality Act 2010 fail.

3. The first claimant's claims that she suffered victimisation under section 27 of the Equality Act 2010 fail.

4. The second claimant's claim that he suffered harassment relating to his disability under section 18 of the Equality Act 2010 fails.

5. The second claimant's claims that he suffered discrimination arising from disability under section 15 of the Equality Act 2010 fails.

6. The second claimant's claim that the respondent failed to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 fails.

7. The second claimant's claim that she suffered victimisation under section 27 of the Equality Act 2010 fails.

8. The first and second claimants claims are dismissed in their entirety.

REASONS

Case Management issues

1. This was a hearing of six consolidated cases relating to the case numbers set out above.

2. The issues to be decided by the tribunal are those set out in the case management summary dated 8 January 2019 as prepared by EJ Manley (the "List of Issues"). It was made clear to the parties at the start of the hearing that these and these alone would be the issues that the tribunal would determine. This is because prior to the final hearing there had been four preliminary hearings and several adjourned hearings and the tribunal decided that it was not in the interests of the overriding objective to extend the case beyond the scope that was agreed in these preliminary hearings.

3. The list of issues refers to various legal categories of claims including failure to make reasonable adjustments, victimisation and harassment. All of these categories of discrimination are adequately defined however paragraphs 7, 12, 20 and 29 of the List of Issues state that all the allegations are also put as allegations of discrimination arising from disability. However something arising in consequence of disability has not been defined and neither has the unfavourable treatment. On the first day of the hearing this was raised with the claimants. They were given examples of what can be "something arising from disability", they were informed the something arising from disability had not been identified and if they were pleading these matters this information was needed. They were also informed that if the claim was properly set out as a reasonable adjustments claim then there was little advantage to them in claiming that it was something else as well. At one point the First Claimant indicated that their claim was really a reasonable adjustments claim and not a discrimination arising from disability discrimination claim but she later drew back from this position.

4. On the second day of the hearing the issue was raised again and the matter was discussed. The claimants were still unable to give any more information what the something arising in consequence of disability and the unfavourable treatment were. The tribunal finds that the claim has not been adequately particularised and the tribunal was unable to determine what the something arising in consequence of disability or the unfavourable treatment were. The tribunal did not consider that it could simply convert what was referred to in the categories of reasonable adjustments, harassment and victimisation to discrimination arising from disability because the information to do so was not available to the tribunal. For these reasons, the tribunal finds that all the claims relating to discrimination arising from disability must fail.

Witnesses

5. The following witnesses adopted signed witness statements and were asked questions in cross examination, re-examination and in some cases questions by the panel:

   5.1 Miss Helen Tewkesbury;
   5.2 Mr Dayle Tewkesbury;
   5.3 Ms Denise Briden (DB);
   5.4 Mr Paul Thomas (PT);
   5.5 Mrs Stephanie Willmer (SW);
   5.6 Ms Lisa Hartley (LH);
   5.7 Ms Lindsay James (LJ);
   5.8 Mr Andrew Broughton (AB);
   5.9 Ms Jenny O'Donnell (JO);
   5.10 Ms Lynn Cunningham (LC);
   5.11 Ms Charlotte Barrett (CB).

6. Witness statements had also been prepared for Michelle Clark and Jane Barnes of the respondent. These witness statements were not signed and the witnesses did not attend the hearing. Therefore the tribunal has given their witness statements no weight.

7. SW and LC gave evidence pursuant to witness orders made on 19 November 2019.

8. The substantial witness evidence taken during the course of the seven day hearing will not be repeated here. The tribunal records the following in relation to certain witnesses:

   Ms Denise Briden

   8.1 DB's witness evidence covered two main areas one was the 31 August 2016 meeting which took place between the First Claimant and SW and AB. The tribunal decided that DB's evidence carried little weight on this area for the following reasons:

      8.1.1 DB's description of the 31 August 2016 meeting went into substantial detail about the facial expressions, demeanours, actions, and words spoken by the meeting attendees. However DB admitted that she was sat in a supermarket coffee shop which is not a quiet environment and she was sat or stood at least 8 to 10 m away from where the meeting took place;
      8.1.2 For almost all of the duration of the meeting she was not able to see the claimant's face;
      8.1.3 she said that she was not paying particular attention to the meeting as she was texting her friends and reading materials. This is inconsistent with the extremely high level of detail she provided about the meeting which included where SW and AB looked at points during the meeting;
      8.1.4 in oral evidence DB repeatedly referred to her interpretation of events;

8.1.5 the tribunal considered that given where she was physically located in relation to the meeting and the fact that for most of the meeting she could not see the claimant's face undermined her claim that she had witnessed what she said in her evidence. The tribunal finds that what she actually observed was overlaid with her own partisan opinion of what occurred and as a result her evidence was not an accurate account.

8.2 The second area was what she had said to PB as part of his grievance investigation. The grievance was only of background relevance to this claim.

Miss Helen Tewkesbury

8.3 The First Claimant's witness statement was extremely detailed. It ran to 51 pages and occupied 333 paragraphs of reasonably small single line font. Paragraphs 90 to 137 (almost 8 pages) of her witness statement covered the 31 August 2016 meeting which lasted for approximately an hour and ½. The level of detail in which the meeting was covered was remarkable: it included statements as to what the other party to the meeting believed, where they looked at at certain times and highly descriptive interpretations of events.

8.4 Several quotes in her witness statement did not correspond with the documents to which she referred. For example paragraphs 115, 118 and 120 referred to quotes attributed to SW and AB which were not set out in her own extremely detailed notes of the meeting;

8.5 The tribunal concluded that the First Claimant's recollection of events had been recounted with a substantial gloss which had arisen from hindsight and in light of events subsequent events and the First Claimant's personal animosity towards the respondent and several witnesses;

8.6 The tribunal found the First Claimant's evidence was of limited weight because it was extremely subjective and loaded with interpretation.

Reasonable adjustments at the hearing

9. The First Claimant has a musculoskeletal disability and dyslexia. The Second Claimant has dyslexia. At the start of the hearing the tribunal checked whether or not reasonable adjustments would benefit any individual involved in the hearing. The First Claimant identified that she needed to use her back support and to stand and walk at times. It was agreed that she could use her back support and that she was free to stand up, walk around and move within the tribunal room whenever she wished to do so and she did not require permission to do this. Regular breaks took place throughout every day.

10. The respondent had provided a copy of the bundle to the claimants on buff coloured paper and the First Claimant and the Second Claimant had the witness statements printed on pink paper. They were allowed to use all of these documents throughout the hearing and when giving their evidence.

Background to the claimants' work for the respondent

11. The area of the respondent's business in which the claimants worked was marketing in retail stores. The First Claimant and the Second Claimant worked tactically. They had no guarantee of tactical work. Tactical work was placed on a portal to which tactical workers had access then the tactical workers chose which work activities they wanted to do. In addition to this tactical work the First Claimant carried out work for some specific accounts including but not limited to "Incomm". This was work that was particularly allocated to the First Claimant in certain post codes.

12. The First Claimant and the Second Claimant, like other individuals who carried out this work for the respondent, worked on location at retail sites and, to a limited extent, at home. They had limited contact with managers and the respondent generally. Contact was largely via the portal, emails, text messages and telephone calls. The First Claimant and the Second Claimant had a line manager and such line managers were responsible for at least 50 if not considerably more individuals carrying out this work. the First Claimant and the Second Claimant had almost complete freedom as to when they carried out the work provided it was completed within specified deadlines.

13. Around summer/autumn 2016 an account on which the First Claimant worked was transferred to a new company and there was a consultation and various issues relating to TUPE at this time for both the First Claimant and the Second Claimant. Initially claims in relation to TUPE had formed part of some of the claimants' claim however these were later withdrawn. Evidence in the bundle disclosed that the First Claimant had raised various issues and had a number of concerns relating to TUPE however this was not part of the claim.

The law

14. Burden of Proof

14.1 Section 136 EqA sets out the following:

> *"(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…"*

14.2 In **Igen Ltd v Wong** the Court of Appeal approved the guidance given in **Barton v Investec Securities Ltd [2003] IRLR 332** concerning the burden of proof in discrimination cases (all references to sex discrimination are also references to other forms of discrimination such as disability discrimination) which is that:

"(1) Pursuant to s 63A of the SDA 1975, 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 1975 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….

(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."

14.3 We took into account, amongst others, the case of **Project Management Institute v Latif [2007] IRLR 579, EAT** in which Elias P (referring to the old Code of Practice under the Disability Discrimination Act but which is still relevant today), stated that:

> *'In our opinion, the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that 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 some evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not'.*

15. Reasonable adjustments

15.1 Section 20 EqA sets outs:

"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..."

15.2 Section 21 EqA sets out:

"21. Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

15.3 Guidance is provided by the Equality and Human Rights (EHRC) Code of Practice, para 5.21:

"If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."

16. <u>Discrimination arising from disability</u>

16.1 Section 15, EqA sets out the following:

"(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."

17. <u>Victimisation</u>

17.1 Section 27 of EqA sets out:

(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.

18. Harassment

18.1 Section 26 EqA sets out:

"(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)n
the other circumstances of the case; (c) whether it is reasonable for the conduct
to have that effect."

Findings of Fact

The First Claimant's 2016 claim relating to Reasonable Adjustments: Did the Respondent have actual or constructive knowledge of the First Claimant's disability prior to 2 September 2016?

19. The First Claimant claims the Respondent had knowledge for reasons which include those set out in her letter of 2 September 2016 and which can be non-exhaustively summarised as:

19.1 A disabled parking space was booked for her in September 2014 in relation to a conference;
19.2 She made managers namely: LC, MC, SW, LJ, FB and maybe AB aware that she suffered from physical limitations;
19.3 She told LC about MRI scans, medical appointments and a PI claim against her former employer during the time LC managed her in 2014 and 2015;
19.4 In July 2016 the First Claimant had messaged SW "*it's too physically demanding for me to do 4 FSDU's in one day*.";

19.5 On 4 August 2016 she had requested a disabled parking space at a conference taking place that day.

20. LC's evidence was that she recalled the First Claimant mentioning a back problem but not a disability, she attended medical appointments and that stock was heavy and it would be better if given in lighter quantities. LC did not think of the First Claimant as being disabled and the First Claimant did not refer to a disability. We found LC to be a credible witness. She gave evidence under a witness order but her evidence was reasonably detailed and informed.

21. As set out above we found that the First Claimant's evidence is tainted by hindsight and is not reliable. The First Claimant gave repeated evidence that she did not say that she had a bad back she was always clear that she had a disability. It has not been denied that the First Claimant suffers from a physical disability which includes suffering from chronic pain.

22. We find that the Respondent did not have actual or constructive knowledge that the First Claimant was disabled prior to 2 September 2016 for the following reasons:

22.1 The First Claimant informed some of the Respondent's employees about physical difficulties she experienced but this information was not linked to a disability. Further, she only made infrequent references over a course of years to physical difficulties. The tribunal finds that mere reference to activities being too physically demanding was not sufficient in the circumstances, even when all other factors are considered, to amount to constructive knowledge of the disability. We accept the evidence of several of the respondents witnesses that numerous workers complained about the physicality of some of the work and bad backs but that there was nothing about the First Claimant's comments which went beyond such comments;

22.2 The information that the First Claimant gave to employees of the Respondent was ad hoc and she did not specifically refer to a disability or such impairments with functioning which would have given rise to constructive knowledge of a disability;

22.3 The disabled parking space booking in 2014 was an administrative matter and there was no other communication in relation to that booking which should have alerted the respondent that the First Claimant was disabled. The First Claimant's evidence was that she had informed LJ, who was an administrator at that point, she was not a member of HR, she was not the First Claimant's manager. LJ was the contact point for administrative arrangements relating to the conference such as dietary requirements, taxis and parking spaces. We find that in this context the First Claimant's disclosure of having a disabled parking badge for the conference could not give the respondent constructive knowledge;

22.4 We accept LCs evidence that in August 2016 the claimant, when arriving at a conference, requested a disabled parking bay. However once

again we do not accept that this was sufficient to give constructive knowledge of a disability as at any given time employees may have health conditions affecting their ability to walk and/or drive. The information was again given in the context of an administrative matter relating to a conference;

22.5 We have also taken into account the context of the relationship between the First Claimant and the the Respondent. This was a relationship at arms length. Most contact between workers and management was through the online portal, emails and some telephone calls. It was not a relationship where an individual's health would be observed or where an individual would have to notify the Respondent that they would be out of the office or unavailable for work at certain times because of a medical condition or appointments. The First Claimant's evidence was that she enjoyed the flexibility of the work and the tribunal finds that the claimant had a high degree of flexibility in choosing when she carried out the work and to a large extent what work she carried out. The tribunal finds that because of this distance in the relationship there were less opportunities for the respondent to find out other material that may have, in a different situation involving closer proximity, contributed to it having constructive knowledge;

22.6 The tribunal also considered whether the accumulation of the claimant's disclosure is gave rise to constructive knowledge of her disability and in all the circumstances it found that it did not.

Did the First Claimant make the following protected acts:

On 22 August 2016 the First Claimant raised a grievance.

23. The tribunal finds that this is not a protected act because it fails to mention a disability or anything connected with one, the Equality Act 2010 or anything connected to it. It only raises complaints about a breakdown in communication with SW and about TUPE but nothing more. It does not make reference to reasonable adjustments.

On 18 August 2016 the First Claimant complained the Second Claimant was being subject to disability discrimination.

24. The tribunal finds that this is a protected act because it makes reference to disability discrimination.

Was the First Claimant subject to the following detriments because of the protected act?

25. The claimants' claim is that "*From 18 August 2016 the first respondent's management subjected her to a series of oppressive meetings and then threatened her with disciplinary action*".

26. We make the following findings of fact:

26.1 The First Claimant only attended the 31 August 2016 meeting with SW and AB of the Respondent;

26.2 The First Claimant was requested to attend meetings with SW before that date and after that date she was requested to attend meetings with SW/AB but she did not attend;

26.3 On 11 August 2016 the claimant sent SW an email about issues including mistakes, setting out some queries and raising a concern that by her disclosing that the Second Claimant had a disability SW was judging his ability to complete calls;

26.4 on 15 August 2016 the First Claimant raised issues directly with SW about her relationship with SW. On that date SW requested a meeting the next day. The First Claimant did not attend;

26.5 On 17 August 2016 SW had responded to the claimant in a forthright tone "*I have invited you to meet with me to properly investigate the issues raised by your original email to me...your response, however indicates that you view yourself as not subject to such mutuality and clearly unhappy at the way you are being treated in your work. If that is your position we have little option but to cease offering syndicated work to you…[I] would like to extend a further invitation to meet with me to investigate your concerns…*"

26.6 the meetings were initially called for legitimate management reasons which included the desire to discuss issues the First Claimant had raised about work and her relationship with SW. Subsequently they were pursued because of the claimant's conduct. By conduct the tribunal refers to and finds that:

26.6.1 the First Claimant repeatedly refused to meet her line manager;

26.6.2 her conduct at the 31 August 2016 meeting;

26.6.3 her written statements that she did not think that there was mutuality of obligation between her and the Respondent. The First Claimant's statements about this resulted in the respondent trying to clarify her position with her which was reasonable for business reasons and wholly unrelated to the protected act;

26.6.4 the First Claimant not attending subsequent meetings despite reasonable requests that she do so;

26.6.5 the First Claimant returning Incomm stock to the depot in relation to calls that she had already accepted and that SW would not remove from her. We find that this would have had cost implications for the Respondent;

26.6.6 On 8 September 2016 the First Claimant hung up a call that SW had made to her and stated that she was working for REL (the

company to which the other account had transferred and to which the First Claimant had also transferred) now and was very busy.

26.7 We recognise that the 31 August 2016 meeting was extremely difficult. AB described it as probably the worst meeting he had had and we accept his evidence. We consider that this was in large part down to the First Claimant's behaviour. The First Claimant's own notes of the meeting say that almost at the start of the meeting she said "*the meeting is about a stage 1 grievance informal meeting Steph*" after SW had said to her "*we've called this meeting because of concerns we want to go through*". The meeting, though lasting approximately 1.5 hours, did not get much further than this in terms of discussing any substantive matter. We find that the First Claimant's claims that she believed the meeting was a stage 1 grievance meeting was disingenuous given the First Claimant's letter dated 28 August which sets out that she understands the 31 August 2016 meeting is an informal meeting to discuss her current concerns and that "*a Formal grievance meeting is likely to be scheduled in the week beginning 5th September*". We do not consider it necessary or helpful to determine exactly what happened at the 31 August meeting but we accept that there was aggressive behaviour from the First Claimant. We accept the evidence of SA and AB on this matter which is supported by the First Claimant's and AB's notes of the meeting. We accept that the First Claimant was upset at the meeting and that she cried at some point. We also find that SW took a robust approach to the First Claimant's attempts to do what she wanted at the meeting. We find that the First Claimant tried to control the meeting, resisted attempts for the meeting to proceed meaningfully which ultimately resulted in it being abandoned, that she jabbed her finger at AB, that she spoke aggressively and unprofessionally and behaved in a wholly unacceptable manner. We accept that all parties to the meeting raised their voice at times. We have set out above why we have given little weight to DB's account of this meeting;

26.8 The First Claimant was not threatened with disciplinary action. AB sent the First Claimant an email on 14 September 2016 which invited the First Claimant "*to an investigatory or fact finding meeting*" and "*if you refuse to attend the meeting then you are warned that it will go ahead in your absence and I may have no choice other than to base any decision that I may have to take on the facts that I have available at that time and without the benefit of your contribution to the process. In other words formal disciplinary action may be a recommendation arising from the meeting notwithstanding your non-attendance."* We find that is a warning of possible consequences of which the Respondent had to inform the First Claimant of in the interests of fairness.

27. The second detriment which the First Claimant claims she suffered is that "*From 19 September 2016 the company removed all on-going "Incomm" work from her which had been allocated to her from September 2013*"

28. We find that:

28.1 The First Claimant informed the Respondent that she would not carry out Incomm work in September 2016;

28.2 In September 2016 the Incomm work was removed from the First Claimant because a vacancy was raised to recruit for that work;

28.3 We find that this was not influenced by the First Claimant making a protected act. As set out above there were numerous reasons wholly unconnected to the protected act as to why the First Claimant's relationship with the Respondent had become strained. We find that the Incomm work was removed because the First Claimant initially asked for it to be removed for a period of time; the First Claimant had informed the Respondent that she believed there was no mutuality of obligation such that she did not have to accept or carry out work and that she was busy working for another company.

The Second Claimant's harassment claim:

Was there unwanted conducted which related to disability when the following occurred:

(1) *In August 2015 SW failed to allocated Incomm calls or Mars Pets at Home calls directly to him by reason of his dyslexia.*

29. In relation to the Mars Pets at Home activity we find that:

29.1 The List of Issues refers to August 2015 however this is an error and it should refer to August 2016. Documents in the bundle clearly refer to these events taking place in or around August 2016;

29.2 CB not SW decided not to allocate the Mars Pets at Home calls to the Second Claimant;

29.3 We accept that CB did not know the Second Claimant was dyslexic and that his disability did not have any impact on his behaviour. We accept CB's evidence that she did not receive a call from the First Claimant in which the First Claimant informed her that the Second Claimant was dyslexic;

29.4 We also accepted CB's evidence that the Second Claimant had been told on several occasions that he needed to complete the feedback part of the Mars flower trial activity but he had not done so repeatedly. This was supported by several documents in the bundle. This meant that the Second Claimant had not completed the Mars flower trial activity correctly and this was the reason why he was then not allocated the Mars Pets at Home activity which followed on shortly from the Mars flower trial;

29.5 the Mars Pets at Home activity was reinstated after the Second Claimant complained that it was a "harsh" decision.

30. In relation to the income activity we find:

30.1 SW did not directly allocate the Incomm calls to the Second Claimant;

30.2 the First Claimant sent an email on 9 July 2016 to SW asking for some calls to be allocated to the Second Claimant but this was sent to the wrong email address and that alone was the reason these calls were not transferred. We are unsure of the dates of those calls as this is not specified in the email;

30.3 the First Claimant had the stock for the September Incomm calls and she returned it rather than request that the calls be allocated to the Second Claimant who lived at the same address;

30.4 SW said that a vacancy was raised and that she would not allocate the area to anyone and it needed to go through the vacancy procedure. She accepted that the Second Claimant had covered some Incomm work but that he carried out limited work. We accept SW's evidence in this regard. We heard evidence that some accounts such as Incomm accounts were recruited for and allocated to particular individuals. The First Claimant's evidence was that in 2013, when she started the income work, she was not recruited for it and we accept that. We also accept this evidence and that the Respondent's view was that she had relinquished the Incomm account (for the reasons set out above) and it needed to be covered on permanent basis. We accept that the Second Claimant was able to apply for the vacancy as any other individual in the Respondent or outside and that his dyslexia played no role in any of these actions. We find that he was not offered the Incomm work because it went through the normal vacancy procedure.

(2) LC caused the second claimant distress by blaming his dyslexia for a mistake when it was actually caused by an error in the respondent's paperwork. This happened on two occasions one in May 2016 and the other in June 2016.

31. We find that:

31.1 LC queried whether the Second Claimant's dyslexia was a reason for an issue with some work codes in May 2016. This was in the context of enquiring if he needed help so that he could improve and meet his targets;

31.2 We do not accept that LC referred to the Second Claimant's dyslexia in June 2016 or July 2016 at the coffee shop meeting (we considered that it is this meeting to which the allegation relates and we are unclear when that actually took place). We accept LC's evidence that she did not and had no reason to do so. Instead she talked positively about the Second Claimant's work improving and him receiving the bonus. We find that LC did not refer to the Second Claimant's dyslexia at any other point;

31.3 We find that the Second Claimant was sensitive about his dyslexia and its potential impact on him and that this affected his interpretation of what was said. We therefore prefer LC's evidence to the Second Claimant's.

(3) The Second Claimant had work removed by CPM relating to the Mars and Incomm contracts again in August 2016

32. We find that this is a duplicate of the first allegation of unwanted conduct and our findings in that regard are set out above.

The First Claimant's 2018 claims relating to reasonable adjustments:

"The respondent accepted that it applied the following provisions, criteria or practices (PCP)? Requiring a risk assessment to be carried out before the first claimant was allowed to select work to carry out."

33. We find that this PCP created a substantial disadvantage because the First Claimant could not undertake any work until it was completed.

"Did CPM failed to take the following reasonable steps? Complete the risk assessment in good time."

34. We make the following findings:

34.1 the context of this situation was that the First Claimant had not selected any work from the Respondent's portal since September 2016 but started to do so around 10 February 2018 after a break of 16 months. The First Claimant had not informed the Respondent that she was going to restart selecting work;

34.2 the Respondent was aware at this stage that the First Claimant either was or claimed to be physically disabled;

34.3 the First Claimant had made comments that the lifting in an activity she undertook was unsuitable for her;

34.4 the respondent took prompt action to try to carry out the risk assessment with the First Claimant;

34.5 the respondent sent the pro forma risk assessment to her and tried to arrange a meeting which eventually took place on 22 March 2018 between LC and the First Claimant;

34.6 at the 22 March 2018 meeting the First Claimant was uncooperative and aggressive. It was her view that sitting down to go through the risk assessment paper form was a completely unsuitable risk assessment and she would not participate in it. Due to the First Claimant's intransigent position and her aggression the meeting was abandoned and the First Claimant would not cooperate from that date to complete a risk assessment.

The First Claimant's victimisation claim was put as follows:

"Did she carry out the following protected act? Asking for an access to work report in March 2018?"

35. It is not disputed that the First Claimant asked for an Access to Work report in March 2018. The tribunal finds that this is a protected act as the First Claimant repeatedly stated that she was seeking it in relation to obtaining information on reasonable adjustments.

Was the First Claimant subject to the following detriments as a result of the protected act?

(1) On 22 March being told be LC on instructions by PT in public that she "was not authorised to carry on doing work"

36. We find that:

    36.1 LC did make the comment to the First Claimant on the instructions of PT;

    36.2 The context of this situation was that the First Claimant had not selected any work from the Respondent's portal since September 2016 but started to do so around 10 February 2018 after a break of 16 months. the First Claimant had not informed the Respondent that she was going to restart selecting work;

    36.3 LC made the comment because the Second Claimant had refused to carry out the risk assessment and they were unable to determine whether or not she could safely carry out the role. There was no connection between this comment and the request for an Access to Work report.

(2) Being prevented from working until the claim form was presented in June 2018;

37. We find:

    37.1 There was no connection between the First Claimant being prevented from working from March 2018 until a risk assessment had been completed and the Access to Work request;

    37.2 As set out above the requirement to complete a risk assessment was a reasonable requirement of the respondent which was informed by other factors and not the Access to Work report request.

The Second Claimant's claims relating to reasonable adjustments were put as follows: *"Did CPM apply the following PCP? Expecting him to carry out any work he logged in for without receiving the training suggested in the Access to Work report."*

38. The PCP as defined above is unique to the Second Claimant and therefore the tribunal considers that it cannot amount to a PCP (**Starmer [2005] IRLR 862** and **Harvey UKEAT/0032/12**). However in case it is wrong in this matter it has gone on to consider the other parts of the reasonable adjustment claim.

"Did the PCP put the second claimant at a substantial disadvantage in comparison with persons who are not disabled?"

39. We find that it did not put him at a substantial disadvantage as compared with non disabled persons for the following reasons:

    39.1 the Second Claimant had worked for the Respondent for some years and only two occasions were raised when there were any problems with his work; one of which was a problem originating from the respondent;

    39.2 the Second Claimant had repeatedly informed the respondent that he did not require reasonable adjustments in order to undertake work for CPM. This is set out in the notes of the grievance appeal hearing held on 1 March 2017 and chaired by JO.

"Did CPM failed to take the following reasonable steps? Arrange for the training in good time without unreasonable delays"

40. The tribunal records as it has found that the Second Claimant was not put at a substantial disadvantage it is not required to make findings on this issue but it will do so for completeness.

41. We find as follows:

    41.1 The tribunal accepted JO's explanation that a large part of the delay in arranging the payment for the training was due to their financial system. She gave detailed evidence about the numerous steps and difficulties that were involved in putting a new supplier on their system and the difficulties that were then experienced in raising a PO that would be accepted by the training supplier. These delays accounted for many months of the delay and it was not possible for the respondent to have completed these steps any quicker;

    41.2 however by around December 2017 the issue appears to have been overlooked and the delays after that were unreasonable.

The second claimant's claims relating to victimisation were put as follows:

"Did he carry out the following protected act? Asking for an access to work report in April 2017."

42. It is accepted that the Second Claimant asked for an Access to Work report in April 2017.

43. The tribunal finds that this is a protected act because it is intricately linked to disability and the Equality Act 2010.

"Was the second claimant subject to the following detriments because of those protected acts? Delays causing difficulties for how much work he could do"

44. We do not accept that the Second Claimant's work activity was reduced or that he was prevented from selecting work. We find that any delay or difficulty in the Second Claimant selecting and/or undertaking work was due to the background situation which was as follows:

    44.1 He was extremely sensitive about the criticisms he had faced on the Mars flower trial. His view of the situation was unreasonable and could not be supported by the facts;

    44.2 In particular he had developed a belief that he was at risk of dismissal or a serious disciplinary sanction when this was not the case. There was no evidence to support his belief in this respect. His evidence to the grievance meeting was "*I am worried that if I do more work I will be under the microscope. Worried about disciplinary action. This all stems from the Mars trial call*";

    44.3 He felt insecure in accepting work and it was this reason which "caused difficulties for how much work he could do" and these were not related to the protected act;

    44.4 He was in fact carrying out other work for other companies at the time which reduced his availability for work with the respondent;

    44.5 There was no evidence to counter the respondent's claim that he remained a priority one which meant that he was able to view the portal and pick and select work as he chose to do so. Therefore we accept the respondents' evidence in this regard.

Decision and conclusions

45. As the tribunal has found that the Respondent was not aware that the First Claimant was disabled in relation to her musculoskeletal condition until 2 September 2016 her claims for failure to make reasonable adjustments referred to as/in the 2016 claim must fail. This because the reasonable steps pre date 2 September 2016. Further, by 2 September 2016 the First Claimant had ceased carrying out work so that the PCPs were not applied to the First Claimant.

46. The tribunal finds that the First Claimant did not suffer victimisation as set out in the 2016 claim because the detriments had no connection whatsoever to the protected acts.

47. Further, in relation to the claim that she suffered the first detriment from 18 August 2016 the tribunal finds that:

    47.1 the First Claimant was not subject to a series of oppressive meetings. The aggressive and difficult nature of the 31 August 2016 meeting was due to her conduct and not the conduct of employees of the Respondent;

47.2 the First Claimant was not threatened with disciplinary action;

47.3 therefore she did not suffer the detriments alleged;

47.4 even if she had suffered a detriment (such as the 31 August 2016 meeting and emails attempting to arrange meetings with her and informing her of the possible consequences if she did not attend) the detriment arose from her own unreasonable conduct and not from her making a protected act.

48. In relation to the claim that the First Claimant suffered the second detriment from 19 September the tribunal finds that the Incomm work was removed for reasons wholly unrelated to the protected act.

49. The tribunal finds that the Second Claimant's claim of harassment fails for the following reasons:

49.1 The conduct identified of not allocating calls to him is not conduct which falls within the character needed to amount to harassment. The tribunal refers to the Equality and Human Rights Commission's Code of Practice on Employment which sets out the following:

"Harassment related to a protected characteristic

This type of harassment of a worker occurs when a person engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or the effect of:

- *violating the worker's dignity; or*
- *creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.*

Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

Example: In front of her male colleagues, a female electrician is told by her supervisor that her work is below standard and that, as a woman, she will never be competent to carry it out. The supervisor goes on to suggest that she should instead stay at home to cook and clean for her husband. This could amount to harassment related to sex as such a statement would be self-evidently unwanted and the electrician would not have to object to it before it was deemed to be unlawful harassment."

49.2 For completeness the tribunal also finds that not allocating the calls to the Second Claimant did not violate his dignity and did not create an intimidating, degrading or humiliating environment;

49.3 The tribunal has found that LC referred to the Second Claimant's dyslexia in relation to mistakes concerning work on one occasion only. The tribunal found that this was in the context of trying to work out if there were any issues and if the Second Claimant needed any help. The tribunal finds that this behaviour did not amount to conduct which violated his dignity or created an intimidating, degrading or humiliating environment.

50. The First Claimant's claim that the respondent failed to make reasonable adjustments in the 2018 claim (by which time the respondent had knowledge of her disability) fails for the following reasons:

50.1 the respondent did not fail to take reasonable steps. It took reasonable steps in trying to carry out a risk assessment with the First Claimant and the only reason it was unable to carry out the risk assessment was because of the First Claimant's conduct and refusal to carry it out because in her view it was not the risk assessment she wanted to take place.

51. The Second Claimant's claim that the respondent failed to make reasonable adjustments fails for the following reasons:

51.1 expecting him to carry out work without receiving training suggested in the Access to Work report was not a PCP as it applied to him uniquely;

51.2 further, the Second Claimant was not placed at a substantial disadvantage. Only two criticisms of his work had been identified over a period spanning many years, he had not been subject to any disciplinary action and he himself had repeatedly said in March 2017, which was shortly before the request of the Access to Work report in April 2017, that he did not require any reasonable adjustments;

51.3 the tribunal accepts the respondent's general defence to the Second Claimant's claim of a failure to make reasonable adjustments that there were no reasonable adjustments to make (**Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10** and **South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley EAT 0341/15**). This is because he did not suffer a substantial disadvantage which reasonable adjustments would ameliorate.

52. The Second Claimant's complaints that he suffered victimisation following asking for an Access to Work report in April 2017 fail for the following reasons:

52.1 the Second Claimant did not suffer a detriment. His work activity was not reduced and he was not prevented from selecting work;

52.2 if the tribunal were wrong in the above and the Second Claimant did suffer a detriment the tribunal finds that this detriment had no connection whatsoever to him asking for an Access to Work report. There were no difficulties caused by the respondent with the Second Claimant taking any work; any difficulties he experienced could only have been internal ones.

53. For the reasons set out above (the claim has not been adequately particularised and the tribunal was unable to determine what the something arising in consequence of disability or the unfavourable treatment were) the First and Second Claimant's claims for discrimination arising from disability fail.

54. The tribunal gave consideration as to whether or not the Second Claimant's 2018 claim had been presented in time. The tribunal decided that the reasonable adjustments claim and the victimisation claim related to a continuing series of events arising from the failure to carry out an act. Therefore the 2018 claim of the Second Claimant had been presented in time.

Employment Judge Bartlett

Date: ……28.11.19……..

Sent to the parties on: .....13.01.20.....

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For the Tribunal Office